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COMMENTS

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AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE—EXPANSION OF DISCOVERY

On April 22, 1974, the Supreme Court of the United States promulgated by order its version of the Amendments to the Federal Rules of Criminal Procedure.[1] These rules would have taken effect as law on August 1, 1974, but Congress interposed a law postponing the effective date of the amendments to August 1, 1975.[2] If precedent were a reliable predictive tool, Congress would probably pass these rules on the extended deadline without serious modifications.[3] But because of the recent scrutiny which has been given to discovery procedures by courts and commentators,[4] some changes will most likely be made before the amendments meet with full Congressional approval.

The amended rules follow trends set by the courts, the Advisory Committee to the Standing Committee on Rules of Practice and Procedure,[5] and the American Bar Association Advisory Committee on Pre-Trial Proceedings[6] in liberalizing the discovery procedures available to both the defense and the prosecution. The amendments specifically related to discovery are the changes to rule 12 on Plead-

[1] Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271 (1974) (hereinafter cited as *Amendments*).

[2] 88 Stat. 397 (July 30, 1974). Congress did not take this type of action when the 1966 amendments were submitted to them. The dissents of Justices Black and Douglas when the 1966 amendments were transmitted reveals some justification for such closer scrutiny. Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 69, 272, 276 (1966) (Black & Douglas, JJ., dissenting). The Justices complained, *inter alia*, that the Supreme Court was acting merely as a conduit for the rules which were recommended by the Advisory Committee to the Standing Committee on Rules of Practice and Procedure. Furthermore, the transmission of these proposed rules through the Supreme Court to Congress, without any requirement of enactment by Congress, might be unconstitutional. *Accord,* Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 865, 865–66 (1963) (Black & Douglas, JJ., dissenting).

[3] The original Federal Rules of Criminal Procedure for the United States District Courts were transmitted to Congress by the Attorney General on January 3, 1945, and became effective on March 21, 1946. Advisory Committee notes were recommended shortly after the original transmittal. 4 F.R.D. 405 (1945). These rules have been amended as follows: December 27, 1948, effective January 1, 1949, 8 F.R.D. 610 (1948); December 27, 1948, effective October 20, 1949, 8 F.R.D. 610 (1948); April 12, 1954, effective July 1, 1954; April 9, 1956, effective ninety days thereafter, 18 F.R.D. 514 (1956); February 28, 1966, effective July 1, 1966, 39 F.R.D. 69 (1966); December 4, 1967, effective July 1, 1968, 43 F.R.D. 61, 164 (1967); March 1, 1971, effective July 1, 1971; April 24, 1972, effective October 1, 1972, 56 F.R.D. 143 (1972). A review of these amendments shows the short period from order by Supreme Court to the effective date, thus demonstrating the traditional "rubber stamp" attitude which Congress has taken toward its input to these rules.

[4] *See, e.g.,* Wardius v. Oregon, 412 U.S. 470 (1973); Giglio v. United States, 405 U.S. 150 (1972); Williams v. Florida, 399 U.S. 78 (1970); Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959); *Amendments, supra* note 1, at 308, 315 (Advisory Committee Notes); FED. R. CRIM. P. 16 (Advisory Committee Notes); AMERICAN BAR ASS'N, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 35–40 (Approved Draft, 1970) (hereinafter cited as ABA); Nakell, *The Effect of Due Process on Criminal Defense Discovery,* 62 KY. L.J. 58 (1973) (hereinafter cited as Nakell, *Due Process*); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations,* 50 N.C.L. REV. 437 (1972) (hereinafter cited as Nakell, *Discovery*); Note, *Prosecutorial Discovery Under Proposed Rule 16,* 85 HARV. L. REV. 994 (1972) (hereinafter cited as *Rule 16 Discovery*); Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery,* 7 JOHN MAR. J. PRAC. & PROC. 364 (1974).

[5] Hereinafter referred to as the Advisory Committee.

[6] ABA, *supra* note 4.

ing and Motions Before Trial, and rule 16 on Discovery and Inspection, along with the addition of two new rules, 12.1 and 12.2, which deal with Notice of Alibi and Insanity Defenses.[7]

The Supreme Court's transmittal of the rules to Congress does not mean that it has passed judgment on their constitutionality.[8] This comment will review how these amended rules change the scope of discovery, and discuss the constitutional and procedural problems which may arise in their implementation.

I. Rule 12—Motions Before Trial

The changes in this rule which deal with discovery are that requests for discovery must be made prior to trial[9] and that the government may give notice of its intention to use certain evidence, either at the request of the defendant or at the discretion of the government.[10] Prior to this amendment, the defendant had less flexible time limitations upon his motion for discovery. Rule 16 now provides that the defendant make his motion for discovery within ten days of arraignment, subject to the court's discretion to allow a motion after the ten-day period "upon a showing of cause why such motion would be in the interests of justice." [11] Since this portion of rule 16 has been eliminated in the amendments, and the motion for discovery has been added to the list of motions which must be made prior to trial, the defendant has up until the time of trial to enter the motion.[12] Another benefit to the defendant is the elimination of the requirement to show "cause" why he has not waived

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[7] Rule 15 also deals with discovery to a limited extent by providing for depositions of witnesses who may be unavailable for testimony. Rule 16 makes the written record of these depositions discoverable. However, because its impact is of a secondary nature, rule 15 is not the subject of this comment.

[8] *Accord,* Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 69, 272 (1966) (Black, J., dissenting). Such a ruling would be outside the constitutional power given to the Court in Article III, because it would be an advisory opinion, and not a "case or controversy." U.S. Const. art. III.

[9] Rule 12. Pleadings and motions before trial; defenses and objections.

. . . .

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

. . . .

(4) Requests for discovery under rule 16. . . .

Amendments, supra note 1, at 287. The current rule on time of motions for discovery is as follows:

Rule 16. Discovery and Inspection.

. . . .

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

Fed. R. Crim. P. 16(f).

[10] Rule 12. Pleadings and motions before trial; defenses and objections.

. . . .

(d) Notice by the government of the intention to use evidence.

(1) At the discretion of the government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

Amendments, supra note 1, at 287–88. There is no corresponding provision in the current rules.

[11] Fed. R. Crim. P. 16(f).

[12] The benefit of more time for the defendant may be illusory because prudent counsel would ordinarily move for discovery as a matter of course as soon as possible. Realization of any benefit assumes that the amount of time between arraignment and trial is usually greater than ten days. Due to the current congestion in the courts, this assumption seems valid. *See* American Bar Ass'n, Standards Relating to Speedy Trial 1 (Approved Draft, 1968). For instance, the median time interval from filing to disposition of criminal cases completed during the fiscal year ended June 30, 1973, for all 90 United States district courts was 3.9 months. 1973 Dir. of Adm. Office of U.S. Courts Ann. Rep. 412. Since the pre-trial procedures usually comprise a large portion of that time period, the time between arraignment and trial probably averages more than ten days. *See* American Bar Ass'n, Standards Relating to Speedy Trial 15 (Approved Draft, 1968). Also the time limits for disposition of criminal cases set in response to Federal Rule of Criminal Procedure 50(b) indicate that the time period from arraignment to trial is probably greater than ten days in most cases. 1973 Dir. of Adm. Office of U.S. Courts Ann. Rep. 771–74.

relief by his failure to make a discovery request before trial.[13]

Section (d) of rule 12 helps to eliminate unnecessary motions to suppress evidence by allowing the defendant to obtain notice from the government of its intention to use certain evidence at trial.[14] This section is redundant to the extent that it covers evidence which the defendant can discover under amended rule 16. However, since amended rule 16 does not limit discovery to evidence which the government will use at trial,[15] prudent defense counsel would have to scrutinize all disclosed evidence to determine the admissibility of each item, and ultimately, which ones he will move to suppress. The amended rule 12 does not expand the number of items the defense can discover; it instead increases the amount of information which must be disclosed about those items. This can speed up the pre-trial process by eliminating the necessity for a motion to suppress certain evidence because the defense knows that the government does not intend to use it at trial. It also aids the defendant in the preparation of his case because he knows which evidence he will have to rebut at trial. Unfortunately, this benefit of amended rule 12 may be lost to the defendant because there is no sanction requiring the government to comply with the defendant's request.[16] Without a legislative or judicial mandate compelling disclosure, the discovery opportunity has little value.[17]

Because of the inadequacy of this amended rule, it should be changed to make government notice to the defendant mandatory upon request, with sanctions for non-compliance. This suggestion is in keeping with the current philosophy espousing more liberal discovery rights for the defendant, in the interest of fairness

[13] Rule 16(f) calls for ". . . a showing of cause why such motion would be in the interest of justice." FED. R. CRIM. P. 16(f). The amended rule's elimination of the qualifier, "in the interest of justice," is only a benefit to the defense to the extent that it is not contained in the one-word requirement of "cause." The trial court seems to have the discretion to interpret this standard of "cause" freely, and could conceivably interpolate the qualifier into the amended rule. *See, e.g.*, Hellman v. United States, 339 F.2d 36, 39 (5th Cir. 1964), in which cause for discovery of certain work sheets was construed by the trial court to mean materiality which would justify a probable delay.

[14] *Amendments, supra* note 1, at 287–88. *See id.* at 290–91 (Advisory Committee Notes).

[15] *Id.* at 305. For example, the defendant can discover his own relevant written or recorded statements or testimony before a grand jury, even though these items will not be used by the government as evidence in chief at trial.

[16] *Id.* at 287–88.

[17] The Advisory Committee suggested that no sanction was necessary because it believed that attorneys for the government would, upon request of the defendant, voluntarily give notice of intention to use evidence at trial, citing an instance of compliance in the past. *Id.* at 290 (Advisory Committee Notes). The committee also implies that the only workable sanction for noncompliance is an automatic exclusion of evidence, and this might put an undue burden on the exclusionary rule.

The Advisory Committee's logic is faulty in two respects. First, prior voluntary compliance by the government does not insure compliance in the future. The American Bar Association Advisory Committee on Pre-Trial Proceedings was concerned about the possibility that the government may fail to answer a request for information such as the use of electronic surveillance or the existence of any relevant material provided by an informant, so it made all of the prosecutor's obligations mandatory in its recommendation. This latter committee provided for sanctions including an order for discovery by the court, and ". . . such other order as it deems just under the circumstances." ABA, *supra* note 4, at 14–15, 106–07.

In addition, all the types of discovery available under the Federal Rules of Civil Procedure may be compelled by the requesting party via motion for an order from the court. FED. R. CIV. P. 37(a). Failure to comply with such order may be contempt of court. FED. R. CIV. P. 37(b). Although these civil rules do not require disclosure of intention to use evidence, they do allow discovery of certain characteristics of the evidence such as the description, nature, custody, condition and location of some tangible items. FED. R. CIV. P. 26(b)(1). The sanctions provided for failure of a party to comply with requests for this information are the same as those provided for failure to produce the tangible evidence itself. FED. R. CIV. P. 37(a), 37(b). In other words, neither the American Bar Association Advisory Committee nor the committee which wrote the Federal Rules of Civil Procedure believe that discovery can be fully effective without a means to enforce the rules at the discretion of the trial court.

Second, while in the comments to rule 12 the Advisory Committee denounces the unfairness of automatic exclusion of evidence about which the government has inadvertently failed to give notice, it recommends exclusion as an alternative sanction in amended rule 16(d)(2). *Amendments, supra* note 1, at 307. The committee does not explain why there is no burden on the government or on the exclusionary rule itself in the notes to this latter provision. It previously stated that in the interests of correcting the prejudice resulting from a failure to comply with a valid request for discovery, the court should have wide discretion in dealing with such a failure. *Id.* at 317 (Advisory Committee Notes); FED. R. CRIM. P. 16 (Advisory Committee Notes).

in the criminal justice system. The principal argument of the government against making the rule mandatory is that it deprives the government of the element of surprise which it would have if allowed to refrain from designating which of the defendant's statements, documents, other tangible objects, and grand jury testimony it intends to use at trial. This justification based upon the advantage of surprise is one element of the "sporting event" or "poker game" view of discovery, and has been criticized by courts and commentators alike.[18]

II. Rules 12.1 and 12.2—Notice of Alibi and Notice of Insanity Defenses

Rule 12.1 requires that the defendant notify the prosecution prior to trial if he intends to rely upon the defense of alibi. A transfer of information is then ordered, in which the government must first disclose details of the date, time, and place of the alleged offense,[19] then the defendant must disclose the place at which he claims to have been, and the names and addresses of the witnesses upon whom he will rely to establish his alibi. Lastly, the government must disclose the names and addresses of witnesses[20] which it will use to establish the defendant's presence at the scene of the alleged offense.[21]

[18] It has been increasingly recognized that due process fairness and the interest of truth necessitate adjustment from the one-time conception of a criminal trial as a sporting contest between two sides, and requires, *e.g.*, disclosure by the prosecutor of material helpful to the defense, and an expanding concept of discovery as a two-way channel between prosecution and defense.

United States v. Reese, 463 F.2d 830, 833 (D.C. Cir. 1972). *See also* Williams v. Florida, 399 U.S. 78, 82 (1970); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 Wash. U.L.Q. 279, 290–95 (1963).

[19] The date, time, and place of the alleged offense are not explicitly *required* to be disclosed to the defendant in the indictment or information according to Federal Rule of Criminal Procedure 7(c). The government may disclose them voluntarily in the information of indictment; in any event, the "essential elements" of the offense must be charged. *See, e.g.*, United States v. Barbato, 471 F.2d 918, 921 (5th Cir. 1973); United States *ex rel.* Harris v. Illinois, 457 F.2d 191, 196–97 (7th Cir.), *cert. denied*, 409 U.S. 860 (1972) (the defendant must also be informed of the offense with sufficient clarity so that he will not be misled in preparing his defense). The date, time, and place of the offense may not be some of its essential elements, but only auxiliary information which identifies the offense to the defendant.

The defendant has another means by which he might be able to obtain this information under the current rules. If he cannot adequately prepare his defense from the facts given in the indictment or information, he can move for a bill of particulars. Fed. R. Crim. P. 7(f); United States v. Barbato, *supra*, at 921. The date, time, and place of the alleged offense are among the items which the defendant can obtain in the bill. *See, e.g.*, United States v. Thomas, 299 F. Supp. 494 (E.D. Mo. 1968) (time and place of manufacture of firearms in violation of federal law); United States v. Acarino, 270 F. Supp. 526 (E.D.N.Y. 1967).

The grant of a bill of particulars is within the discretion of the trial court, whose ruling will only be disturbed upon an abuse of discretion. *See, e.g.*, United States v. Clay, 476 F.2d 1211, 1215 (9th Cir. 1973). Thus there is no guarantee that the defendant will obtain the information requested via his motion for a bill of particulars. The Advisory Committee does not comment on its rationale for requiring disclosure, in the amended rules, of the date, time, and place of the alleged offense. A possible basis for this provision is the committee's reluctance to leave the discovery of such information to the discretion of the trial court when the defendant cannot prepare a sufficient alibi defense without it.

[20] There is no federal discovery provision, except in capital cases, which requires disclosure of names and addresses of witnesses to the defendant. 18 U.S.C. § 3432 (1970).

The defendant may, nevertheless, move for a bill of particulars under Federal Rule of Criminal Procedure 7(f), but he is generally not entitled to receive a bill which contains the names and addresses of government witnesses. *See, e.g.*, Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963); United States v. Elliott, 266 F. Supp. 318, 327 (S.D.N.Y. 1967).

[21] The text of Rules 12.1 and 12.2 is as follows:

Rule 12.1. Notice of alibi.

(a) Notice by defendant. If a defendant intends to rely upon the defense of alibi, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk.

(b) Disclosure of information and witnesses. Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the government shall inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed. The defendant shall then inform the attorney for the government in writing of the specific place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. The attorney for the government shall then inform the defendant in writing of the names and addresses of the witnesses upon whom the government intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) Time of giving information. The court

Rule 12.1 is very similar to the Florida notice-of-alibi-defense rule which the Supreme Court held constitutional in *Williams v. Florida.*[22] The defendant, Williams, had complied with the Florida statute requiring notice of alibi defense and later claimed that such disclosure was violative of his fifth amendment privilege against self-incrimination. The Court held that there was no compulsion[23] of the defendant to testify:

> That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. . . . However "testimonial" or "incriminating" the alibi defense proves to be, it cannot be considered "compelled" within the meaning of the Fifth and Fourteenth Amendments.[24]

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may fix the time within which the exchange of information referred to in subdivision (b) shall be accomplished.
(d) Continuing duty to disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b) of this rule, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.
(e) Failure to comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.
(f) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of this rule.

Rule 12.2. Notice of defense based upon mental condition.
(a) Defense of insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
(b) Mental disease or defect inconsistent with the mental element required for the offense charged if a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
(c) Psychiatric examination. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court.
(d) Failure to comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Amendments, supra note 1, at 292–93, 295. These rules have no counterpart in the current Federal Rules of Criminal Procedure, nor are they part of the original package of amendments which was suggested by the Advisory Committee in 1970. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 597 (1970). They were proposed at a later date. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 52 F.R.D. 409, 432–36 (1971).

They are similar in many respects to rules which have already been adopted in various states. With regard to notice-of-alibi statutes see, *e.g.,* FLA. R. CRIM. P. 1.200 (1967); KAN. STAT. ANN. § 22-3218 (Supp. 1971); OKLA. STAT. ANN. tit. 22, § 585 (1969). At least fifteen states have adopted some type of alibi-notice requirement. For a complete list see Williams v. Florida, 399 U.S. 78, 82 n.11 (1969). Only a few state courts have had to consider the propriety of penalizing noncompliance. *See, e.g.,* State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 137–38, 163 N.E.2d 177, 180 (1968). For a representative survey of the state courts as of 1964 see Epstein, *Advance Notice of Alibi,* J. CRIM. L.C. & P.S. 29, 37–38 (1964). For notice-of-insanity statutes see, *e.g.,* ARIZONA R. CRIM. P. 192(A) (1956); KAN. STAT. ANN. § 22-3219 (Supp. 1971); MICH. COMP. LAWS ANN. §§ 768.20, 768.21 (1968); REV. CODE MONT. § 95-503 (1947).

[22] 399 U.S. 78 (1970).

[23] *Accord,* State v. Nunn, 113 N.J. Super. 161, 273 A.2d 366 (1971). *See* Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966) (exclusion of defendant's evidence of alibi in a state criminal case because he failed to give notice as required by statute did not deprive him of a constitutional right).

[24] 399 U.S. at 84. In their opinion, Justices Black and Douglas attempted to show that the defendant was helping to prosecute himself by informing the government of his defense. They con-

The *Williams* case did not, however, resolve all the constitutional questions raised by this notice-of-alibi rule. A remaining problem posed by the Court was whether the constitutionality of alibi-notice rules might depend on whether the defendant enjoys reciprocal discovery against the government. This issue was later discussed in *Wardius v. Oregon*,[25] in which Mr. Justice Marshall, speaking for the Court, said that due process forbids enforcement of non-reciprocal notice-of-alibi rules. His use of the term "reciprocal" includes mandatory equal discovery for both prosecution and defense,[26] and this is what the Court promulgated in rule 12.1.[27]

But upon careful scrutiny, it can be seen that the provisions of the rule are not exactly reciprocal under the *Wardius* formulation. In *Wardius* the Court held that it was fundamentally unfair for the defendant to be required to disclose the details of his defense, if he is not allowed to discover the evidence which the government will use in rebuttal. Rule 12.1(b) requires notification to the government of "the names and addresses of the witnesses upon whom [the defendant] intends to rely to establish such alibi." [28] Since proof of alibi demands a showing that the defendant was absent from the place of the crime at the time it was allegedly committed,[29] there are two types of witnesses who can establish the defendant's alibi. One type says that he was at the place where the defendant claims to have been at the time of the alleged offense, and that the defendant was there. The other testifies that he was at the place of the alleged offense at the time of commission, and the defendant was not there. Under rule 12.1(b) the defendant will have to provide the names and addresses of both types of witnesses, since he will rely on them to establish his alibi. According to the *Wardius* rule, the government should then disclose the names and addresses of witnesses whom it will use in its "*refutation* of the very pieces of evidence which [the defendant] disclosed to the state." [30] Thus, the Court mandated disclosure of witnesses who will contradict the alibi by rebutting the testimony of either one or both types of witnesses.[31] However, rule 12.1(b) only requires the government to provide the identity of the witnesses which it will use to "establish defendant's presence at the scene of the alleged offense." [32] In other words, if the defendant intends to establish his alibi using a witness who will testify that the defendant was with him, and not at the scene of the crime, rule 12.1(b) does not require the government to disclose the identity of the witness it will use for direct rebuttal. This lack of reciprocity

tend that any assistance given to the prosecution, even in the form of mere disclosure, is self-incriminating. *Id.* at 111. (Black & Douglas, JJ., concurring in part and dissenting in part).

[25] 412 U.S. 470, 472 (1973). Mr. Justice Marshall did not explicitly define "reciprocal," nor did any of the courts which cited *Wardius*. In spite of the lack of a positive definition, the Court did hold that the Oregon statute in question was *not* reciprocal, because it did not even mention the right of the defendant to obtain discovery of the prosecution's alibi-rebuttal witnesses.

[26] Since ". . . discovery must be a two-way street . . ." and the Florida rule held constitutional in *Williams required* state disclosure to the defendant, permissive reciprocity is not sufficient. *Id.* at 474. Two types of discovery would therefore conform with the *Wardius* formulation: that which is mandatory for both prosecution and defense, and that which conditions prosecution discovery upon the prior disclosure to the defendant.

[27] *Amendments, supra* note 1, at 292.

[28] *Id.*

[29] Roper v. United States, 403 F.2d 796, 798 (5th Cir. 1968).

[30] 412 U.S. at 476 (emphasis added).

[31] *See* Nakell, *Due Process, supra* note 4, at 62–66. Professor Nakell notes that the witnesses which the government will use to indirectly rebut the evidence of alibi will probably already be part of the government's evidence in chief at trial, since they would tend to establish that the defendant committed the crime. So if the defendant makes any disclosures of evidence, whether of tangible evidence under rule 16 or identity of witnesses, the *Wardius* rule requires disclosure of any evidence which the government would use to show that the defendant committed the crime. This technique of disclosing a small amount of alibi evidence in order to obtain almost complete discovery of the government's case is a tactical advantage only to the extent that it allows discovery which is broader than that under rule 16. The limits of the reciprocity doctrine which compels the government disclosure have not yet been defined by the courts. Cases could be hypothesized in which, as a result of the defendant's technique, the government must provide evidence currently not subject to disclosure under rule 16, such as statements made by government witnesses or prospective government witnesses.

[32] *Amendments, supra* note 1, at 292. The government cannot prove the defendant's presence by sole reliance on direct rebuttal evidence, for this would only show that the defendant was not at the place mentioned in his alibi at the time of the alleged offense.

leaves the defendant subject to surprise, in violation of his due process rights as discussed in *Wardius*.[33]

The second constitutional problem which remains is possible infringement upon sixth amendment rights if the penalty of rule 12.1 is imposed.[34] The applicability of the sixth amendment is especially evident with regard to this rule, since the penalty for its violation, although discretionary, provides for the exclusion of the testimony of *witnesses* who were not disclosed to the prosecution.[35] The sixth amendment provides, "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."[36] The first case which went beyond the literal interpretation that the words of the sixth amendment give the accused the right to obtain witnesses, but not necessarily to interrogate them, is *Washington v. Texas*.[37] The Court explained that the rights guaranteed by that amendment include "[t]he right to offer the *testimony* of witnesses, and to compel their attendance, if necessary, [which] is in plain terms the right to present a defense. . . ."[38]

In the *Washington* case the defendant's coparticipant in the offense, who had already been convicted and sentenced, was not allowed to testify for the defendant under the Texas law denying admission of such testimony, based on its presumed untrustworthiness,[39] even though the record indicated that the testimony would have been exculpatory and material to the defense. Mr. Chief Justice Warren, speaking for eight members of the Court, said that the sixth amendment right was a fundamental element of due process as applied to the states via the fourteenth amendment:[40]

> [T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the state *arbitrarily* denied him the right to put on the stand a witness who was *physically and mentally capable* of testifying to events that he had *personally observed* and would have been *relevant and material* to the defense.[41]

In order to determine the impact of *Washington* upon exclusion sanctions, such as the one in rule 12.1, two other elements of its rationale must be examined. First, the mandatory ban on testimony of a category of witnesses made the Texas statute violative of the sixth

[33] The defendant may attempt to circumvent this limitation by moving for a court order compelling disclosure of witnesses whom the government will use for direct rebuttal, on the grounds that the lack of reciprocity is "good cause" for an exception to the requirements of the rule. *Amendments, supra* note 1, at 293. The "good cause" is supported by Brady v. Maryland, 373 U.S. 83 (1963), which stated the defendant's right to exculpatory evidence in the hands of the government. Such an order might not be granted because of restrictions which have been imposed on the *Brady* rule by the courts. *See* Comment, *Discovery in Criminal Cases: Denial to Misdemeanants as a Violation of Due Process and Equal Protection*, 65 J. CRIM. L. & C. 181, 184–85 (1974).

[34] We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. Williams v. Florida, 399 U.S. 78, 83 n.14 (1970). Justice Brennan noted the possibility of constitutional problems with such exclusion in Palermo v. United States, 360 U.S. 343, 363, 365–66 (1959) (Brennan, J., concurring in result).

[35] *Amendments, supra* note 1, at 292.

[36] U.S. CONST. amend. VI.

[37] 388 U.S. 14 (1967). *See* Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery*, 7 JOHN MAR. J. PRAC. & PROC. 364 (1974); Note, *The Preclusion Sanction —A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972) (hereinafter cited as *Preclusion Sanction*).

[38] 388 U.S. at 19 (emphasis added). *Accord*, Holloway v. Wolff, 351 F. Supp. 1033 (D. Neb. 1972); State v. Grant, 519 P.2d 261 (Wash. 1974) (exclusion of defendant's alibi witness was unconstitutional since it denied him the right to have testimony in his own behalf).

[39] VERNON'S ANN. TEX. PEN. CODE, art. 82; TEX. CODE CRIM. P., art. 711 (1925) (*now* VERNON'S ANN. TEX. CODE CRIM. P., art. 36.09 (1965)).

[40] 388 U.S. at 19.

[41] *Id.* at 23 (emphasis added). The evidentiary requirements which generally apply to a witness' testimony are not changed by this ruling. Before a sixth amendment constitutional violation can be raised following the imposition of the exclusion sanction of rule 12.1, the excluded testimony must be shown to be otherwise admissible. The testimony of the defendant's witness must be relevant and material to his case. This test is easily met, since a witness which the defendant will use to establish that he was elsewhere at the time of the crime is relevant to his alibi defense which, in turn, is probably material to his entire defense. In addition, other evidentiary requirements such as personal observation of the witness, and sufficient physical and mental capacity of the witness to observe are not altered.

amendment because it completely barred co-defendants from being defense witnesses.[42] The sanction of rule 12.1(e), on the other hand, is not mandatory but permissive. The judge may decide to exclude the witness, unless "cause" is shown for failure to comply with the discovery provisions.[43] To the extent that whole categories of defense witnesses are not necessarily prevented from testifying, the *Washington* case is not directly applicable to rule 12.1.[44]

Second, the Court mentions that the exclusion mandated by the Texas statute arbitrarily denied the defendant his right to put a witness on the stand. After stating that making all defense testimony inadmissible for reasons of procedure would be unconstitutional, the Court continues: "It is difficult to see how the Constitution is any less violated by *arbitrary* rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[45] An arbitrary rule is irrational, and an indication of its irrationality is the irrationality of the presumption on which it is based. In the *Washington* case, there was no rational connection between the presumed fact of untrustworthiness and the status of the defense witness as a co-defendant, which would justify an irrebuttable presumption of untrustworthiness.[46] In the Court's words, "[T]he rule disqualifying an alleged accomplice from testifying on behalf of a defendant cannot *even* be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury."[47] Therefore, instead of just excluding witnesses who would not be admissible at trial because of their bias, a rule which fails this rational connection test would also unconstitutionally exclude witnesses who would testify truthfully.

The standard used to implement this test in the *Washington* case was necessarily a nearly perfect correlation between the proven fact that the witness was a co-defendant and the presumption that the witness was untrustworthy.[48] However, because the rule 12.1 exclusion sanction is permissive, the presumption of untrustworthiness on which it is based is rebuttable. The standard to be used for such a presumption is at least a greater-than-fifty per cent,[49] but not necessarily perfect, correlation. Any definitive determination of whether the rational connection test is satisfied by the rule would involve the use of empirical data such as the Court used in *Leary v. United States*.[50] If the permissive sanction of rule 12.1 could be shown to exclude truthful testimony of alibi witnesses more often than it excludes untruthful testimony, then it would appear to violate the defendant's sixth amendment right to compulsory process.[51]

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[42] VERNON'S ANN. TEX. PEN. CODE, art. 82.

[43] The Advisory Committee explains that the use of the term "may" in rule 12.1(e) is intended to show that a requirement of "cause" is necessary before the testimony can be admitted. "This is further emphasized by subdivision (f), which provides for exceptions whenever 'good cause' is shown for the exception." *Amendments, supra* note 1, at 294 (Advisory Committee Notes).

[44] *Accord,* State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 138–40, 163 N.W.2d 177, 181–82 (1968). The court held the Wisconsin notice of alibi statute, WIS. STAT. ANN. § 955.07, did not conflict with the ruling of the *Washington* case, because it was not an absolute ban on testimony of certain categories of defense witnesses. *Contra, Preclusion Sanction, supra* note 37, at 1347–49. The commentator did not take into account the restrictions placed upon the holding of *Washington* by the facts of the case, and read it as a bar to the use of any exclusion sanction. Moreover, he did not mention the qualifying use of the word "arbitrary" in the Court's holding.

[45] 388 U.S. at 22 (emphasis added).

[46] This rational connection test was used subsequently in Leary v. United States, 395 U.S. 6, 36 (1969), where the Court said:

> [a] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend.

[47] 388 U.S. at 22 (emphasis added).

[48] *Accord, Preclusion Sanction, supra* note 37, at 1349–50.

[49] Ashford & Ringer, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview,* 79 YALE L.J. 165, 185 (1969).

[50] 395 U.S. at 37–53.

[51] Sometimes the courts have subsumed the rational connection standard into one of fairness. *See, e.g.,* Chambers v. Mississippi, 410 U.S. 284, 297–98 (1973). The Court said that in cases of obvious trustworthiness, fundamental fairness could compel compulsory process to take precedence over a procedural rule.

The same view is expressed in Hardin v. Estelle, 365 F. Supp. 39, 45 (N.D. Tex. 1973). *But see* Green v. Estelle, 488 F.2d 918 (5th Cir. 1973), where the state's failure to produce a subpoenaed witness who was confined at the time of trial was not error because the defendant failed to call the subpoenaed witness or move for a continuance or request a warrant for attachment.

A third constitutional issue presented by this section of the amendments is self-incrimination. The defendant may decide, subsequent to mutual disclosure of witnesses and location at the time of the alleged offense, that he will not use an alibi defense, possibly because the poor character reputation of the witnesses would hinder rather than help his case. If he makes this decision to refrain from using the alibi defense, then any such information which is obtained as a result of his prior disclosure should not be introduced into trial because it is self-incriminating.[52] No express provision to that effect can be found in the amended rules.

Rule 12.2 has the same types of provisions as rule 12.1, requiring mandatory disclosure of intent to rely upon a defense of either insanity or mental disease or defect inconsistent with the mental element required for the offense charged. The penalty for non-compliance is exclusion of the defense itself, or of the testimony of expert witnesses.[53] The first subdivision requires notice of intent to use the defense of insanity, but it does not require that the defendant give names and addresses of the witnesses he will use to prove his insanity. In that respect, the defendant is not actually giving evidence to the prosecution, for which he would constitutionally expect to receive evidence in return. In addition, application of the *Wardius* reciprocity rule is limited by the facts of its case to situations involving defense disclosure of witnesses, not just notice.

However, an argument could be made, based on language of the Court in *Wardius,* that mere notice of a defense, without the opportunity for the defendant to discover prosecution witnesses, may violate fundamental fairness and due process notions:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state. . . . Thus, in the absence of fair notice that he would have an opportunity to discover the State's rebuttal witnesses, *petitioner cannot be compelled to reveal his alibi defense.*[54]

No court has expressly spoken to the due process problems in requiring the defendant to give notice of his insanity defense, without receiving any reciprocal information from the prosecution.[55] Such required information, according to a liberal interpretation of the *Wardius* rule, would be the identity of the witnesses, especially expert witnesses, upon which the prosecution would rely to rebut the defense of insanity.[56] A justification for such a liberal extension of the *Wardius* rule is the counterbalancing of the advantage which the government already has in its investigative techniques.[57]

The sanctions which can be applied for failure to give notice are twofold: under rule 12.2(a) the defense itself can be prohibited, or under rule 12.2 (d) the testimony of an expert witness on the defendant's mental state can be excluded.[58] The first sanction is broader than that of rule 12.1 and conflicts with the strong dictum of the *Washington* case, establishing the right to present a defense.[59] By precluding the defendant from asserting his defense, the rule affronts the defendant's sixth amendment rights.

The alternative sanction of rule 12.2(d) is

[52] The Court in *Wardius* recognized that the current rules do not require exclusion of the initially disclosed items and the evidence derived from them: "Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted." 412 U.S. at 477. *Contra,* Radford v. Stewart, 320 F. Supp. 826, 831 (D.C. Mont. 1970), in which the court saw no problem of self-incrimination as long as the prosecution did not make its prima facie case merely from investigation of the notice and list of witnesses which the defendant provides. *See* discussion commencing with text accompanying note 100 *infra.*

[53] *Amendments, supra* note 1, at 295. For the text of rule 12.2 see note 21 *supra.*

[54] 412 U.S. at 476, 479 (emphasis added).

[55] Montana has a similar notice-of-insanity defense rule. REV. CODE MONT. § 95-503 (1947). The Montana courts have not yet dealt with the constitutional issues involved in this rule. *See* State *ex rel.* Krutzfeldt v. District Ct., 515 P.2d 1312 (Mont. 1973)(defendant could not raise the constitutional question of lack of reciprocity in the statute on its face, because it was applied reciprocally to him).

[56] If the *Wardius* rule is read narrowly, the reciprocal information would only be notice of the government's intent to rebut the defendant's insanity defense. Such notice is useless since the defendant will anticipate rebuttal.

[57] *See Rule 16 Discovery, supra* note 4, at 1018-19; text accompanying note 125 *infra.*

[58] *Amendments, supra* note 1, at 295.

[59] 388 U.S. at 19 (dictum).

more limited than that in rule 12.1. The only types of witnesses which are excluded are expert witnesses; the defendant can still bring in lay witnesses to testify regarding insufficient mental capacity for the alleged offense.[60] Moreover, the defendant may be allowed to subsequently use expert witnesses if the government uses them in rebuttal.[61]

The rationale for such exclusion is not based on an irrebuttable presumption of untrustworthiness, as in the *Washington* case.[62] If the failure to give notice is intentional, there is a possibility that the defendant may be seeking a sympathetic expert witness who will agree to commit perjury. However, the defendant may also not want to disclose such a personal frailty before trial because of the ensuing stigma[63] and possible liability for civil commitment.[64] Moreover, because the use of an insanity defense is tantamount to an admission of guilt, the requirement of notice of an insanity defense is harmful to the defendant's case if he subsequently intends to plead not guilty and the prosecution is allowed to comment on the defendant's previous intent to use the defense.[65] The correlation between defendant's failure to give notice of an insanity defense and the untrustworthiness of the expert witness may, as in the case of the exclusion sanction of rule 12.1, not be sufficient to satisfy the rational connection test[66] and thus the exclusion sanction would be unconstitutional. Furthermore, there is no rational basis for the assumption that the defendant would be more likely to tamper with an expert than a lay witness. The reluctance of the Advisory Committee to exclude all witnesses as a penalty indicates that it both has doubts about the validity of the rationale for such exclusion, and that it does not expect lay witnesses to be of much assistance to the defendant's case.[67] The difficulty remains that the court may exclude some of the defendant's witnesses without a rational basis, and to that extent, even though he can still bring other witnesses to the stand, the defendant is being denied his right to compulsory process.[68]

The self-incrimination problems of rules 12.2 are not as apparent as they are in the notice-of-alibi provisions. In fact, a distinction has been made by courts between notice and evidence, in that the transfer of notice does not provide any factual information which the prosecution can use against the defendant.[69] In this respect the notice requirements of rules 12.1 and 12.2 are not violative of the defendant's fifth amendment rights, although other

[60] "[H]e will be limited to 'lay' testimony, which generally is not effective for a defense of mental disease or defect." REV. CODE MONT. § 95-503 (1947) (Comment). The reason for the ineffectiveness of the lay testimony is that substantial limitations are placed on the use of laymen to state observations which embody opinions, such as the testimony of a mother that her son has been "acting strangely lately," or is "mad." Sometimes, however, they are admitted as "short hand renditions." R. MCCORMICK, EVIDENCE ch. 3, § 11 n.31 (1972). The courts have not yet gone so far as to equate effective loss of a defense with denial of the right to present a defense.

[61] REV. CODE MONT. § 95-503 (1947) (Comment). This is only a possibility, since the use of the exclusion is at the court's discretion. *Amendments, supra* note 1, at 295.

[62] 388 U.S. at 20-21. *See* text accompanying note 46 *supra*.

[63] *Accord, Preclusion Sanction, supra* note 37, at 1350 n.62.

[64] *See, e.g.*, 18 U.S.C. §§ 4244 *et seq.* (1949); ILL. REV STAT. ch. 91½, §§ 6-1 *et seq.* (1971).

[65] Some courts have recognized the prejudicial effect of the insanity defense on other defenses, and have consequently recommended severing that portion of a criminal trial which deals with insanity as a defense. *See, e.g.*, United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973); Holmes v. United States, 363 F.2d 281 (D.C. Cir. 1966); Curl v. State, 40 Wis. 2d 474, 162 N.W.2d 77 (1968).

[66] *See* text accompanying note 51 *supra*.

[67] *See* note 60 *supra*.

[68] In the *Washington* case the defendant was not denied the testimony of all his witnesses, just the one who would have substantiated his alibi. Washington v. State, 400 S.W.2d 756, 758 (Tex. Cr. App. 1966), *rev'd*, Washington v. Texas, 388 U.S. 14 (1967). Yet the Supreme Court found this denial unconstitutional, and implied that the defendant has a right to compulsory process for obtaining the testimony of *all* his witnesses, subject to the rules of evidence regarding their testimony. *But see* State v. Whitlow, 45 N.J. 3, 23, 210 A.2d 763, 775 (1965) (it is proper to limit or exclude testimony by a defense psychiatrist whenever the defendant refuses to be examined by another psychiatrist).

[69] *See* Radford v. Stewart, 320 F. Supp. 826, 829 (D. Mont. 1970); Commonwealth v. Pritchett, 225 Pa. Super. 401, 312 A.2d 434 (1973); *Preclusion Sanction, supra* note 37, at 1350-51. This distinction is also used in limiting the applicability of the *Wardius* reciprocity test to relinquishment of evidence by the defendant. *But cf.* text accompanying note 54 *supra*.

fifth amendment problems may still exist.[70] Section (c) of rule 12.2 presents no self-incrimination problem when viewed in light of recent Supreme Court cases such as *Schmerber v. California*[71] and *United States v. Dionisio*,[72] whose rationales would allow the examination of the defendant by a psychiatrist designated by the court.[73]

III. Rule 16—Discovery and Inspection

The most obvious change in the amendment to rule 16 is the allowance of independent discovery for both prosecution and defense. The current rule allows prosecutorial discovery only on the condition that the discovery sought by the defendant has been granted.[74] This further expansion of discovery is an attempt to offset the great advantage which the govern-

[70] *See* discussion commencing with text accompanying note 100 *infra* for a more complete discussion of the self-incrimination problems.

[71] 384 U.S. 757 (1966). *See* text accompanying note 102 *infra*.

[72] 410 U.S. 1 (1973).

[73] *Accord*, State v. Risden, 56 N.J. 516, 264 A.2d 214 (1970); State v. Obstein, 52 N.J. 516, 247 A.2d 5 (1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 673 (1965).

[74] The full text of amended rule 16 appears *infra*. Additions to the language of current rule 16 of the Federal Rules of Criminal Procedure are shown in italics; deletions are shown in brackets. Because the amended rule has substantially rearranged the current rule, there are changes in the order of presentation of the provisions which are not delineated in the text *infra*.

Rule 16. Discovery and inspection.

(a) Disclosure of evidence by the government.

(1) Information subject to disclosure.

(A) Statement of defendant. Upon *request* [motion] of a defendant the *government shall permit* [court may order the attorney for the government to permit] the defendant to inspect and copy or photograph: any relevant written or recorded statements [or confessions] made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; *the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent;* and [relevant] recorded testimony of the defendant before a grand jury *which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.*

(B) *Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.*

(C) Documents and tangible objects. Upon *request* [motion] of the defendant the *government shall permit* [court may order the attorney for the government to permit] the defendant to inspect and copy or photograph books, papers, documents, *photographs*, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, *and which are material* [upon a showing of materiality] to the preparation of his defense *or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant* [and that the request is reasonable].

(D) Reports of examinations and tests. Upon *request* [motion] of a defendant *the government shall permit* [the court may order the attorney for the government to permit] the defendant to inspect and copy or photograph any [relevant] results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(E) *Government witnesses. Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.*

(2) Information not subject to disclosure. Except as provided in *paragraphs (A), (B), and (D) of subdivision (a)(1)* [subdivision (a)(2)], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by *the attorney for the government or other* government agents in connection with the investigation or prosecution of this case, or of statements made by government witnesses or prospective government witnesses [(other than the defendant)] except as provided in 18 U.S.C. § 3500.

(3) *Grand jury transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.*

ment has enjoyed from its access to superior investigational resources for constructing a case against the defendant.

The amended rule permits defense discovery not only of the defendant's statements,[75] written or recorded, but also allows discovery

(4) *Failure to call witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.*
(b) Disclosure of evidence by the defendant.
(1) Information subject to disclosure.
(A) Documents and tangible objects. [If the court grants relief sought by the defendant under subdivision (a)(2) of this rule, it may,] upon request [motion] of the government, *the defendant shall* [condition its order by requiring that the defendant permit] the government to inspect and copy or photograph [scientific or medical reports,] books, papers, documents, *photographs,* tangible objects, or copies or portions thereof, which [the defendant intends to produce at the trial and which] are within *the* [his] possession, custody or control *of the defendant,* [upon a showing of materiality to the preparation of the government's case and that the request is reasonable.] *and which the defendant intends to introduce as evidence in chief at the trial.*
(B) *Reports of examinations and tests. Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.*
(C) *Defense witnesses. Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.*
(2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.
(3) *Failure to call witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.*
[(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.]
(c) Continuing duty to disclose. If, [subsequent to compliance with an order issued pursuant to this rule, and] prior to or during trial, a party discovers additional *evidence or* material previously requested or ordered, which is subject to discovery or inspection under this rule, *or the identity of an additional witness or witnesses,* he shall promptly notify the other party or his attorney or the court of the existence of the additional material *or witness.*
(d) Regulation of discovery.
(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon *request by a party* [motion by the government] the court *shall* [may] permit the *party* [government] to make such showing, in whole or in part, in the form of a written statement to be inspected by the *judge alone* [court *in camera*]. If the court enters an order granting relief following *such* a showing [*in camera*], the entire text of the *party's* [government's] statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal [by the defendant].
(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, [or with an order issued pursuant to this rule] the court may order such party to permit the discovery or inspection [of materials not previously disclosed,] grant a continuance, or prohibit the party from introducing [in] evidence [the material] not disclosed, or it may enter such other order as it deems just under the circumstances. [An order of the court granting relief under this rule shall] *The court may* specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.
(e) *Alibi witnesses. Discovery of alibi witnesses is governed by Rule 12.1.*

Amendments, supra note 1, at 304–06; FED. R. CRIM. P. 16.

[75] Defining the scope of the term "statements" has consumed much court time since it was first used in the Federal Rules of Criminal Procedure, and included in the Jencks Act. FED. R. CRIM. P. 16; Jencks Act, 18 U.S.C. § 3500(e) (1970). See FED. R. CIV. P. 26(b) for another definition of the term. Rule 801 (a) of the Federal Rules of Evidence gives a definition of "statement" which is drafted for use with hearsay rule questions. It is not as informative as those definitions given by the courts, and to the extent that it includes non-verbal

of the substance of any oral statement which was made by the defendant to anyone who he knew at the time to be an agent of the government.[76] The Supreme Court refused, however, to extend the defendant's right of discovery beyond his own statements to those of his co-defendants or co-conspirators.[77]

The amendments made a special adjustment allowing a defendant corporation to discover any *relevant* recorded testimony of a witness before a grand jury, when the witness is an officer or employee who could legally bind the defendant corporation.[78] The requirement of relevancy does not seem appropriate, when, according to the amended rules, the grand jury testimony of a non-corporate defendant can be admitted upon a lesser showing of *relation* to the offense charged.[79] In fact, recent cases do not even require relevancy for discovery of grand jury testimony by a non-corporate defendant.[80] Neither have they demanded, as the amended rule does, that the officer or employee be situated so as to legally bind the defendant, in respect to activities mentioned in the charges.[81]

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conduct, the definition is not relevant to discovery. FED. R. EV. 801(a)

Some courts have held that the statements must be substantially verbatim and contemporaneous (United States v. Elife, 43 F.R.D. 23 (S.D.N.Y. 1967)) or must purport to reproduce his exact words. United States v. Armantrout, 278 F. Supp. 517 (S.D.N.Y. 1968). Others have allowed discovery of documents which, although not verbatim, set forth the substance of the statements which the defendant made. United States v. Scharf, 267 F. Supp. 19 (S.D.N.Y. 1967); United States v. Morrison, 43 F.R.D. 516 (N.D. Ill. 1967). (*See also* Campbell v. United States, 365 U.S. 85 (1961); United States v. McMillen, 489 F.2d 229 (7th Cir. 1972); United States v. Black, 282 F. Supp. 35 (C.D. Cal. 1968); United States v. Iovinelli, 276 F. Supp. 629, 631 (N.D. Ill. 1967).

The amended rule does not attempt to provide a definition for the term, "statements," but it implies that the definition must be narrow, since discovery of the substance of the statements of a defendant is placed in a separate category from the original statements themselves. *Amendments, supra* note 1, at 304–05. *See* ABA, *supra* note 4, at 56–63.

[76] *Amendments, supra* note 1, at 304–05; ABA, *supra* note 4, at 13.

[77] This is one area where expansion has been attempted by the courts. In United States v. Percevault, 490 F.2d 126 (2d Cir. 1974) the district court allowed discovery by the defendant of his own statements, the statements of his co-defendant, and statements of co-conspirators, made during the course and in furtherance of the conspiracy, which the government intended to introduce against the defendant, Percevault, as his own admissions. An amended order of the trial court allowed discovery of statements made by co-conspirators after the termination of the conspiracy when they included a statement which the government intended to use against the defendant because it was made by a co-conspirator in the course and in furtherance of the conspiracy. The government complied with the orders except where it claimed that disclosure would conflict with the Jencks Act, 18 U.S.C. § 3500(a) (1970); thus it did not disclose statements of prospective government witnesses, both co-defendants and co-conspirators, made after the termination of the conspiracy.

Judge Weinstein advanced two novel extensions of rule 16(a) when he said that according to rule 801(d)(2) of the then-proposed Federal Rules of Evidence the statements of a co-conspirator during the course and in furtherance of the conspiracy are exceptions to the hearsay rule, and thus they should be treated as statements of the defendant for the purposes of discovery. Secondly, he stated that the defendant should, in all fairness, be allowed discovery of his co-defendants' statements. United States v. Percevault, 61 F.R.D. 338, 339–42 (E.D.N.Y. 1973). On review Judge Kaufman disallowed this expansion of discovery because it went beyond the limits of rule 16(a). 490 F.2d at 130–32.

In their 1970 proposal the Advisory Committee also recommended disclosure of the co-defendant's statements. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 588 (1970). The recommendation was not submitted to Congress by the Supreme Court, and some cases have accordingly denied disclosure of a co-defendant's statements. *See, e.g.,* United States v. Edwards, 42 F.R.D. 605 (S.D.N.Y. 1967).

[78] *Amendments, supra* note 1, at 305.

[79] *Id.*

[80] *See, e.g.,* United States v. Longarzo, 43 F.R.D. 395 (S.D.N.Y. 1967); United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966). The Advisory Committee has codified the view of these courts, because it replaced the standard of "relevancy" with one of "relation." FED. R. CRIM. P. 16(a)(3). "Relation" implies a mere connection between two items. Van Schaick v. Marinelli, 276 N.Y.S. 241, 243 App. Div. 7 (1934). *See generally* Note, *Discovery by a Criminal Defendant of His Own Grand Jury Testimony,* 68 COLUM. L. REV. 311 (1968).

[81] *See, e.g.,* United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969), *dismissed as moot sub nom.* United States v. Gifford-Hill-American, 397 U.S. 93 (1970); United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970).

Some courts have been so liberal as to allow discovery of grand jury testimony of a corporate defendant's officers as a matter of right. *See, e.g.,* United States v. Stone, 319 F. Supp. 364 (S.D.N.Y. 1970); United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966). Others have assembled a need for the testimony from the facts of the case, without any particular showing. *See, e.g.,* United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970).

The main addition to the section of rule 16 which deals with discovery of documents is the allowance of inspection and copying of evidence not only if the defendant shows that the evidence will be material to his defense, but also if the government intends to use such documents at trial or if they were obtained from or belong to the defendant.[82] The Advisory Committee suggests that these latter provisions are actually examples of judicial standards for proof of materiality.[83] The disclosure of reports of physical or mental examinations and scientific tests and experiments, made in connection with the particular case, is also mandatory.[84]

Both the government and the defense will have substantial discovery of names and addresses of each other's witnesses. In capital offense cases the government is currently required to provide the defendant with the names and addresses of witnesses which it will use at trial to prove the indictment.[85] However, courts have been very reluctant to extend defense discovery of names of witnesses beyond the limits of the federal statute.[86]

One fault of amended rule 16 is that it restricts the discovery opportunities of the defendant to witnesses which the government intends to call in the presentation of the case in chief. This excludes witnesses whom the government does not intend to call, who might nevertheless provide important leads to exculpatory information.[87] Reciprocal discovery of these witnesses is not compelled under the *Wardius* formulation, since the disclosure of the defendant's witnesses is limited to those whom he will call at trial. However, an extension of the *Brady v. Maryland* due process and fundamental fairness arguments may mandate such disclosure, because the evidence which the witnesses could provide might be exculpatory.[88]

The discovery allowed to the defendant is still severely limited by the Jencks Act, which is specifically cited in the amended rules[89] and current rule 16.[90] In the recent case, *United States v. Feinberg,* District Court Judge Marshall made an attempt to place the defendant's right to discovery outside the restrictions of the Jencks Act.[91] The question was whether the portion of the government witness' statement which contained a statement of the defendant should be disclosed by the government, based on the required governmental disclosure of all the defendant's statements according to rule 16(a). Although the reviewing court found Judge Marshall's arguments powerful, it read the language of rule 16(a)(2) strictly and prohibited discovery of statements made by the defendant to the prospective government witness.[92] Thus, Jencks Act confrontations are inevitable under the amended rules, and the current trend of the courts is to read the Jencks Act to reduce allowable defense discovery.[93]

Lastly, if either the government or the defense suspect that disclosure of the names and addresses of their witnesses will subject them to probable tampering or harm, they have two alternatives. Either the testimony of such witnesses can be perpetuated in accordance with provisions of rule 15, should they later become unavailable for testimony, or a protective order denying, restricting, deferring, or otherwise limiting discovery may be granted upon a sufficient showing.[94] The use of the subjective term, "sufficient showing," reveals that the "mandatory" rules are ultimately at the discre-

[82] *Amendments, supra* note 1, at 305.
[83] *Id.* at 312 (Advisory Committee Notes).
[84] *Id.* at 305.
[85] 18 U.S.C. § 3432 (1970).
[86] *See* note 20 *supra.*
[87] *See,* Note, *Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16,* 12 WM. & MARY L. REV. 603, 618 (1971).
[88] 373 U.S. 83 (1963). *See* text accompanying note 99 *infra.* However, the *Brady* rule may not extend to witnesses whose testimony may be primarily incriminating, and only derivatively provides exculpatory evidence. Where there is a doubt as to disclosure, the trial court has the discretion to resolve the doubt as it desires. Giles v. Maryland, 386 U.S. 66, 80 (1966).
[89] *Amendments, supra* note 1, at 306.
[90] FED. R. CRIM. P. 16(b).
[91] 371 F. Supp. 1205, 1212–15 (N.D. Ill.), *rev'd,* 502 F.2d 1180 (7th Cir. 1974).
[92] 502 F.2d at 1182.
[93] The harm to the defendant's case by denial of discovery of his statements within statements of government witnesses is particularly evident in cases such as *United States v. Kopple,* which was consolidated with *Feinberg.* The defendant, Kopple, was a seventy-seven year old physician who claimed he was unable to remember his whereabouts and activities on the dates alleged in the indictment. He sought to learn the statements which he allegedly made to government agents or third parties so that he could prepare a defense.
[94] *Amendments, supra* note 1, at 305–07.

tion of the court.[95] The Supreme Court omitted a third alternative, listed in the preliminary draft,[96] which would allow the government to certify that pre-trial disclosure would subject the witnesses or others to substantial economic harm or coercion. Such disclosure would then not be required. Under the *expressio unius est exclusio alterius* maxim, this alternative has not have been subsumed into the protective order category. The Advisory Committee Notes as revised by the Court do not provide any explanation for this deletion, which is contrary to the recommendation of the American Bar Association.[97]

Since their initial publication in preliminary draft, the requirements of rule 16 have been the subject of much debate and their constitutionality is still in question.[98] The expansion of discovery for the defendant is more a matter of policy than anything else, although some courts have held that it should be considered a matter of right.[99] However, the increased discovery recommended for the prosecution comes dangerously close to infringement of fifth and sixth amendment protections. The problems relate basically to four areas: the privilege against self-incrimination, the attorney-client and work-product privileges, due process and fundamental fairness, and compulsory process for the attendance of witnesses.

Self-Incrimination

One of the most elementary objections to a disclosure of evidence by the defendant is that he is aiding the prosecution in its case against him, in disregard of his fifth amendment privilege against self-incrimination.[100] The Supreme Court has not endorsed this broad interpretation. Even in light of liberal constructions given to the fifth amendment in previous cases,[101] the Court in *Schmerber v. California* refused to extend the scope of the privilege to physical evidence obtained from the defendant, such as a blood sample.

> The distinction which has emerged, often expressed in different ways, is that the privilege is a ban against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real

[95] *Accord,* ABA, *supra* note 4, at 101–02.

[96] Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 589–90 (1970).

[97] ABA, *supra* note 4, at 84.

[98] *See, e.g.,* FED. R. CRIM. P. 16 (Advisory Committee Notes); Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 595–610 (1970); Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 69, 277–78 (1966); Discovery in Criminal Cases, 44 F.R.D. 481, 497–506 (1968) (Newman); Rezneck, *The New Federal Rules of Criminal Procedure,* 54 GEO. L.J. 1276, 1276–94 (1966) (detailed analysis of 1966 amendments, with some comments on their constitutionality); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 228, 247–48 (1964) (discusses constitutional problems with expansion of prosecutorial discovery); Wright, *Proposed Changes in Federal Civil, Criminal and Appellate Procedure,* 35 F.R.D. 317, 327–28 (1964); Zagel and Carr, *State Criminal Discovery and the New Illinois Rules,* 1971 ILL. L.F. 557, 582–88 (1971) (discusses the constitutionality of the ABA standards and Illinois rules, which are somewhat similar to the federal amendments); *Rule 16 Discovery, supra* note 4; Note, *Constitutionality of Conditional Mutual Discovery under Federal Rule 16,* 19 OKLA. L. REV. 417 (1966).

[99] *See, e.g.,* Brady v. Maryland, 373 U.S. 83, 87 (1963) (defendant has a right to evidence which is favorable to him and material to his guilt or punishment); Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965) (a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant).

[100] U.S. CONST. amend. V. Justices Black and Douglas have been consistent exponents of the privilege against self-incrimination, keenly aware of the violations which are imminent on any discovery proceeding. Speaking of the fifth amendment, Justice Black wrote: "If words are to be given their plain and obvious meaning, that provision, in my opinion, states that a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the State to aid it in convicting him of crime." Williams v. Florida, 399 U.S. 78, 111 (1969) (Black, J., dissenting).

Justice Douglas sounded his support for independent discovery and noted fifth amendment violations under any other system when he said:

> To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 69, 277 (1966) (Douglas, J., dissenting).

[101] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Boyd v. United States, 116 U.S. 616, 634, 638 (1886).

> or physical evidence" does not violate [the fifth amendment].[102]

As the Court noted in *Schmerber,* though certain evidence is incriminating, and testimonial or communicative, its disclosure must be compelled before the fifth amendment privilege can be evoked.[103]

Given this restriction, "testimonial" and "communicative" must be defined. Clearly a statement by the defendant is an item of communication and thus protected by the privilege.[104] For this reason, any statements made by the defendant to anyone, or by a government witness to the defendant, his agents, or attorney, are excluded from the ambit of the government's discovery in rule 16.[105] Scientific or medical reports are included since these are the types of records which would usually contain only information of a non-testimonial nature.

The defendant may still be compelled to give testimonial or communicative evidence under the amended rule, however. The Court in *Schmerber* mentioned that some tests or experiments like lie detectors, although seeming to obtain merely nontestimonial evidence, may actually compel testimonial responses.[106] Furthermore, the definitions of "statements" given by the courts vary.[107] Thus there may be situations in which an accurate, but not necessarily contemporaneous or verbatim reconstruction of what the defendant said to a person is not a statement.[108] The Advisory Committee does not address the possibility that this evidence may be compelled under amended rule 16 in violation of the fifth amendment.

Any document prepared by the defendant is communicative if it is used to obtain its substance, as opposed to exemplars such as voice or handwriting.[109] It is not clear that amended rule 16(b)(2) would exclude all such documents from discovery as "internal defense documents." Some documents made prior to the commencement of any adversary proceeding might not be classified as "made in connection with the investigation or defense of the case." [110] To the extent that the amended rule permits government discovery of these documents, it arguably violates the fifth amendment privilege against self-incrimination.

One commentator has suggested that any segment of the discovery process which requires the defendant to communicate with the prosecution would violate his privilege, including informing the prosecutor of the existence or location of evidence or tendering a list of witnesses which the defendant intends to

[102] 384 U.S. 757, 764 (1965). See 8 J. WIGMORE, EVIDENCE § 2265 (3d ed. 1940) for one of the first attempts at distinguishing non-testimonial evidence from that which is communicative or testimonial. The author limits testimonial evidence to that which comes directly from the person's lips. However, the *Schmerber* Court explicitly disclaims adoption of the Wigmore formulation. 384 U.S. at 763 n.7.

[103] *Accord,* Michigan v. Tucker, 417 U.S. 433, 444–45 (1974). This is because constitutional rights can be voluntarily waived. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

The following standard for compulsion has been suggested by the Supreme Court: "[A person has the right] to remain silent unless he chooses to speak in the unfettered exercise of his own free will and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964)(dictum).

[104] *See* Schmerber v. California, 384 U.S. 757, 763–64 (1965).

[105] *Amendments, supra* note 1, at 307.

[106] 384 U.S. at 764 (dictum).

[107] *See* note 75 *supra.*

[108] For example, the defendant may make statements to a Welfare Department employee, who records these statements in his record of the defendant. The files of the employee are admissible in a civil case under the business records exception to the hearsay rule. Kelley v. Wasserman, 5 N.Y.2d 425, 185 N.Y.S.2d 538, 158 N.E.2d 241 (1959). *Cf.* Yates v. Bair Transport, Inc., 249 F. Supp. 681, 682–88 (S.D.N.Y. 1965), which provides an excellent summary of the business records exception to the hearsay rule. There the court also cites a case which justified the admissibility of a defendant's testimony, included in a business record, because it was an admission by a party. *Id.* at 685.

The business entry may thus be a record of the defendant's testimony, and its admission into evidence can be violative of his fifth amendment privilege if the testimony is incriminating. It is probable, in light of the conflicting definitions of "statements," in the context of the discovery rules (*see* note 75 *supra*), that this testimonial or communicative evidence which originated with the defendant might not be excluded from discovery under amended rule 16(b)(2).

[109] One's voice and handwriting are, of course, means of communication . . . [but] a mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its [the fifth amendment privilege against self-incrimination] protection.

Gilbert v. California, 388 U.S. 262, 266–67 (1966).

[110] *Amendments, supra* note 1, at 307.

use.[111] The argument is engaging, but has been rejected by courts on the ground that because the evidence will later be brought up by the defendant in court, he will be waiving his privilege with respect to it.[112] The discovery, therefore, would merely advance the waiver of privilege and ultimate disclosure of evidence. The Supreme Court in *Williams v. Florida* said that such an acceleration of disclosure of defense material is not unconstitutional when caused by an alibi-defense rule.[113] Proponents of greater disclosure by the defense, on the other hand, have suggested that such disclosure will generally be of information which must be exculpatory to the defendant, since it is in his possession. This argument overlooks that neutral or even exculpatory evidence can be made incriminating in the hands of a skilled attorney.[114]

In summary, there seem to be no fifth amendment violations if the defendant is compelled to disclose evidence which he will later use at trial, even though this evidence either is or could be made to be incriminating. However, if the defendant, after disclosing the evidence to the prosecution, decides that he will not use the evidence at trial, there are no provisions in the amended rules which require the evidence itself or any derivative evidence to be withheld.[115] In such a case the prosecution would not merely be compelling the defendant to advance his waiver of privilege; he would be compelling disclosure of incriminating evidence, which, if testimonial or communicative, would be in violation of the fifth amendment.

Attorney-Client Privilege

Another claim made by those in opposition to amended rule 16, and to disclosure by the defendant in general, is that any divulgence of information assembled by the defendant and his attorney is a breach of the common law attorney-client privilege.[116] The limits of the privilege, however, reduce the possibility of its infringement. It only applies to information of a communicative nature and not to facts which the attorney may obtain for the benefit of his client.[117] *Hickman v. Taylor,* which dealt with

[111] *Rule 16 Discovery, supra* note 4, at 1003–04. *See* Williams v. Florida, 399 U.S. 78, 83–84 (1969).

[112] *See, e.g.,* State v. Grove, 65 Wash. 2d 525, 398 P.2d 170 (1965); People v. Lopez, 60 Adv. Cal. 171, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Jones v. Superior Ct., 58 Cal. 2d 56, 373 P.2d 919, 22 Cal. Rptr. 879 (1962). Nevertheless, self-incrimination problems may still arise if the defendant subsequently decides not to use the evidence at court. *See* text accompanying note 115 *infra.*

[113] Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

399 U.S. at 85. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (discovery simply advances the time of disclosure of evidence).

[114] The Supreme Court recognized this ability of an attorney in Brooks v. Tennessee, 406 U.S. 605, 609–10 (1972), when it said, with regard to witnesses:

> Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses.

See Nakell, *Discovery, supra* note 4, at 500–01.

[115] *See* note 52 *supra.* Perhaps, the defendant could make a sufficient showing under amended rule 16(d)(1) which would convince the court to order that evidence be withheld since the defendant did not effectively waive the privilege with respect to these items. But constitutional guarantees should not depend on probabilities or possibilities.

> These precious rights [privilege against self-incrimination and right to assistance of counsel] were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured '. . . for ages to come and *** designed to approach immortality as nearly as human institutions can approach it.' [citation omitted]

Miranda v. Arizona, 384 U.S. 436, 442 (1966).

To safeguard the defendant's privilege against self-incrimination, the amended rules should contain a requirement to withold evidence already disclosed if the defendant subsequently decides not to use it at trial.

[116] Dean Wigmore defined the attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived.

8 J. WIGMORE, EVIDENCE § 2292 (3d ed. 1940). *See* Chirac v. Reinecker, 24 U.S. (11 Wheat.) 280, 294–95 (1826).

[117] *Accord, e.g.,* United States v. Goldfarb, 328

the work-product privilege in civil litigation, helps to delineate the scope of the attorney-client privilege.

> [T]he protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.[118]

The amended rule 16 does not require disclosure of the defendant's own statement, including those made to his attorney,[119] and to this extent it protects the privilege.

Should some memoranda of the attorney summarizing or noncontemporaneously recording the statements of the defendant not fall within the definition of "statements," the amendments further protect the defendant by removing from required discovery ". . . reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation of the case."[120] This exclusion safeguards the work-product privilege which was derived from *Hickman,* and is also part of the Federal Rules of Civil Procedure.[121] The privilege covers items which the attorney used in connection with the preparation of his case, such as memoranda, private impressions, and communications. To be protected by the work-product privilege, such items must have been prepared with the idea of being used at trial.[122]

The amendments to rule 16 codify the current definitions of the attorney-client and work-product privileges and do not raise any other common law privilege problems. Amended section 16(b)(2) is essentially the same as the current rule, and there have been no cases contesting that section as violative of these privileges.[123]

Due Process

The third constitutional test which must be satisified by these discovery amendments is due process and fundamental fairness. When these fifth amendment safeguards are applied, a balancing test is traditionally used, weighing the government's interests against those of the defendant.[124] The interests of the government are in promoting effective law enforcement by preventing undue surprise to the prosecution at trial, and in facilitating procurement of evidence while it is still fresh. Those of the defendant can be summarized as attempting to insure that his trial and the events leading up to it and after it are "fundamentally fair."

The government has an arsenal of discovery devices which are not available to the defendant, including the search warrant, the power to make reasonable searches and seizures without warrant,[125] and, because of its status as a law

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F.2d 280 (6th Cir. 1964); Leve v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), *rev'd in part on other grounds,* 403 U.S. 946 (1971).

[118] 329 U.S. 495, 508 (1947). However, some of these areas are now covered by the "work-product" privilege.

[119] *Amendments, supra* note 1, at 307.

[120] *Id.*

[121] FED. R. CIV. P. 26(b)(3). *See, e.g.,* Puerto Rico v. Steamship Zoe Colocotroni, 61 F.R.D. 653, 658 (D.C. P.R. 1974). For an analysis of the rationale behind the work-product doctrine and the merits of various definitions of its scope, see Note, *"Work Product" in Criminal Discovery,* 1966 WASH. U.L.Q. 321, 334–44.

[122] Zenith Corp. v. Radio Corp. of America, 121 F. Supp. 792, 795 (D.C. Del. 1954). The policy reasons for the work-product privilege are excellently summarized by the American Bar Association Committee on Pre-Trial Proceedings:

> To preserve the value engendered by the difference in perspective of opposing advocates, serious attention must be given to the dangers of dulling this perspective if the competitive spirit is dampened by the knowledge that all ideas and notions which occur to the advocate must be shared, on a continuing basis, with opposing counsel.

ABA, *supra* note 4, at 89.

[123] The Advisory Committee found that the provision had been sufficiently without challenge that they recommended retaining its form as in the last sentence in Rule 16(c). They made no further comments. *Amendments, supra* note 1, at 317 (Advisory Committee Notes). *See* Zagel and Carr, *supra* note 98, at 585–87.

[124] *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307–08, *on remand,* 277 Ala. 89, 167 So. 2d 171 (1964) (alternative means test); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (compelling state interest test); *Preclusion Sanction, supra* note 37, at 1360–61; *Rule 16 Discovery, supra* note 4, at 1009.

[125] *See* Nakell, *Due Process, supra* note 4, at 70–71. In any case many indigents could not pay for extensive investigation.

enforcement agency, the "arm of the law" has the muscle to secure voluntary cooperation with its efforts.[126] In light of these advantages, expansion of discovery rights for the defendant should be encouraged until the imbalance is corrected.[127]

The amended rules reflect an expansion of discovery rights for the defendant; however, this attempt at correction of the imbalance in discovery rights is offset by an increase in discovery allowed to the government. In other words, the government still has the effective advantage.[128] For example, in the amended rules, the government is given the right to obtain a list of the names and addresses of the witnesses which the defendant intends to use in this case.[129] Even though the defendant is allowed to perpetuate the testimony of the witnesses in order to prevent their testimony from being altered by government persuasion,[130] this provision does not remove the government's advantage of having already made the initial contact with most of the witnesses at the time of the police or F.B.I. report, and therefore having the ability to commence interviewing the witnesses before the defendant. In the interviewing process, the government will also have a greater influence over the witnesses. It may therefore be unfair to compel the defense to submit names of the witnesses which it will use, witnesses who probably would recount the facts as viewed by the defendant, because of the possibility of government influence and intimidation.

In recognition of the possible unfairness of expanding discovery equally for both prosecution and defense, some commentators have argued that there should be a return to conditional discovery,[131] under which the government is not entitled to receive any disclosure from the defendant until it initially gives the information which the defendant requests.[132] Such a

[126] The American Bar Association Committee on Pre-Trial Proceedings, along with its recommendations to extend discovery, which are more expansive than the amended rules, said, "It is clear, however, that even with the expansion of the rights of accused, the defendant in a criminal case does not enjoy every advantage or more advantages than the state." ABA, *supra* note 4, at 43.

[127] *But cf.* Note, *Developments in the Law of Discovery*, 74 HARV. L. REV. 940 (1961), in which the commentator states, "In any event, it would seem that the question of the desirability of criminal discovery ought not to turn solely upon a close balancing of procedural advantages." *Id.* at 1063.

[128] Due process notions demand that even if the scope of discovery is equal for both prosecution and defense, the effective advantage should lie with the defendant. As Professor Nakell wrote,

> Taking *Wardius* in conjunction with the *Giles-Brady* disclosure requirement, due process would not seem to be limited to strictly tit-for-tat discovery because the limitations on prosecutorial discovery are founded in part on constitutional policies not applicable to the defendant.

Nakell, *Due Process, supra* note 4, at 70.

[129] *Amendments, supra* note 1, at 306.

[130] The amendment is not clear as to when such a perpetuation right may be exercised by the defendant. If he must comply with the request for names and addresses of the witnesses before the perpetuation can be effected, then the possibilities for witness tampering are still present. If the defendant can perpetuate the witnesses' testimonies before disclosure of their identities, then the government still has the advantage in access to records, including those of criminal offenses, to begin investigation of the character of the witnesses in an attempt to show that their testimonies are unreliable.

[131] *See, e.g.*, Note, *Constitutionality of Conditional Mutual Discovery Under Rule 16*, 19 OKLA. L. REV. 417, 424 (1966). This note recognized that before the Federal Rules of Criminal Procedure were amended in 1966, the government's discovery from the defendant was conditioned upon its prior compliance with the defendant's request for discovery. The current rules allow, but do not require, defense discovery, and permit the court to condition defense discovery on release of information to the government.

Another alternative might be to condition discovery by *either* side upon their disclosure of evidence. The parties could present their requests for evidence to each other, and file copies with the court. Then evidence would not be released to either side until all of the requested items had been submitted to the court. This would allow the defendant to withhold evidence, if he so desired, in order to counteract the government's inherent advantage of investigative machinery. However, not only is this unfair to the government by perpetuating the "poker game" aspects of discovery, but also the defendant's advantage might disappear, since the withholding of evidence would also be available to the prosecution. In addition, there would be disadvantages to the machinery of justice, more time would be required, and the judge would have to foresee the arguments of both the prosecution and the defense so that he could classify the information properly. *See* Nakell, *Discovery, supra* note 4, at 460–61.

Although a sanction of refusal to permit discovery by the defendant until he consents to the prosecution's discovery request does not violate sixth amendment guarantees, it would present problems of due process.

[132] The advantage of the government lies both in the means by which it can obtain evidence re-

drastic reversion is not necessary. As long as the defendant has the opportunity to compel disclosure from the government, the basic rights of the government to obtain disclosure, in the interest of fairness, need not be subordinate to those of the defendant. Nor does increase in the discovery rights afforded to the defendant with a corresponding decrease in prosecutorial discovery provide a fair solution for the prosecution. It would perpetuate the "sporting event" or "poker game" aspects of discovery. The best remedy was chosen by the Advisory Committee. Since the investigative advantages of the government may not have an impact in all cases, and they cannot feasibly be given to the defendant because they are inherent in the powers of a law enforcement agency, the best way to handle alleged unfairness is on a case-by-case basis. The amendment, by allowing for protective orders[133] as in current rule 16(e), provides the mechanism for denying government discovery of certain items, such as the identity of witnesses who may be in danger of physical harm or intimidation.[134] While such an order will correct the unfairness, its issuance is at the discretion of the court.[135] To more fully protect the defendant by reducing this discretion, a statement should be placed in the amended rules or comments to rule 16 which would explicitly include within the scope of "sufficient showing" a demonstration of how the inherent governmental investigative advantages have prevented the defendant from adequately preparing his defense prior to trial.

Compulsory Process

The final constitutional issue presented by amended rule 16 involves the sixth amendment guarantee of compulsory process for the attendance of witnesses. The sanctions for failure to disclose evidence required by amended rule 16 are essentially the same as those in rule 12.1.[136] Amended rule 16 itself, and the Advisory Committee's comments thereto, do not expressly give the court the power to exclude the testimony of witnesses whose names have not been disclosed.[137] Using the *ejusdem generis* maxim of statutory interpretation, the power to exclude the testimony of the witnesses may come under the power to ". . . enter such other order as it deems just under the circumstances. . . ." [138] Such an exclusion would arguably be unconstitutional in light of previous discussion.[139]

The trial court presently has the power to exclude documents and other tangible objects which should have been, but were not, disclosed upon request of the government prior to the trial. This exclusionary rule has been in effect since 1966 and has not provoked constitutional challenge; therefore, it was included, without alteration, in the amended rule.[140] However, some commentators[141] have argued that the strong dictum of the *Washington* case compels the conclusion that the right to compulsory process encompasses the right to present tangible evidence which is material and relevant to the defendant's case.

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lating to a crime, and the aura of authority or status which induces "voluntary" cooperation. One of the rationales for conditional discovery is that since the basis for the government's superiority cannot be categorized on an item-by-item basis, a fine analysis should not be attempted and the government's opportunity to obtain evidence should be conditioned upon the exercise of the defendant's opportunity, plus a delivery to him of the material requested.

[133] *Amendments, supra* note 1, at 307.

[134] FED. R. CRIM. P. 16(e) (Advisory Committee Notes).

[135] *Amendments, supra* note 1, at 307.

[136] *See* text accompanying note 35 *supra*.

[137] *Amendments, supra* note 1, at 317 (Advisory Committee Notes). The comments of the Advisory Committee merely state that the amended sanctions are the same as the old ones. The earlier comments of the Advisory Committee when rule 16(g) was introduced also shed no light on the matter, except to say that ". . . the second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order." Second Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts, 34 F.R.D. 411, 455–56 (1964).

Cases speaking to the issue have only repeated that the remedies are within the broad discretion of the court. *See, e.g.*, Hansen v. United States, 393 F.2d 763 (8th Cir. 1968) (trial court has discretion to admit competent evidence not disclosed to defendant).

[138] *Amendments, supra* note 1, at 307.

[139] *See* discussion commencing with text accompanying note 34 *supra*.

[140] *Amendments, supra* note 1, at 307.

[141] *See* Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery, supra* note 37, at 390–91; *Preclusion Sanction, supra* note 37, at 1350–53.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[142]

Although there may be some logical justification for extending the *Washington* rule to include compulsory process for the production of documents, the courts have only required process for witnesses. When the issue is actually due process, the extension of the sixth amendment language to include documents as well as witnesses seems to strain the constitutional provision.[143] In this regard, it is better argued that the exclusion of the evidence from trial and the resulting infringement of the accused's defense must be balanced against the interests of the government in using the exclusion sanction. When the prosecution's interest in avoiding surprise at trial is not compelling,[144] and can be satisfied by alternative means,[145] the infringement of the defendant's due process rights is unconstitutional.[146] The exclusion sanction of amended rule 16(d)(2) is therefore arguably unconstitutional to the extent that the defendant's witnesses can be excluded in violation of sixth amendment guarantees, and to the extent that the exclusion of tangible evidence infringes on due process.

IV. Conclusion

The amendments to the Federal Rules of Criminal Procedure represent a significant step in the expansion of discovery for both the prosecution and the defense. Given the initial advantage of the government in obtaining evidence for trial, a nearly equal increase in disclosure for both sides leaves the parties in the same relative imbalance as prior to the amended rules. This imbalance infringes upon the defendant's due process rights, while specific sections of the amended rules, especially the exclusion sanction, may affront other constitutional guarantees.

Because of the number of unresolved constitutional and semantic issues regarding the amended rules, Congress was wise to postpone their effective date until August 1, 1975. Although it would be naive to expect that all the possible constitutional problems will be explored and corrected, the rules which finally become law should contain significant revisions from the amendments as originally transmitted to Congress.

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[142] 388 U.S. at 19 (dictum).

[143] 388 U.S. at 24–25 (Harlan, J., dissenting). There is a problem of due process denial whenever a procedural defect prevents the defendant from presenting evidence to the court, especially if the prosecution can use the evidence for its own benefit if it so desires. There is no valid government justification for denying the use of such evidence when, after a continuance, the government could recover from any surprise which may have hampered its prosecution. Moreover, there are alternative means available to remedy the situation, and in fact, they are provided in the amended rules: an order to permit discovery or inspection, a grant of continuance, or any other order which the court deems just. *Amendments, supra* note 1, at 307.

[144] *See Preclusion Sanction, supra* note 37, at 1355.

[145] *See Rule 16 Discovery, supra* note 4, at 1010–11.

[146] *See* Clewis v. Texas, 386 U.S. 707 (1967), (may be a denial of due process to refuse the defendant discovery of his statements to the police); Giles v. Maryland, 386 U.S. 66 (1967) (denial of due process when law enforcement agencies knowingly present or let stand uncontradicted false evidence or withhold material exculpatory evidence); Roviaro v. United States, 353 U.S. 53 (1957) (may be a denial of due process to withhold from the defendant an informant's identity or the contents of his communications); Nakell, *Discovery, supra* note 4, at 452.

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JOINDER OF SUBSTANTIVE OFFENSES AND PERJURY IN ONE INDICTMENT

Investigation of criminal offenses is one of the primary functions of a federal grand jury,[1] and its powers incident to that function are broad indeed.[2] One such power is the unquestioned right to call as witnesses persons who are "targets" of particular investigations.[3] Although any witness before the grand jury is entitled to invoke his fifth amendment privilege against self-incrimination,[4] the "target" witness may choose to waive its protection in an attempt to exculpate himself.

Should the grand jury conclude that it has probable cause to indict the "target" witness for the substantive offense under investigation, this exculpatory testimony may provide the basis for an additional charge of perjury.[5] If the grand jury decides to indict the "target" witness for perjury as well as the substantive offense under investigation, these offenses can be, and often are, joined for trial in one indictment[6] pursuant to rule 8 of the Federal Rules of Criminal Procedure.[7]

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[1] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343–44 (1974); United States v. Owens-Corning Fiberglass Company, 271 F. Supp. 561, 565 (N.D. Cal. 1967).

[2] United States v. Brozovich, 465 F.2d 372 (9th Cir. 1972). For cases involving the power to subpoena documents see *In re* Corrado Brothers, 367 F. Supp. 1126 (D.C. Del. 1973); *In re* Grand Jury Subpoena Duces Tecum, 342 F. Supp. 709 (D.C. Md. 1972). For cases involving the power to subpoena witnesses see United States v. Calandra, 414 U.S. 338, 345 (1974); Nixon v. Sirica, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973).

The grand jury has no power to enforce its own subpoenas, however. It must resort to the courts for enforcement. Brown v. United States, 359 U.S. 41, 49 (1959). Federal courts will not enforce grand jury subpoenas if the grand jury is not pursuing an investigation in good faith or is motivated by a desire to harrass an individual. *In re* Grand Jury Proceedings, 486 F.2d 85, 91 (3d Cir. 1973).

[3] United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973); United States v. Sweig, 441 F.2d 114, 121 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); United States v. Winter, 348 F.2d 204, 206–08 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

[4] *See* Comment, *The Grand Jury Witness' Privilege Against Self-Incrimination*, 62 NW. U.L. REV. 207, 216–25 (1967). *See also* United States v. Kastigar, 406 U.S. 441, 444–45 (1972).

The grand jury may override a fifth amendment claim only if the witness is granted immunity coextensive with the privilege against self-incrimination. United States v. Calandra, 414 U.S. 338 (1974).

There is some question as to the right of such a witness to Miranda-type warnings prior to his testimony. The Court of Appeals for the Sixth Circuit has held that a witness who is a target of a grand jury investigation is entitled to such warnings. United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967). One commentator suggests that, although the law is unclear, it has been the general practice in federal grand jury proceedings to give Miranda-type warnings to "target" witnesses. Beigal, *The Investigation and Prosecution of Police Corruption*, 65 J. CRIM. L. & C. 135, 145 n.38 (1974). In any event, there is no duty to give such warnings to "ordinary" witnesses. Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3d Cir. 1967).

[5] 18 U.S.C. § 1621 and 18 U.S.C. § 1623 provide that perjury before a federal grand jury is punishable as a felony. For an excellent discussion of perjury in general see Comment, *Perjury—The Forgotten Offense*, 65 J. CRIM. L. & C. 361 (1974).

[6] United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); United States v. Pacente, 490 F.2d 661 (7th Cir. 1973), *rev'd on other grounds on rehearing en banc*, 503 F.2d 543 (7th Cir. 1974); United States v. Gill, 490 F.2d 233 (7th Cir.), *cert. denied*, 417 U.S. 968 (1974); United States v. Carson, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1970); United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y. 1974); United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970); United States v. Wolfson, 282 F. Supp. 772 (S.D.N.Y. 1967); United States v. Cohen, 230 F. Supp. 587 (S.D.N.Y.), *mandamus denied*, 332 F.2d 975 (2d Cir. 1964); United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1963); United States v. Verra, 203 F. Supp. 87 (S.D.N.Y. 1962).

[7] FED. R. CRIM. P. 8.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indict-

It is the position of this comment that joinder in one indictment of substantive offenses and perjury before the grand jury which investigated those offenses is prejudicial to the defendant. This comment will explore some of the ramifications of, and objections to, this type of joinder in light of rules 8 and 14 of the Federal Rules of Criminal Procedure.[8] Separate consideration will be given to cases involving single and multiple defendants, as the problems involved in each are somewhat different.

Although it is not the purpose of this comment to present an extensive discussion of rules 8 and 14, a brief overview of those rules will contribute to a better understanding of the subject matter.

Rule 8(a) of the Federal Rules of Criminal Procedure is applicable to cases involving only one defendant.[9] It permits (but does not require) two or more offenses to be joined in one indictment for purposes of trial.[10] Under the rule, offenses may be joined if they are "of the same or similar character";[11] if they are based on "the same act or transaction";[12] or if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." [13]

Rule 8(b) of the Federal Rules of Criminal Procedure is applicable to multi-defendant cases, and permits two or more defendants to be joined in one indictment for purposes of trial.[14] Under rule 8(b), defendants may be joined "if they are alleged[15] to have partici-

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ment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[8] FED. R. CRIM. P. 14.

Relief From Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires. . . .

[9] 1 ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, § 8.47, at 801 (1966).

Joinder of offenses committed by two or more defendants is controlled by rule 8(b). 8 J. MOORE, FEDERAL PRACTICE, § 8.05(1), at 8–17 (Cipes ed. 1965). *Cf.* United States v. Isaacs, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied,* 417 U.S. 968 (1974): "When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a)."

[10] *See* note 7 *supra.*

[11] Joinder of offenses "of the same or similar character" is permissible only against a single defendant. 8 J. MOORE, FEDERAL PRACTICE, § 8.06(1), at 8–24 (Cipes ed. 1965).

Similar-offense joinder under Rule 8(a) is criticized in 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 143, at 316–17 (1969) and 8 J. MOORE, FEDERAL PRACTICE, § 8.05(2), at 8–19 (Cipes ed. 1965).

For a discussion of the evidentiary problems involved in similar offense joinder see Bradley v. United States, 433 F.2d 1113 (D.C. Cir. 1968); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964); Comment, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure,* 74 YALE L.J. 553, 556–60 (1965).

[12] It is the policy of the Justice Department "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." Petite v. United States, 361 U.S. 529, 530 (1960).

[13] In determining whether offenses are based on "acts or transactions connected together", the predominant consideration is whether joinder would serve the goals of trial economy and convenience. This consideration is reflected in concrete form in the following test: whether evidence sufficient to establish the defendant's guilt of one offense will also serve to establish his guilt of another offense. United States v. Pacente, 490 F.2d 661 (7th Cir. 1973), *rev'd on other grounds on rehearing en banc,* 503 F.2d 543 (7th Cir. 1974); United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied,* 403 U.S. 932 (1970). The primary purpose of this kind of joinder is to insure that a given transaction need only be proved once. Baker v. United States, 401 F.2d 958, 971 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).

[14] *See* note 7 *supra.*

[15] Since it is solely the allegation which initially supports joinder of defendants, the issue of "retroactive misjoinder" arises if it is later determined that the allegation is baseless. This situation arises most often in cases where an allegation of conspiracy constitutes the connecting link between otherwise unrelated offenses and defendants. Four examples are identifiable: 1) the trial court, prior to submission of the case to the jury, dismisses the conspiracy count for failure of proof, and continues to try the defendants jointly on the unrelated substantive offenses. Dismissal of the conspiracy count does not result in misjoinder, since the original *allegations* of the indictment met the explicit provisions of rule 8(b). Schaeffer v. United States, 362 U.S. 511 (1960). *But see* United States v. Branker, 395 F.2d 881 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969); 2) an appellate court, rather than the trial court, decides that the conspiracy count was not proved at trial and

pated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[16]

Courts broadly construe rule 8 in favor of initial joinder of offenses[17] or defendants[18] in order to effectuate its goal of "the economy of a single trial."[19] This is especially true in single defendant cases where the offenses sought to be joined under rule 8(a) are based on the same act or transaction, or arise out of a series of factually connected acts.[20] There is no limit to the number of offenses which may be joined in one indictment pursuant to rule 8(a);[21] nor does rule 8(b) limit the number of defendants who may be joined for trial.[22]

Misjoinder of offenses, without more, does not require reversal of a conviction.[23] The circumstances of a particular case may indicate to an appellate court that the misjoinder was harmless to the defendant; in that event, rule 52 of the Federal Rules of Criminal Procedure[24] (the harmless error rule) applies. If misjoinder of offenses is found to constitute error outside of the scope of rule 52, the appropriate relief is election or separate trial of offenses, not dismissal of the indictment.[25]

The harmless error rule[26] is applicable to

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reverses conspiracy convictions, but affirms convictions on the substantive counts. There is no issue of misjoinder when the initial joinder was proper under rule 8(b). Fernandez v. United States, 329 F.2d 899, 905–06 (9th Cir.), *cert. denied,* 379 U.S. 832 (1964); 3) the jury acquits all defendants on the conspiracy count, but convicts on the substantive counts. "[W]here there is evidence from which a jury may find a connection, joint activity and conspiracy, the failure of the jury to convict in such fashion will not retroactively establish misjoinder." Cacy v. United States, 298 F.2d 227, 228–29 (9th Cir. 1961); 4) the conspiracy count is dismissed, and there is either a mistrial or a reversal on appeal of the convictions on substantive counts. On retrial of the substantive counts, the defendants may be tried jointly. United States v. Granello, 365 F.2d 990, 994–95 (2d Cir. 1966), *cert. denied,* 386 U.S. 1019 (1967).

The good faith of the government in joining defendants under rule 8(b) is an issue to be considered in situations such as that above described. *E.g.,* United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1973); United States v. Manfredi, 275 F.2d 588, 593 (2d Cir.), *cert. denied,* 363 U.S. 828 (1960).

[16] Unlike rule 8(a), rule 8(b) makes no provision of joinder of offenses of the same or similar character. 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 144, at 319 (1969); *see also* United States v. Williamson, 310 F.2d 192, 197 n.16 (9th Cir. 1962).

[17] *E.g.,* United States v. Isaacs, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); United States v. Friedman, 445 F.2d 1076, 1082 (9th Cir.), *cert. denied,* 404 U.S. 958 (1972).

[18] *E.g.,* United States v. Roselli, 432 F.2d 879, 899 (9th Cir.), *cert. denied,* 401 U.S. 924 (1970); United States v. Isaacs, 347 F. Supp. 743, 761 (N.D. Ill. 1972).

[19] Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

[20] When joined offenses arise from the same act or transaction, or from a series of connected acts, the proof necessary to establish the defendant's guilt of one offense is generally sufficient to establish his guilt of the other. Under these circumstances, trial convenience dictates that the government should not be made to prove the same facts twice. Tillman v. United States, 406 F.2d 930, 934 (5th Cir.), *vacated in part on other grounds,* 395 U.S. 830 (1969).

This consideration of trial economy does not apply, however, in the case of similar-offense joinder. Because these offenses are unrelated, *i.e.,* are not based "on the same act or transaction or on two or more acts or transactions connected together," the evidence necessary to prove the defendant's guilt of one offense will not suffice to establish his guilt of the other. 8 J. MOORE, FEDERAL PRACTICE, § 8.05(2), at 8–19 (Cipes ed. 1965).

[21] 8 J. MOORE, FEDERAL PRACTICE, § 8.05(1), at 8–17 (Cipes ed. 1965).

Joinder of offenses not only results in trial economies, but also increases the government's chances of conviction on at least some counts. "Separate criminal acts in a single transaction may be split up into as many counts relating to the transaction as the United States Attorney may think necessary, so that if the facts as proved turn out to be insufficient for conviction on one count the Government may have the benefit of them on another charge to which they are applicable. . . ." Orth v. United States, 252 F. 566 (4th Cir. 1919).

[22] Butler v. United States, 317 F.2d 249, 264 (8th Cir.), *cert. denied,* 375 U.S. 836 (1963).

For a discussion of the problems involved in mass-joinder of defendants see United States v. Agueci, 310 F.2d 817, 840–41 (2d Cir.), *cert. denied,* 372 U.S. 959 (1962); United States v. Bufalino, 285 F.2d 408, 417–18 (2d Cir. 1960); Note, *Joinder of Defendants in Criminal Prosecutions,* 42 N.Y.U.L. REV. 513, 531–35 (1967).

[23] Baker v. United States, 401 F.2d 958, 973–74 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).

[24] FED. R. CRIM. P. 52.

(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

Rule 52 is applicable to misjoinder of offenses. Baker v. United States, 401 F.2d 958, 973–74 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).

[25] United States v. Goodman, 285 F.2d 378, 379 (5th Cir. 1960); United States v. Bally Manufacturing Corp., 345 F. Supp. 410, 429 (E.D. La. 1972).

[26] *See* note 24 *supra.*

misjoinder of defendants under rule 8(b),[27] with one exception: where multiple defendants are charged with unrelated offenses, and are tried together, prejudice is presumed and the trial court has no discretion to deny relief.[28] If misjoinder of defendants is found to constitute error beyond the scope of the harmless error rule, the appropriate relief is severance of defendants, not dismissal of the indictment.[29]

Although a particular joinder of offenses or defendants may satisfy the literal requirements of rule 8, the effect of that joinder may be so prejudicial to a defendant that relief may be sought under rule 14 of the Federal Rules of Criminal Procedure.[30] However, it has often been held that an election or severance of offenses is not mandated by rule 14, despite the fact that a particular joinder of offenses may be prejudicial to the defendant. Similarly, trial courts rarely grant severances of defendants under rule 14.[31] In order to promote the goal of trial efficiency embodied in rule 8, trial and appellate courts consistently resort to other means to cure the prejudice engendered by joinder.[32]

Relief from joinder of offenses or defendants which is otherwise proper under rule 8 may be sought by motion pursuant to rule 14.[33] Whether offenses or defendants should be tried jointly or separately is a matter within the discretion of the trial court,[34] and relief from joinder will be granted only upon an affirmative showing that a fair trial cannot be obtained without severance.[35] The trial court's determination that joinder is or is not prejudicial is virtually unreviewable, in that an appellate court will intervene only upon finding clear abuse of discretion.[36]

In determining whether the trial court has abused its discretion in denying severance of offenses, appellate courts have relied upon the following tests, among others: the likelihood that the jury became confused in its deliberations and applied evidence directed to one of-

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[27] *E.g.*, United States v. Roselli, 432 F.2d 879, 901 (9th Cir.), *cert. denied*, 401 U.S. 924 (1970); United States v. Granello, 365 F.2d 990, 995 (2d Cir. 1966), *cert denied*, 386 U.S. 1019 (1967).

[28] *E.g.*, Metheany v. United States, 365 F.2d 90, 94–95 (9th Cir. 1966); United States v. Spector, 326 F.2d 345, 351 (7th Cir. 1963).

"Such a rule is justified since the introduction at the trial of one defendant of evidence which in law is relevant only to the guilt of another in itself is prejudicial, and it would be inappropriate to speculate as to the extent to which that evidence may have affected the deliberations of the jury or embarrassed the defendant in presenting his defense." Baker v. United States, 401 F.2d 958, 973–74 & n.63 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970).

[29] 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 145, at 337 (1969).

[30] *See* note 8 *supra*, and discussion of rule 14 *infra*. *See* Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964), for some of the reasons why a defendant may be prejudiced by joint trial of offenses; see notes 46–49 and 90–108 *infra* and accompanying text for some of the reasons why one or more defendants may be prejudiced by joinder of defendants.

[31] Davenport v. United States, 260 F.2d 591, 594 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); Comment, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 554 & n.4 (1965).

[32] For cases involving joinder of offenses see United States v. Williamson, 482 F.2d 508, 511–12 (5th Cir. 1973) (instructions to the jury that evidence presented on each count is to be considered separately in determining guilt negates any prejudice which may have resulted from joinder); United States v. Hatcher, 423 F.2d 1086, 1089 (5th Cir.), *cert. denied*, 400 U.S. 848 (1970) (jury verdict of acquittal on one count indicates that no prejudice resulted from joinder); Baker v. United States, 401 F.2d 958, 973–74 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970) ("the concurrent sentences imposed by the District Court make unnecessary any inquiry by us into the possibility of such prejudice"). For cases involving joinder of defendants see notes 46, 48 and 49 *infra* and accompanying text.

[33] 8 J. MOORE, FEDERAL PRACTICE, § 14.02(1), at 14–2 (Cipes ed. 1965); *cf.* United States v. Gougis, 374 F.2d 758, 762 (7th Cir. 1967).

See Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) for a discussion of the principal reasons why a defendant may be prejudiced by joinder of offenses; see notes 46–49 and 90–108 *infra* and accompanying text for some of the reasons why one or more defendants may be prejudiced by joinder of defendants.

[34] *E.g.*, Opper v. United States, 348 U.S. 95 (1954); United States v. Johnson, 478 F.2d 1129, 1131 (5th Cir. 1973); Frieje v. United States, 408 F.2d 100 (1st Cir.), *cert. denied* 396 U.S. 859 (1969) (the trial court's discretion is particularly broad in a bench trial).

[35] *E.g.*, United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973); United States v. Blue, 440 F.2d 300, 302 (7th Cir.), *cert denied*, 404 U.S. 836 (1971).

A general, unsupported assertion of prejudice is not enough to justify the severance of counts properly joined. Williamson v. United States, 310 F.2d 192, 197 (9th Cir. 1962).

[36] *See* note 34 *supra*. Refusal to grant a severance has been upheld even when the circumstances indicated that a severance would have been justifiable. United States v. Rivera, 348 F.2d 148, 150 (2d Cir. 1965).

fense to another offense; whether a weak evidentiary case and a strong one were joined in the hope that an over-lapping consideration of the evidence would lead to convictions on both; whether the sentences on two or more convictions are to run concurrently; and whether evidence admissible on one count would also have been admissible in a separate trial of the other count.[37]

Application of these tests, however, rarely leads to the conclusion that severance of offenses should have been granted. For example, appellate courts have held that when the evidence is simple and readily referable to the crime with respect to which it was introduced, severance of offenses is not required by fear that the jury will consider evidence directed to one count in its deliberations on another.[38] It has also been held that severance of offenses is not required merely because proof under one count may be stronger than proof under another.[39] The fact that conviction on two or more counts is followed by imposition of concurrent sentences is said to obviate any possibility that joinder of offenses was prejudicial to the defendant.[40] Finally, it has been held that, despite the prejudicial effects of joinder of offenses, separate trial of offenses offers no relief to a defendant when evidence of one crime would be admissible in a separate trial of another crime.[41]

In multi-defendant cases, the showing needed for severance of defendants or separate trial of counts is greater than in the case of a single defendant charged with multiple counts.[42] Courts generally hold that persons indicted together should be tried together,[43] absent compelling circumstances.[44] This judicial attitude emanates from the nature of the formal requisites of rule 8(b), and is typically justified on grounds of public convenience.[45]

The tests employed to determine whether joinder of defendants is so prejudicial as to justify relief under rule 14 are similar to those employed when the prejudicial effect of joinder of offenses is at issue. As with joinder of offenses, application of these tests rarely leads to the conclusion that a denial of severance was an abuse of discretion. For example, appellate courts uniformly reject arguments that the jury became confused and applied evidence introduced against one defendant in its determination of the guilt of another. Instead, appellate courts rely upon the trial court's cau-

[37] *See* United States v. Williamson, 482 F.2d 508, 511 (5th Cir. 1973); Robinson v. United States, 459 F.2d 847, 855–56 (D.C. Cir. 1972); United States v. Clayton, 450 F.2d 16, 18–19 (1st Cir. 1971), *cert. denied,* 405 U.S. 975 (1972).

[38] Dunaway v. United States, 205 F.2d 23, 26–27 (D.C. Cir. 1953).

Instructions to the jury that evidence of each offense is to be considered independently of evidence pertaining to other offenses further reduces the possibility of prejudice. United States v. Clayton, 450 F.2d 16, 18–19 (1st Cir. 1971), *cert. denied,* 405 U.S. 975 (1972); United States v. Adams, 434 F.2d 756, 759 (2d Cir. 1970).

[39] United States v. Sherman, 84 F. Supp. 130, 131–32 (E.D.N.Y. 1947), *rev'd in part on other grounds,* 171 F.2d 619 (2d Cir.), *cert. denied,* 337 U.S. 931 (1948); *accord,* United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973). *But cf.* Gregory v. United States, 396 F.2d 185, 189 (D.C. Cir. 1966).

[40] *E.g.,* United States v. Clayton, 450 F.2d 16, 18–19 (1st Cir. 1971), *cert. denied,* 405 U.S. 975 (1972); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970). It has also been held that refusal to grant a severance of offenses is not prejudicial where the jury acquits as to one count. Gornick v. United States, 320 F.2d 325, 326 (10th Cir. 1963).

[41] United States v. Williamson, 482 F.2d 508, 511 (5th Cir. 1973); Robinson v. United States, 459 F.2d 847, 855–56 (D.C. Cir. 1972).

[42] United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973).

[43] *E.g.,* United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973); Brown v. United States, 375 F.2d 310, 315 (D.C. Cir.), *cert. denied,* 388 U.S. 915 (1967). "Such a rule conserves judicial resources, alleviates the burdens on citizens serving as jurors, and avoids the necessity of having witnesses reiterate testimony in a series of trials." United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970).

[44] United States v. DeSapio, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied,* 402 U.S. 999 (1971). "The defendant must show something more than the fact that a separate trial might offer him a better chance of acquittal." Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), *vacated in part on other grounds,* 395 U.S. 830 (1969).

See 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 223, at 443 & nn.38–45 (1969) and Note, *Joinder of Defendants in Criminal Prosecutions,* 42 N.Y.U.L. REV. 513, 530 & nn.125–30 (1967) for examples of what does not constitute compelling circumstances.

[45] *See* notes 20 and 42 *supra. See* Daly v. United States, 231 F.2d 123, 125 (1st Cir.), *cert. denied,* 351 U.S. 964 (1956). *But see* United States v. Claytor, 52 F.R.D. 360, 363 (S.D.N.Y. 1971), where the court placed primary emphasis on the defendants' need for protection against prejudicial joinder.

tionary instructions to the jury.[46] It has also been held that severance of defendants is not required merely because the evidence against one defendant is stronger than that against a co-defendant.[47] Appellate courts have relied upon the jury's verdict with respect to co-defendants when confronted with a defendant's claim that he was prejudiced by a joint trial.[48] Finally, although joinder pursuant to rule 8(b) may be prejudicial to one or more defendants, severance is held to offer no relief when evidence admissible on one count or against one defendant would also be admissible in a separate trial of other counts or defendants.[49]

In light of the foregoing judicial interpretation of rules 8 and 14 of the Federal Rules of Criminal Procedure, this comment will discuss joinder in one indictment of substantive offenses and perjury before the grand jury which investigated those substantive offenses and the manner in which a defendant may be prejudiced by such joinder.

Indictment Charges a Single Defendant with One or More Substantive Offenses and Perjury Before the Grand Jury Which Investigated Those Substantive Offenses

As discussed above, a federal grand jury, in its investigation of criminal offenses, is entitled to call before it any person suspected of committing those offenses, and it may question such a witness concerning his knowledge of, or participation in, the criminal activity under investigation.[50] Upon the grand jury's decision to indict the "target" witness for the substantive offense under investigation, a denial of any knowledge of, or participation in, that offense can, and often does, provide the basis for a charge of perjury as well.[51]

It seems clear that when the perjury charge emanates from the defendant's testimony on the subject-matter of the grand jury's investigation, both charges can be joined in one indictment for purposes of trial. Support for such joinder is found in the language of rule 8(a). Because one or more elements of the substantive offense form the subject-matter of the perjury count, the two offenses constitute ". . . two or more acts or transactions connected together . . ." [52] within the meaning of rule 8(a). Further justification for joinder in this situation is found in the fact that evidence necessary to prove the substantive count will also suffice to establish guilt under the perjury count.[53]

One commentator[54] suggests that inclusion in an indictment of a charge of perjury before the grand jury is advantageous to the prosecution for several reasons. Among these are: the increased possibility in a close case of a compromise verdict;[55] the likelihood that the presence of the perjury count in the indictment will indicate to the petit jurors that the grand jurors—laymen like themselves—believed the defendant was not a truthful witness; the likelihood that the presence of the perjury count in the indictment will force the defendant to testify at trial;[56] and the opportunity to punish

[46] *See, e.g.*, United States v. Tanner, 471 F.2d 128, 138 (7th Cir. 1972); Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965). *See also* United States v. Branker, 395 F.2d 881, 887–89 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969). *But see* United States v. Bruton, 391 U.S. 123 (1967).

[47] United States v. Heinlein, 490 F.2d 725, 737 (D.C. Cir. 1973).

[48] *See, e.g.*, United States v. Baum, 482 F.2d 1325, 1332 (2d Cir. 1973); United States v. Hutul, 416 F.2d 607, 620 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

[49] United States v. Rogers, 475 F.2d 821, 828 & cases cited therein (7th Cir. 1973).

[50] *See* note 3 *supra* and accompanying text.

[51] *E.g.*, United States v. Pacente, 490 F.2d 661 (7th Cir. 1973), *rev'd on other grounds on rehearing en banc*, 503 F.2d 543 (7th Cir. 1974); United States v. Carson, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

[52] United States v. Pacente, 490 F.2d 661, 663 (7th Cir. 1973), *rev'd on other grounds on rehearing en banc*, 503 F.2d 543 (7th Cir. 1974).

[53] *Id.*; United States v. Sweig, 441 F.2d 114, 118–19 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

[54] Beigal, *The Investigation and Prosecution of Police Corruption*, 65 J. Crim. L. & C. 135 (1974).

[55] Beigal notes the importance of joinder where, without the perjury count, the indictment would have only one count. Beigal, *The Investigation and Prosecution of Police Corruption*, 65 J. Crim. L. & C. 135, 143 (1974).

[56] Beigal hypothesizes that, because the defendant's grand jury testimony will be introduced at the trial, the defendant cannot afford to remain silent at trial. *Id.*

a person for substantive offenses rendered moot by the statute of limitations.[57]

While joinder in one indictment of substantive offenses and perjury may indeed be advantageous to the prosecution, it is clear that rule 8 was not designed to circumvent long established policies in the administration of criminal justice. It is not the function of a prosecutor to join offenses in an indictment for the purpose of achieving compromise verdicts. Articulation of such an advantage indicates a probability that the substantive offense or offenses, absent a charge of perjury and evidence supporting that charge, might not be supported by evidence sufficient to justify a conviction. A joinder designed to overcome this probability is beyond the role of the prosecutor in our system of criminal justice, as indicated by standard 3.9(a) of the American Bar Association Standards Relating to the Prosecution Function and the Defense Function,[58] which states: "It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause." The suggested revision of standard 3.9(a) reads as follows: "It is unprofessional conduct for the prosecutor to prosecute charges for which there is insufficient supporting legal evidence." [59]

Nor is it within the scope of the prosecutorial function to include a charge of perjury before the grand jury in an indictment for the purpose of demonstrating to the petit jurors that the defendant's trial testimony is not trustworthy. Inclusion of the perjury charge in an indictment for such a purpose may be, in essence, an attempt by the prosecutor to transform the perjury count from an accusation of guilt into evidence on the substantive count. Because a defendant in a criminal trial is presumed innocent until proven guilty beyond a reasonable doubt, an indictment is not, and cannot be, evidence of the guilt of the accused.[60]

Nor is it the function of a prosecutor to devise methods to force a criminal defendant to waive his fifth amendment privilege against self-incrimination. The United States Supreme Court, in *Malloy v. Hogan*,[61] stated clearly and unmistakably that a defendant's fifth amendment privilege is the "essential mainstay" of our criminal justice system.[62]

Finally, it is not the function of a prosecutor to include a perjury count in an indictment for the purpose of punishing a defendant for substantive offenses not indictable because the statute of limitations has run. Although a perjury charge can be based on false testimony given before a federal grand jury, it is also true that a prosecutor who directs a grand jury to investigate crimes for which it cannot return true bills because the statute of limitations has run, has no purpose other than extraction of perjured testimony from the defendant. Case law indicates that such a purpose voids the perjury charge *ab initio*.[63]

Setting aside the issue of the prosecutor's function vis-a-vis joinder, it is evident that the propriety of the joinder under rule 8(a) does not foreclose a defendant's claim that joinder in one indictment of substantive offenses and perjury may prejudice him.

[57] An equally important use of the federal false testimony statutes is the permissability of indicting an officer for collecting money more than five years prior to the date of the indictment. These payments would be beyond indictment under the Hobbs Act because of the statute of limitations. A prosecutor with witnesses who have paid money to a police officer, for example in 1964, may call the officer before the grand jury and ask him if he ever asked for or received any money from any businessman in the course of his official duties. If the officer testifies that he did not, he can be prosecuted under the perjury or false declaration statute despite the fact that, had he answered in the affirmative, he could not have been indicted at all. *Id.* at 143.

[58] *See* Uvillar, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L.R. 1143, 1148 (1973).

[59] *Id.* at 1154.

[60] Garrison v. United States, 353 F.2d 94, 96 (10th Cir. 1965).

[61] 378 U.S. 1 (1964).

[62] *Id.* at 7.

[63] Brown v. United States, 245 F.2d 549 (8th Cir. 1957); United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956); *cf.* United States v. Mandujano, 496 F.2d 1050, 1058 (5th Cir. 1974) and United States v. Rangel, 496 F.2d 1059, 1063 (5th Cir. 1974) (failure to give the target-witness Miranda-type warnings prior to his grand jury testimony makes that testimony inadmissable in a subsequent perjury prosecution). *Contra,* United States v. Nickels, 502 F.2d 1173, 1176–77 (7th Cir. 1974).

A defendant's claim that joinder of a substantive offense and a charge of perjury was so prejudicial as to require an election or severance of counts under rule 14 was upheld by a panel of the United States Court of Appeals for the Seventh Circuit in *United States v. Pacente*.[64] In *Pacente* the defendant was indicted in one count for extortion in violation of the Hobbs Act[65] and in another count for perjury before a special grand jury investigating possible Hobbs Act violations. He was convicted on both counts, and sentenced to concurrent terms of three years on each count.

In reversing the convictions because the trial court had failed to sever the counts, the panel distinguished a multi-count indictment charging various substantive offenses only from a multi-count indictment charging perjury as well as substantive offenses. The presence of the perjury count was found prejudicial to the defendant's ability to defend on the substantive count, because

> [i]n the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jurors that the defendant's testimony is not to be believed. Accordingly, the defendant is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count.[66]

Unlike so many other courts,[67] the panel in *Pacente* rejected the notion that the prejudice engendered by this joinder of offenses could be cured by limiting instructions to the jury.[68] The panel opinion, however, was reversed by an en banc court[69] which specifically rejected the panel's denial of the efficacy of the limiting instructions to the jury as a means of curing prejudice.

The relevant limiting instructions given by the trial court to the jury in *Pacente* are:

> You are instructed to consider the testimony given by the defendant Pacente before the Grand Jury . . . only as evidence under count 2 of the indictment and you should not consider it as evidence on any other count in the indictment. . . .[70]

With respect to these instructions, the panel in *Pacente* noted that a "vital question is whether a limiting instruction such as the one here *in the context of this case* can erase the slate once it is written upon." [71] The panel ruled that these limiting instructions would not suffice to dissuade the jurors from considering the grand jury's determination that the defendant had lied when he denied any participation in Hobbs Act violations in their deliberations on the substantive count. To so ignore the grand jury's determination, said the panel, "would require twelve minds more perfectly disciplined than those of the average human jurors." [72] The en banc court dismissed the fears of the panel as unwarranted speculation,[73] noting that "[o]ur theory of trial relies

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[64] 490 F.2d 661 (7th Cir. 1973).

[65] 18 U.S.C. § 1951 (1970).

[66] United States v. Pacente, 490 F.2d 661, 664 (7th Cir. 1973), *rev'd on rehearing en banc*, 503 F.2d 543, 547 (7th Cir. 1974). *Cf.* United States v. Carson, 464 F.2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972) (the commonality of proof between the perjury count and other counts in the indictment permits denial of a rule 14 motion to sever offenses).

[67] *See* note 32 *supra*.

[68] United States v. Pacente, 490 F.2d 661, 665–66 (7th Cir. 1973), *rev'd on rehearing en banc*, 503 F.2d 543, 547–48 (7th Cir. 1974).

There is a subtle difference between "limiting instructions" and "curative instructions:"

> The curative instruction functions as an alternative to the granting of a new trial whenever inadmissible evidence is heard by the jury. It is presumed that, as a result of the judge's admonition, the jury will completely disregard the incompetent evidence. The limiting instruction functions somewhat differently in that the jury hears and considers evidence, but is charged to limit consideration of it to its competent use. The function required of the jury in implementing the limiting instruction is probably more difficult. Rather than entirely disregarding the evidence, the juror must ultimately consider it but only for a limited purpose.

Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 267 (1966).

[69] United States v. Pacente, 503 F.2d 543 (7th Cir. 1974).

[70] *Id.* at 547.

[71] 490 F.2d 661, 665 (7th Cir. 1973) (emphasis added).

[72] United States v. Pacente, 490 F.2d 661, 666 (7th Cir. 1973), *rev'd on rehearing en banc*, 503 F.2d 543, 548 (7th Cir. 1974).

[73] United States v. Pacente, 503 F.2d 543, 548 (7th Cir. 1974).

upon the ability of a jury to follow instructions." [74]

This difference of opinion concerning the ability of jurors to follow limiting instructions designed to eliminate the possibility of prejudice appears to be the crux of the conflict between the panel and the en banc court. Neither position can be characterized as absolutely correct, given the traditional secrecy surrounding a jury's decision-making process. What little empirical evidence exists on the subject of the efficacy of limiting instructions to the jury, however, supports the position of the panel.[75] This empirical evidence indicates not only that jurors often do not remember the trial court's instructions sufficiently to attempt to follow them, but also, and more importantly, that limiting instructions sensitize jurors to the very evidence they are directed to ignore.[76] This position is complimentary to the experience of many respected jurists who view the limiting instruction as incapable of accomplishing its purpose.[77]

Further support for the panel's rejection of the notion that the limiting instructions could effectively compartmentalize the grand jury's determination in the minds of the petit jurors is found in the superficial nature of the instructions themselves. The instructions given by the trial court delineate no reasons why the petit jurors should ignore the grand jury's determination that the defendant lied in their consideration of the substantive count. Common sense teaches that seemingly arbitrary directions to act in a certain manner are more easily accepted and followed when the reasons behind that direction are explained.

The respective positions of the en banc court and the panel regarding the value of limiting instructions ultimately reduce themselves to value judgments on the abilities of individual jurors. The en banc court appears to have placed the juror on a pedestal, perceiving in him extraordinary power to control his own emotions. The panel opinion, on the other hand, recognizes that jurors are unversed in the ways of the law.[78]

Rule 14 of the Federal Rules of Criminal Procedure was designed to avoid prejudice *before the fact* by segmenting trials.[79] The panel in *Pacente* appears to have implemented that design, not only by rejecting commonly used, after the fact, curative devices,[80] but also by its analysis of the uniqueness of the joinder.[81] Furthermore, the reasoning and result of the panel opinion are more consistent with a realistic view of a juror's limitations. The panel permits a defendant to rely upon the presumption of innocence traditionally accorded criminal defendants, the right to trial by jury, and the obligation of the government to prove him guilty beyond a reasonable doubt.

Indictment Charges Multiple Defendants Variously with Substantive Offenses and Perjury Before the Grand Jury Which Investigated Those Substantive Offenses

Joinder in one indictment of multiple defendants, variously charged with substantive offenses and perjury before the grand jury,

[74] *Id.*

[75] *See* Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 Minn. L. Rev. 264, 265–66 & nn.7–16 (1966).

[76] *Id.*

[77] *See* Delli Raoli v. United States, 352 U.S. 232, 247–48 (1957) (Frankfurter, J., dissenting); Lutwak v. United States, 344 U.S. 604, 623 (1953) (Jackson, J., dissenting); Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); Delli Raoli v. United States, 229 F.2d 319, 321, 323 (2d Cir. 1956) (L. Hand, J.) (Frank, J., dissenting); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932) (L. Hand, J.); People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265 (1965) (Traynor, C.J.).

[78] In assessing the fallibility of petit jurors, the Seventh Circuit has acknowledged that information which may seem "innocuous" to the government or the court has actually and demonstrably not appeared so to the jurors. United States v. Thomas, 463 F.2d 1061, 1065 (7th Cir. 1972).

[79] *See* Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 Yale L.J. 553, 556 (1965).

[80] *But see* United States v. Pacente, 503 F.2d 543, 547–48 (7th Cir. 1974).

[81] However, the panel's reliance on the unique aspects of this joinder may also be the weakest feature of the opinion, in terms of the function to be served by rule 14. The panel has provided a guide for the application of Rule 14 in a limited factual setting only, and has thereby facilitated future efforts to distinguish its reasoning.

Perhaps the panel's failure to provide general guidelines for the application of rule 14 in all cases can be explained by the fact that federal courts deal with claims of prejudicial joinder only on a case by case basis. *See, e.g.*, United States v. Shuford, 454 F.2d 772, 776 (4th Cir. 1971); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

has uniformly been upheld.[82] This result has been reached on the basis of the language of rule 8(b), which requires that each count of the indictment arise out of factually related acts or transactions in which all defendants participated at some time.[83] Because the perjury count in the problem under discussion is based on the grand jury testimony of one who denies knowledge of, or participation in, the criminal activity under investigation, the same evidence necessary to prove one or more defendants guilty of various substantive counts will also serve to establish the guilt of those defendants charged with perjury. This identity of proof establishes the nexus between defendants and offenses which rule 8(b) requires.[84]

The claim that such joinder prejudices the defendants, however, remains. Under rule 14, two avenues of attack on the joinder are open. First, any defendant can challenge joinder of offenses with which he or another defendant is charged;[85] second, one or more defendants can challenge joinder of defendants.[86]

A rule 14 motion for severance of counts properly joined under rule 8(b) is addressed to the discretion of the trial court.[87] In exercising that discretion in the factual situation with which this comment is concerned, trial courts typically rely on the same factor which prompted a finding of proper joinder, *i.e.*, identity of proof.[88] An additional test employed by trial courts when faced with a motion to sever counts properly joined under rule 8(b) is whether evidence admissible on one count would also be admissible at a separate trial of the remaining count or counts.[89]

United States v. Verra[90] illustrates use of both tests. In that case, four defendants were charged with conspiracy to obstruct justice. One of the defendants so charged was also named in two counts charging perjury before the grand jury which investigated the conspiracy. The defendants not named in the perjury counts moved under rule 14 to sever the trial of the perjury counts from the trial of the conspiracy count, claiming that joint trial of all counts would inject extraneous and confusing issues into the trial of the conspiracy count; the defendant named in the perjury counts joined in this motion. After finding that the perjury and conspiracy counts were factually related, the court stated that the commonality of proof between the offenses charged, absent a showing that evidence relevant to the perjury charge would be inadmissible in a trial of the conspiracy count, militated against a finding of prejudice sufficient to justify severance of counts. Holding that evidence of the alleged perjury would be admissible in a separate trial of the conspiracy count under the false exculpatory statements doctrine, the trial court denied the motion for severance.[91]

The "identity of proof" reasoning of *Verra* was adopted by the trial court in *United States v. Haim*.[92] In *Haim*, under facts similar to those in *Verra*, the defendants not named in the perjury count moved to sever that count, arguing that joinder of the perjury count with other counts in the indictment was an attempt by the government to include them in an implied charge of conspiracy to obstruct justice.

[82] United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); United States v. Gill, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y. 1974); United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970); United States v. Wolfson, 282 F. Supp. 772 (S.D.N.Y. 1967); United States v. Cohen, 230 F. Supp. 587 (S.D.N.Y.), *mandamus denied*, 332 F.2d 975 (2d Cir. 1964); United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1963); United States v. Verra, 203 F. Supp. 87 (S.D.N.Y. 1962).

[83] *E.g.*, United States v. Isaacs, 347 F. Supp. 743, 761 (N.D. Ill. 1972); United States v. Haim, 218 F. Supp. 922, 931 (S.D.N.Y. 1964).

[84] *E.g.*, United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); United States v. Gill, 490 F.2d 233, 238-39 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); United States v. Isaacs, 347 F. Supp. 743, 760-61 (N.D. Ill. 1972); United States v. Verra, 203 F. Supp. 87, 90 (S.D.N.Y. 1962).

[85] United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

[86] *E.g.*, United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); United States v. Gill, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

[87] *See* note 34 *supra*.

[88] United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y. 1974); United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1963); United States v. Verra, 203 F. Supp. 87 (S.D.N.Y. 1962).

[89] *See* note 88 *supra*.

[90] *Id.*

[91] 203 F. Supp. at 90-91 (S.D.N.Y. 1962).

[92] 218 F. Supp. 922 (S.D.N.Y. 1963).

The trial court denied the motion, relying entirely upon the reasoning of *Verra*.

Verra and *Haim* place primary emphasis in their consideration of motions under rule 14 on efficiency in the conduct of criminal trials. Because the criminal justice system commands but limited resources, this emphasis on efficiency is not totally unwarranted. However, this should not be allowed to override a defendant's right to a fair trial. Rule 2 of the Federal Rules of Criminal Procedure[93] states that rules 8 and 14, among others, are intended to provide for the just determination of criminal cases. Neither *Verra* nor *Haim* discuss the contribution efficiency makes to a fair trial.[94] This is especially evident in *Haim*, where the defendants' claim placed the good faith of the government in issue.[95]

Considerations of trial efficiency should not be invoked in the particular factual situation under discussion, for the reasons outlined by the panel in *United States v. Pacente*.[96] Common sense dictates that when the liberty of defendants is at stake, protection of the right to a fair trial should not be dependent upon the unrealistic assumption that petit jurors are capable of putting out of their minds the finding by the grand jury that the defendant lied.[97]

A motion under rule 14 to sever defendants properly joined under rule 8(b), like a motion to sever offenses, is addressed to the discretion of the trial court.[98] In exercising that discretion in the factual situation with which this comment is concerned, trial courts base their decision, generally, on the same factor which permitted joinder of defendants, *i.e.*, identity of proof.[99]

United States v. Sweig[100] illustrates the use of this test. In that case, two defendants were charged with conspiracy to defraud the United States and with various overt acts in furtherance thereof; each was also charged with perjury before the grand jury investigating the conspiracy. Both defendants moved under rule 14 for an order granting each a separate trial on the perjury counts. Finding common elements of proof in the perjury and substantive counts, the trial court denied the motion for severance of defendants.[101]

As with motions to sever counts under rule 14, the court in *Sweig* places primary emphasis on efficiency when confronted with a motion to sever defendants. This emphasis on efficiency, however, detracts from the defendants' right to a fair trial. This is perhaps best illustrated by noting the contribution that joinder of substantive offenses and perjury makes to the inability of defendants to obtain witnesses.

One of the most common arguments asserted in support of severance of counts or defendants properly joined under rule 8(b) is the need of a defendant to call co-defendants as witnesses. *United States v. Wolfson*[102] involved such an argument in support of a motion to sever counts; *United States v. Isaacs*[103] dealt with

[93] FED. R. CRIM. P. 2.
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

[94] At first glance it may seem true that when evidence admissible in a separate trial of one count would also be admissible in the trial of another count, joint trial of the two counts is not prejudicial to the defendant. But consider the reasoning of the panel in United States v. Pacente, 490 F.2d 661, 664–65 (7th Cir. 1973), *rev'd on rehearing en banc*, 503 F.2d 543, 547–48 (7th Cir. 1974).

[95] Courts have recognized, in some contexts at least, that the good faith of the government in joining offenses and defendants under rule 8(b) is an issue to be considered when a motion to sever under rule 14 is made. *E.g.*, United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971); Peterson v. United States, 405 F.2d 102 (5th Cir. 1969); United States v. Manfredi, 275 F.2d 588, 593 (2d Cir.), *cert. denied*, 363 U.S. 828 (1960).
It is also true, however, that defendants must make affirmative showings of prejudice when moving for severance under rule 14. *See* note 35 *supra*.

[96] 490 F.2d 661, 664 (7th Cir. 1973), *rev'd on rehearing en banc*, 503 F.2d 543, 547 (7th Cir. 1974).

[97] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion). *See also* Bruton v. United States, 391 U.S. 123, 131–32 nn. 6 & 8 (1967); notes 71–77 *supra* and accompanying text. *Contra*, United States v. Pacente, 503 F.2d 543, 547–48 (7th Cir. 1974).

[98] *See* note 34 *supra*.

[99] United States v. Sweig, 316 F. Supp. 1148, 1157–58 (S.D.N.Y. 1970).

[100] 316 F. Supp. 1148 (S.D.N.Y. 1970).

[101] *Id.* at 1158–59.

[102] 282 F. Supp. 772 (S.D.N.Y. 1967).

[103] 493 F.2d 1124 (7th Cir. 1974).

such an argument in the context of a motion to sever defendants.

In *Wolfson,* five defendants were charged with conspiracy; four of the defendants so charged were also charged variously with substantive offenses and perjury before the Securities and Exchange Commission. One defendant, named only in the conspiracy count, moved to sever the trial of that count from trial of the counts in which he was not named, arguing that a joint trial of all counts would prevent him from calling co-defendants as witnesses. The trial court denied the motion, holding that the movant had failed to show a probability that co-defendants would testify on his behalf.[104]

In *Isaacs,* two defendants charged with different, though factually related, offenses were joined for trial. One defendant, who was charged with perjury before the grand jury, moved to sever his trial from that of his co-defendant, claiming that he needed the exculpatory testimony of that co-defendant. The trial court's denial of the motion was affirmed by the appellate court, which stated "[the] court is not required to sever where the possibility of the co-defendant's testifying is merely colorable or there is no showing that it is anything more than a gleam of possibility in the defendant's eye." [105]

The rulings in *Wolfson* and *Isaacs* are in accord with existing case law dealing with motions to sever to enable one defendant to call co-defendants as witnesses.[106] However, use of this case law in the factual situation under consideration effectively prevents defendants from procuring witnesses on their behalf.

For example, had the movant in *Wolfson* been able to convince the court that co-defendants would testify on his behalf, he would have been relegated, under current evidentiary rules, to calling as witnesses persons known to the jury to be under indictment for perjury.[107] The utility of such a witness already branded as a liar by one tribunal is limited.[108] The only certain remedy in such a case is to prohibit the joinder in the indictment of the perjury counts.

In *Isaacs,* unless the movant is able to convince the court that the testimony of his co-defendant will be forthcoming upon severance, he is denied the benefit of a witness untainted by a charge of perjury.

Conclusion

Joinder of one indictment of substantive offenses and a charge of perjury before the grand jury should not be permitted. Such joinder effectively prevents a defendant from testifying on his own behalf, it prevents him from obtaining untainted witnesses, and it may even force him to testify when he would prefer not to. Despite judicial protestations to the contrary, the prejudice engendered by such joinder cannot be cured by after-the-fact devices such as limiting instructions to the petit jury. If fair trials are to be accorded defendants in criminal cases, the government should not be permitted to utilize rule 8 of the Federal Rules of Criminal Procedure in such a manner. Alternatively, when confronted with rule 14 motions for severance of offenses or defendants, trial courts should not persist in the practice of placing the goal of trial efficiency ahead of a defendant's right to a fair trial.

[104] *Cf.* United States v. Echeles, 352 F.2d 892 (7th Cir. 1965); United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1962).

[105] United States v. Isaacs, 493 F.2d 1124, 1161 (7th Cir. 1974).

[106] United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); Smith v. United States, 385 F.2d 34, 38 (5th Cir. 1967): United States v. Kahn, 381 F.2d 824, 841 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967); Brown v. United States, 375 F.2d 310, 316–17 (D.C. Cir.), *cert denied,* 388 U.S. 915 (1966); Gorin v. United States, 313 F.2d 641, 645–46 (1st Cir. 1963), *cert. denied,* 379 U.S. 971 (1965). *Cf.* United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

[107] United States v. Sweig, 316 F. Supp. 1148, 1158 (S.D.N.Y. 1970); United States v. Verra, 203 F. Supp. 87, 90–91 (S.D.N.Y. 1962).

An additional hurdle confronting the movant in *Wolfson* is the fact that, despite the severance of counts, persons to be called as witnesses would remain co-defendants of the movant in the trial of the conspiracy count. As such, those persons have the right under the fifth amendment not to be called as witnesses at all. United States v. Shuford, 454 F.2d 772, 777 (4th Cir. 1971).

[108] *See* note 66 *supra.*

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PROPOSED CHANGES IN PRESENTENCE INVESTIGATION REPORT PROCEDURES

INTRODUCTION

The presentence investigation report has been described as a compilation of information about the legal, personal and social history of a defendant.[1] This report is largely an unrestricted document regarding the information it contains[2] and the sources of that information.[3] Under the current rule,[4] the report is prepared by the probation service and given to the court after the entrance of a plea of guilty or after conviction.[5] The importance of the sentencing procedure, which includes the judge's consideration of the presentence report, is magnified when defendants plead guilty,[6] making the sentencing process their only "day in court."

One of the major controversies concerning the presentence investigation report in federal courts centers on the question of whether the due process clause of the fifth amendment[7] or policy considerations require mandatory disclosure to defendant or defense counsel of all or part of the report, accompanied by the right of defendant or defense counsel to comment upon and rebut the report. Federal Rule of Criminal Procedure 32(c), by amendment in 1966, adopted the position that disclosure was completely at the discretion of the court. Rather than settling the controversy, the 1966 amendment resulted in further divergence in opinions and practices regarding disclosure of the presentence investigatory report.[8]

[1] Roche, *The Position for Confidentiality of the Presentence Investigation Report,* 29 ALBANY L. REV. 206 (1965).

[2] "This includes . . . offender's previous criminal record, early life and developmental history, school and employment record, mental and physical condition, religion, habits, attitudes, associates and other pertinent factors." *Id.* at 209. "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." FED. R. CRIM. P. 32(b).

[3] "The offender is interviewed as may be family members, relatives, friends, neighbors, associates, law enforcement officials, complainants, employers, clergymen, teachers and others who may possess any knowledge helpful to an understanding of the offender and his situation," Roche, *supra* note 1, at 209. *See generally* Evjen, *Some Guidelines in Preparing Presentence Reports,* 37 F.R.D. 177, 179 (1965).

[4] FED. R. CRIM. P. 32:

> (a) When made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation, unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> (b) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.
>
> (c) Disclosure. Before imposing sentence the court may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford the defendant or his counsel an opportunity to comment thereon.

[5] The report is also utilized beyond the sentencing process by the probation service and prisons to facilitate rehabilitation.

[6] In fiscal year 1966, 85 per cent of criminal defendants in the federal district courts pleaded guilty or nolo contendre. 1966 DIR. OF ADM. OFFICE OF U.S. COURTS ANN. REP. 220.

[7] U.S. CONST. amend. V.

[8] The experience of the circuit courts of appeal under the current rule indicates that the defendant may encounter any of a number of practices concerning the disclosure of the presentence report. The point of greatest uniformity is that the trial judge may not establish a policy of nondisclosure, but must exercise that discretion on a case-by-case basis. United States v. Miller, 495 F.2d 362 (7th Cir. 1974); United States v. Brown, 470 F.2d 285 (2d Cir. 1972); United States v. Bryant, 442 F.2d 775 (D.C. Cir. 1971).

The United States Court of Appeals for the Fifth Circuit has placed the greatest curbs upon judicial discretion to withhold information contained in the presentence report. Shelton v. United States, 497 F.2d 156 (5th Cir. 1974). Prior to *Shelton* this court's most perplexing decisions were that disclosure of the full presentence report was not required even after it became known that part of the report that had been disclosed was inaccurate, United States v. Jones, 473 F.2d 293 (5th Cir.), *cert. denied,* 411 U.S. 984 (1973), while at the

The Supreme Court has not recognized the issue of disclosure as a constitutional question arising under the due process clause of the fifth amendment,[9] although the Court has held that a sentence based upon misinformation contained in the presentence report constitutes a failure to meet due process requirements.[10] Because the Court rather systematically denied certiorari to cases asserting a right to disclosure,[11] proponents of curbing judicial discretion have looked to somewhat analogous situations involving kindred due process issues and the exercise of judicial discretion.[12]

After years of intense debate,[13] a period of

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same time holding that defendant must be given the opportunity to rebut factual reasons stated orally by the judge for the sentence. United States v. Espinoza, 481 F.2d 553 (1973). In something of a fit of judicial candor, the court acknowledged that:

> It might appear anomalous or even inconsistent to permit the withholding of presentence reports and other information relied on by the sentencing judge . . . while at the same time requiring the allowance for rebuttal when and if presentence information is disclosed and challenged.

Id. at 558.

Recognizing the difficulty of its situation in *Shelton,* the court decided that defendant must have the opportunity to rebut information explicitly relied upon in determining sentence. The court found that as a matter of due process defendant must be given the opportunity to rebut information concerning alleged prior criminal conduct and, without much guidance, directed the trial court to make "some accommodation" between the right to withhold the confidential contents of the report and the right of defendant to be fairly advised of information which formed the basis for the sentencing. Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974).

The Seventh Circuit holds that the court must disclose to defendant or defense counsel the substance of any information in the presentence report that is "sufficiently important" to affect the sentence. United States v. Miller, 495 F.2d 362 (7th Cir. 1974). The court has also directed the trial courts, in instances where certain information is not disclosed, to "discount... reliance on the information to allow for its lesser reliability." *Id.* at 365. Though this court has held that the trial judge must exercise discretion on a case-by-case basis, a defendant recently petitioned the Supreme Court for certiorari on the ground that the presentence report had been withheld by the trial court under a blanket nondisclosure policy. Gorden v. United States, 495 F.2d 308 (7th Cir.) *cert. denied,* 419 U.S. 833 (1974).

Though the Fourth Circuit feels that "disclosure when requested should be enforced in order that the appearance of justice will be fostered and respect for the administration of the law increased," it only "urges" the district courts to voluntarily adopt a policy of routine full disclosure subject to exception for confidential information where it can be reasonably expected that disclosure may adversely affect defendant, harm others, or substantially impede the administration of justice. United States v. Johnson, 495 F.2d 377, 378 (4th Cir. 1974).

The United States Court of Appeals for the District of Columbia requires that the fact of the exercise of discretion appear on the face of the record. United States v. Bryant, 442 F.2d 775 (D.C. Cir. 1971); United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970). But the court has also held that it is not a denial of due process for a trial judge to rely upon a presentence report without disclosing its entire contents to defendant and

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without giving defendant an opportunity to rebut. United States v. Dockery, 447 F.2d 1178 (D.C. Cir. 1971).

[9] Defendant was convicted by a jury which recommended the sentence of life imprisonment. After considering additional information obtained through the probation service and other sources and considering defendant's previous criminal record, the judge sentenced defendant to death. On appeal defendant contended that the Court could not consider such information. The Court held that the due process clause was not violated "merely because a judge gets additional out-of-court information to assist him. . . ." Williams v. New York, 337 U.S. 241, 252 (1949).

[10] In imposing sentence upon defendant, the trial judge gave explicit consideration to defendant's record of previous convictions. It was later conclusively determined that two of the previous convictions were constitutionally invalid. The Court affirmed remand for reconsideration of sentence noting that "we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." United States v. Tucker, 404 U.S. 443, 447 (1972).

[11] *See* Gorden v. United States, 495 F.2d 308 (7th Cir.), *cert. denied,* 419 U.S. 833 (1974); Shelton v. North Carolina, 18 N.C. App. 616, 197 S.E.2d 588, *cert. denied,* 415 U.S. 976 (1974); Dowell v. Utah, 30 Utah 323, 517 P.2d 1016, *cert. denied,* 417 U.S. 962 (1974).

[12] Morrissey v. Brewer, 408 U.S. 471 (1972) (procedural protection required in revocation or parole); Mempa v. Rhay, 389 U.S. 128 (1967) (extent of the right of counsel at time of sentencing where the sentence is deferred subject to probation); Kent v. United States, 383 U.S. 541 (1966) (manner in which a juvenile court exercised its discretion to waive jurisdiction over the defendant).

[13] For arguments favoring disclosure see Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 69, 278 (1966) (Douglas, J., dissenting in part); Gray, *Post Trial Discovery: Disclosure of the Presentence Investigation Report,* 4 U. TOLEDO L. REV. 1 (1972); Higgins, *Confidentiality of Presentence of Reports.* 28 ALBANY L. REV. 12 (1964); Lehrich, *The Use and Disclosure of Presentence Reports in the U.S.,* 47 F.R.D. 225 (1970); Thomsen *Confidentiality of the Presentence Report: A Middle Position,* 28 FED. PROB. 8 (1964); Wyzanski, *A Trial Judge's Freedom and*

near chaos among the federal courts,[14] and the advocacy of disclosure by major legal organizations,[15] the Supreme Court on April 23, 1974 adopted an amendment to the current Federal Rule of Criminal Procedure 32(c).[16] The proposed amendment imposes some limitations upon the trial courts but does not abolish the role of judicial discretion as to the disclosure of the presentence report. By specifying the reasons for which the court may refuse disclosure to defendant or defense counsel, the proposed amendment limits the broad discretion of the court provided by the current rule. The proposed amendment also requires the court to give defendant or defense counsel a summary of any part of the report relied upon in sentence determination which has been withheld according to the specified exceptions.

This comment will analyze whether the proposed amendment is a meaningful alternative to the failures of the current rule and whether it adequately responds to the case made for greater disclosure. First, however, the general debate among commentators surrounding the issue of disclosure and the responses of various legal organizations in the form of model acts and proposals will be discussed.

The Disclosure Debate

Positions for and against greater disclosure of the presentence report are based upon two considerations: (a) a constitutional due process right to disclosure and (b) the weighing of various policy considerations. Advocates of broad judicial discretionary powers regarding disclosure[17] generally begin by interpreting the decision of the Supreme Court in *Williams v. New York*[18] to hold that defendant does not have a constitutional right to disclosure of information in the presentence report. Dismissing any effort to raise the issue to a constitutional level,[19] they contend that after conviction a case is no longer an action at law, but rather, a "social problem."[20] Viewing the issue of disclosure solely in terms of policy considerations, advocates of broad judicial discretion argue three points:

> (1) Disclosure will dry up sources of information and diminish the quality of the presentence report;
>
> (2) Disclosure will unduly delay the sentencing process;
>
> (3) Disclosure of certain parts of the report may be harmful to the rehabilitation efforts, such as disclosure of psychiatric evaluations or recommendations by probation officers who might later be assigned to supervise the defendant.[21]

The validity of these assertions is doubtful in light of the actual experiences of courts which routinely disclose the report[22] as well as the arguments advanced by proponents of mandatory disclosure.[23] Probably one of the major factors motivating advocates of mandatory disclosure is the all too possible situation of a defendant incarcerated for five years rather than one year (during which he is subjected to inappropriate "rehabilitative efforts") because the sentencing judge and the prison officials relied upon an inaccurate presentence report.[24]

Responsibility, 65 Harv. L., Rev. 1281, 1291 (1952); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821 (1968). For discussions opposing any limitations upon the courts' discretion see Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—A Survey (1964); Parsons, *The Presentence Investigation Report Must Be Preserved as a Confidential Document*, 28 Fed. Prob. 3 (1964); Roche, *supra* note 1.

[14] *See* note 8 *supra*.

[15] *See* analysis of model acts and recommendations in text following note 39 *infra*.

[16] Amendments to Federal Rules of Criminal Procedure, 416 U.S. 1001, 1023 (1974). The order of the Court transmitting the proposed amendment to Congress provides that the amendment take effect August 1, 1974; however the effective date has been postponed until August 1, 1975. For the text of the proposed amendment see note 65 *infra*.

[17] For representative sample see note 13 *supra*.

[18] 337 U.S. 241.

[19] For articles assuming this perspective see note 13 *supra*.

[20] "After conviction a case ceases to be an action at law and becomes a social problem" and therefore creates no need for scrupulous hearings with full disclosure and confrontation. American Bar Assn., Standards Relating to Sentencing Alternatives and Procedures 220 (Approved Draft 1968).

[21] *See* relevant articles cited at note 13 *supra*, particularly those by Parsons and Lehrich.

[22] Chief Judge Roszel Thomsen reported in 1962 that the District of Maryland had customarily disclosed the report to defendant's counsel for seven years without adverse affects. Thomsen, *supra* note 13, at 9.

[23] *See* pp. 59–60 *infra*.

[24] Concern as to the possibility of such occurences has been expressed. *See* United States v.

Concern about the procedure which makes that occurrence so possible is rooted in two rather different perspectives. First, "guilty" people are entitled to fair treatment and the protections warranted by the due process clause of the fifth amendment; second, the accuracy of the presentence report is important to effective correctional treatment which is determined at the sentencing phase and later at the prison.

From these two basic propositions stem the various attacks on the judicial discretion permitted by the current rule. Judge Skelly Wright, in a vigorous dissent, evaluated the issue of disclosure and found that:

> [A]fter [defendant] is determined to be guilty of a crime, his protection shrinks to the barest minimum. From sentencing onward, he is left at the mercy of a discretionary decision making by officials proceeding on the basis of 'confidential' information. . . . [A] citizen [is] entitled to know what is happening to him and why and how it is happening—not as a Kafkaesque victim of Star Chamber secret proceeding.[25]

The advocacy of disclosure on constitutional grounds begins with the general rule that the due process clause requires a fair hearing when government acts to seriously injure a person and when its decision turns upon "adjudicative facts." [26] Upon weighing the competing interests,[27] Judge Wright concluded that in light of defendant's substantial interest and the "minimal weight" of governmental interest, the "constitutional balance" is heavily struck in favor of an adversary process at sentencing.[28] It has been noted that the "fairness" embodied in the due process clause should require notice to defendant of what information is being used against him.[29]

In addition, proponents of disclosure as a constitutional right point to procedures analogous to sentencing in which rights of due process have been determined by the Supreme Court to require disclosure of information. In *Morrissey v. Brewer*[30] the Court was concerned with procedure for parole revocation. The Court suggested that the minimum re-

Dockery, 447 F.2d 1178, 1193 (D.C. Cir. 1971) (Wright, J., dissenting); Lehrich, *supra* note 13.

A small survey of defense attorneys produced the following results: sixteen of seventeen defense counsel felt hampered by the secrecy of presentence reports, particularly because they were disabled from correcting errors. The consensus was that serious mistakes often appear in these reports. Two lawyers cited cases in which defendant's sentence was in part based on an alleged criminal record when, in fact, defendant had no such record. Junior Bar Section of the District of Columbia, *Discovery in Federal Criminal Cases,* 33 F.R.D. 101, 124 (1963).

The following cases suggest that the concern is well-founded:

(a) In imposing sentence upon defendant, the judge gave explicit consideration to defendant's record of previous convictions. It was later conclusively determined that two of the previous convictions were constitutionally invalid. United States v. Tucker, 404 U.S. 443 (1972).

(b) The court vacated the sentence and remanded because the district judge may have relied on misinformation about material factors bearing on the severity of punishment. United States v. Powell, 487 F.2d 325 (4th Cir. 1973).

(c) The court found defendant entitled to resentencing because the record supported the contention that the prior sentence was imposed by reference to materially inaccurate facts. The sentencing judge mistakenly believed that defendant had been previously convicted of three criminal offenses.

(d) Defendant stole a checkbook and wrote a number of checks totalling $1467. He was sentenced to a term of twenty-one to thirty-five years. Eight years after conviction, defendant was able to examine the presentence report and found grossly inaccurate information including the statement that he had numerous convictions and had spent most of his life in prisons. In fact, defendant had one prior conviction—stealing a car at the age of 18. State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1966); for discussion of this case see Gray, *supra* note 13.

[25] United States v. Dockery, 447 F.2d 1178, 1191 (D.C. Cir. 1971) (Wright, J., dissenting). Note the similarity with a much earlier decision:

> The lack of constitutional and evidentiary safeguards thrown around a convicted offender is in striking contrast to those surrounding him before he is found guilty. . . . Yet every lawyer engaged in defending criminal cases knows that often a finding of guilt is a foregone conclusion, and that the real issue centers about the severity of the punishment. . . . [A] convicted offender is not completely beyond the pale of constitutional protection.

Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955).

[26] United States v. Dockery, 447 F.2d 1178, 1190 (D.C. Cir. 1971) (Wright, J., dissenting).

[27] (a) Defendant's interest in the substantive outcome of the hearing; (b) Defendant's interest in the particular right to know and meet the evidence in the report; (c) The governmental interest in continued secrecy of the report. United States v. Dockery, 447 F.2d 1178, 1190 (D.C. Cir. 1971) (Wright, J., dissenting).

[28] *Id.* at 1200.

[29] Low, *Standards Relating to Sentencing Alternatives and Procedures,* 57 F.R.D. 391, 399 (1972).

[30] 408 U.S. 471 (1972).

quirements of due process in that situation included disclosure to the parolee of evidence against him, and the opportunity to be heard and to present witnesses and documentary evidence, as well as a limited right to confront and cross-examine witnesses. In *Kent v. United States*[31] the Court considered the discretionary waiver of jurisdiction by a juvenile court. One of the grounds of attack was that the court had denied the juvenile's attorney access to an information file which was considered by the court in waiving jurisdiction. The Court held that the juvenile court could not rely upon secret information:

> [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony, without hearing, without effective assistance of counsel, without statement of reasons. It is inconceivable that a court of justice dealing with adults with respect to a similar issue, would proceed in this manner.[32]

Proponents of mandatory disclosure contend that sentencing is just such a "similar issue," and therefore disclosure of the presentence report should be considered a matter of constitutional right.

Advocates of disclosure also utilize arguments based upon policy considerations. The experiences of jurisdictions which customarily disclose the presentence report, such as in California and Maryland, are used to refute conjectures of opponents of disclosure that disclosure of the report will "dry up" sources of information and diminish the quality of the presentence report.[33] Perhaps most convincing is the statement by Chief Judge Roszel Thomsen to the effect that in the District of Maryland the presentence report has been customarily shown to defense counsel since 1955 without impairing its utility.[34]

As to the contention that disclosure will unduly delay the sentencing process, it is asserted that the necessity of disclosure to assure justice outweighs the possible inconvenience. Furthermore, it is contended that experience has shown that disclosure does not promote unnecessary delay.[35]

After meeting the considerations raised by proponents of discretion, the advocates of disclosure note the crucial importance of accuracy and assert that the best way of insuring that accuracy in the presentence report is to disclose the report and hear from defendant regarding its contents.[36] They underpin their position with arguments based upon the concern for fairness in the sentencing process.[37]

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[31] 383 U.S. 541 (1966).

[32] Kent v. United States, 383 U.S. 541, 554 (1966).

[33] "Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports...." Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 618 (1970) (Advisory Committee Notes). The presentence report in the District of Maryland is prepared in two parts: (a) the principal body of the report setting out the facts is ordinarily available to defense counsel and (b) a much shorter, confidential portion containing the recommendation of the probation office which is not made available to defense counsel. Thomsen, *supra* note 13.

The "drying up" of sources argument also applies rather unconvincingly to another frequent supplier of information, social welfare agencies, just as it does to other governmental services. The relation of trust which may exist with defendant may be worthy of some protection, as Judge Wright says; however, "[t]his interest . . . does not seem sufficient to defeat disclosure. . . . [t]he governmental interest in denying an individual its information about him, on the ground that disclosure would make him trust it less, is paternalistic at best and a gross distortion of priorities. What is more important—a friendly relationship between defendant and his welfare worker or the length of time the defendant must spend in prison?" United States v. Dockery, 447 F.2d 1178, 1197 (D.C. Cir. 1971). Furthermore, the "drying up" argument ignores the fact that there is the possibility of that phenonemon under the discretionary rule as it currently exists. "Because discretion must be exercised in each case (under the current rule) the probation officer cannot know whether the report will be disclosed. Thus no informant can be assured that his information will remain confidential." *Id.*

[34] Thomsen, *supra* note 13.

[35] Lehrich, *supra* note 13, at 240.

[36] FED. R. CRIM. P. 32, 1972) (Advisory Committee Notes).

[37] "Withholding the information from the defendant or his counsel may permit material of a derogatory character to be used ex parte against the defendant. It also deprives the defendant of any opportunity to help the court in its appraisal of favorable information. The court . . . is deprived of any help from defendant and his counsel in respect to the report." United States v. Bryant, 442 F.2d 775, 777 (D.C. Cir. 1971). "Defendant has the right to be fairly advised of the information which formed the basis of sentencing." Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974). "Disclosure when requested should be fa-

Three major legal organizations and a presidential commission have considered the issues involved in this controversy and find the arguments for greater disclosure more persuasive. The model acts and proposals resulting from their deliberations all favor some restrictions upon the court's discretion to withhold information used in the determination of sentence.[38]

The American Bar Association, American Law Institute, National Council on Crime and Delinquency, and the President's Commission on Law Enforcement and Administration of Justice, in contrast to the divergent court opinions,[39] have generally favored greater disclosure of presentence reports than is required under the current rule. As the first codification in this series of model acts and recommendations, the Model Penal Code of the American Law Institute[40] seems to have tested the receptiveness of the legal community with its rather mild provisions which do not require the showing of the report nor provide for appellate review of a decision not to disclose. The Model Penal Code directs the court to advise the defendant or his counsel of the factual contents and conclusions of the presentence report as well as allow an opportunity for defendant to challenge that information upon his request. In the comment to the disclosure provisions, the promulgators state that this draft takes a "middle position" on the issue of disclosure.[41] The comment indicates that this position was taken not only because of a balancing of policy considerations but also because "[r]esistance to requiring larger disclosure would . . . probably be insuperable." [42]

The Model Sentencing Act of the National Council [43] provides for mandatory disclosure of the presentence report to persons determined to be "dangerous" offenders.[44] This position of mandatory disclosure is based on the rationale that additional safeguards for "dangerous" offenders are deemed required by due process because of the possible length of commitment and the character of the findings required before sentence may be imposed, such as whether defendant may be characterized as suffering from a severe personality disorder indicating a propensity toward criminal activity and whether defendant poses a threat to public safety.[45]

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vored in order that the appearance of justice will be fostered and respect for the admiration of the law increased." United States v. Johnson, 495 F.2d 377, 378 (4th Cir. 1974).

[38] *See* notes 40, 45, 46, and 50 *infra.*

[39] *See* note 8 *supra.*

[40] MODEL PENAL CODE § 7.07(5) (1962) provides that:

> Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant requests, to controvert them. The sources of confidential information need not, however, be disclosed.

[41] MODEL PENAL CODE § 7.07(5), Comment (1962).

[42] *Id.*

[43] MODEL SENTENCING ACT (1963).

[44] One is determined by the court to be a "dangerous" offender on the basis of several criteria. First, the court will find that the crime committed was a felony and that commitment of 30 years or less is required for the protection of the public because of the dangerousness of defendant. Then the court must also find one or more of the following: (a) a felony in which defendant inflicted or attempted to inflict serious bodily harm and the court finds him suffering from a severe personality disorder indicating a propensity toward criminal activity; (b) a crime which seriously endangered the life or safety of another, previous convictions for one or more felonies not related to the instant crime as a single criminal episode and that defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity; (c) a crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons. These findings are required to be incorporated into the record. MODEL SENTENCING ACT § 5 (1963).

[45] Ordinary felony offenders are sentenced according to the alternatives provided in section 9 of the Model Sentencing Act: a) suspension of the imposition or execution of the sentence with or without probation; b) probation; c) fine with or without probation or commitment; d) commitment for a term of 5 years or less or commitment to a local correctional facility for a term of one year or less. MODEL SENTENCING ACT § 9 (1963).

The Act leaves to the discretion of the court whether to disclose the presentence report or parts of it to defendant or others or whether to conceal the identity of persons who provided confidential information if defendant is sentenced under section 9. However, if defendant is to be sentenced under section 5 (cited in note 44 *supra*) or section 7 (which provides the life-sentence for defendants convicted of first-degree murder), the judge is required to make the presentence report, the report of the diagnostic center, and other diagnostic reports available to the attorney for the state and to the defendant or his counsel or other representative upon request. Furthermore, subject to the control of the court, defendant is entitled to

While the Model Sentencing Act recognizes a due process right to complete disclosure as to "dangerous" offenders within its restructured sentencing process, the interest of the "ordinary" offenders and the function of the presentence report in their sentencing is apparently considered insufficient to raise a due process requirement of disclosure.

The President's Commission on Law Enforcement and Administration of Justice opted for the fairness and balancing of the Model Penal Code and provided for inspection of the report itself, but the Commission found circumstances which could outweigh defendant's interest and so provided for exceptions to disclosure.[46] Noting that the facts necessary to a judge's determination of sentence will be absent when conviction has resulted from a plea of guilty, the President's Commission finds that fairness requires that defendant be given an opportunity to present information to the court and to contest the accuracy of important factual statements in the report. Omitting any provision for appellate review of nondisclosure, the President's Commission recommends:

> In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.[47]

Discussing this recommendation, the President's Commission indicates that within the category of "compelling reasons" are circumstances such as preclusion of disclosure because of the particularly confidential nature of the source of information or the possibility that the disclosure of certain statements would be harmful to rehabilitation.[48] The President's Commission would leave these matters to the "proper exercise of judicial discretion." [49]

The American Bar Association noted possible constitutional grounds, but perhaps as a tactic of persuasion, based its advocacy of mandatory disclosure with "limited exceptions" [50] upon policy considerations:

> [A]s a matter of policy . . . disclosure of the report ought to be required because such a practice will increase the fairness of the system . . . increase the appearance of fairness, and . . . assure a greater degree of accuracy in the sentencing determination.[51]

Implementing these policy considerations, the American Bar Association would require disclosure of the substance of all derogatory

cross-examine those who make these reports to the court. The reports then become part of the record.

The presentence report plays a very significant role in this sentencing structure. It is one of the critical factors utilized by the court in determining whether defendant is a "dangerous" offender, whether defendant comes within section 5 (a) or (b) as a sufferer from a severe personality disorder indicating a propensity toward criminal activity, and is also significant as the judge makes decisions as to sentencing alternatives under section 9.

[46] "In many cases information clearly could be disclosed without substantial likelihood of harm; yet there can be circumstances in which the particularly confidential nature of the source of the information may preclude its disclosure, or in which disclosure of a statement would be harmful to rehabilitation. . . . [Furthermore] social, welfare and juvenile agencies . . . might stop providing information if disclosure were compelled." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 144 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

[47] *Id.* at 145.

[48] Outlined in note 46 *supra.*

[49] THE CHALLENGE OF CRIME, *supra* note 46, at 144.

[50] The disclosure section proposed by the American Bar Association states:

> (a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.
>
> (b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself, if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the record which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review. ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4 (Approved Draft 1968) [hereinafter cited as ABA STANDARDS].

[51] *Id.* at 224.

information[52] to defense counsel or to defendant if unrepresented.[53] This disclosure is the inspection of the report rather than a recitation of its contents or a summary by the sentencing judge. The American Bar Association finds that the adversary system serves two important functions which should be preserved during the sentencing process: (a) the judicial system cannot function in a consistent and rational manner unless methods are devised to provide it with complete and reliable information about the defendant; and (b) the prosecution and defense ought to be afforded a meaningful chance to test the reliability of the information which is to be used in sentencing.[54]

The discussion of the disclosure issue by commentators, the model acts and recommendations of these legal organizations, along with the decisions and discussion of the issue by federal courts have played a significant role in the evolution of the current proposed amendment to Federal Rule of Criminal Procedure 32(c). The formal structure for amending federal rules consists of an Advisory Committee on Criminal Rules which submits its recommendations to the Standing Committee on Rules of Practice and Procedure, both comprised of judges, lawyers and legal scholars.[55] Furthermore, the final proposals of these committees are not made to the Supreme Court until amended drafts are submitted and sometimes redrafted and submitted to the bench and bar for consideration and suggestions.[56] This interaction is clearly evident in the effort to obtain stronger disclosure requirements.

Since 1962 the Advisory Committee on the Rules of Federal Criminal Procedure has urged mandatory disclosure of the presentence report. The 1962 preliminary draft provided that upon request of defendant the court disclose to defendant or his counsel a summary of the material contained in the presentence report.[57] The second draft in 1964 went further and required the court to permit counsel for defendant to read the report, but without the sources of confidential information. If defendant were not represented by counsel, the court was required to disclose to defendant, upon request, the essential facts in the presentence report.[58] However, the amendment as

[52] All but one member of the Committee would have further implemented that principle by permitting the defense attorney and prosecuting attorney to inspect the entire report, with carefully limited exceptions. *Id.*

[53] *Id.*

[54] *Id.* at commentary to § 4.1.

[55] In 1960, the Chief Justice appointed six nationally-oriented committees including the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules. The Advisory Committee is to conduct the basic studies and develop reports and recommendations for submission to the Standing Committee on Rules of Practice and Procedure. The Standing Committee then reports to the Judicial Conference of the United States. If approved, the Judicial Conference forwards the report and recommendations to the Supreme Court. The Supreme Court may then approve, modify, or disapprove of the changes in the Federal rules, and those adopted will be transmitted by the Supreme Court to Congress. 18 U.S.C.A. xv-xviii.

[56] For a description of this interaction see Vanderbilt's description of the evolution of the federal rules. Vanderbilt, *Proceeding at the Institute of Federal Rules of Criminal Procedure,* 5 F.R.D. 88, 93 (1946). Note that this is the continuing method of drafting proposed rules. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553 (1970).

[57] Upon request of the defendant the court before imposing sentence shall disclose to the defendant or his counsel a summary of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. The sources of confidential information need not, however, be disclosed.
Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts, 31 F.R.D. 665, 686 (1962).

[58] The second draft of the proposed amendment provided:

> If the defendant is represented by counsel and so requests, the court before imposing sentence shall permit counsel for the defendant to read the report of the presentence investigation (from which the sources of confidential information may be excluded) and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel and so requesting, the court shall communicate, or have communicated, to the defendant the essential facts in the report of the presentence investigation (from which communication the sources of confidential information may be excluded) and shall afford the defendant an opportunity to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 34 F.R.D. 411, 438 (1964).

In drafting both of these proposed amendments

adopted in 1966 took a different position as to disclosure than did these earlier proposals.[59] It has been suggested that the Advisory Committee changed its position because of substantial objections advanced by federal judges.[60] In 1970 the Advisory Committee submitted another proposal to the Committee on Rules of Practice and Procedure of the Judicial Conference.[61] This proposal provided for mandatory disclosure with an exception permitted if in the opinion of the court disclosure would be "harmful to the defendant or other persons."[62] If the court made such a determination, a summary of the factual information contained in the report and relied upon in determining sentence was to be given to defendant or his counsel.[63] The Committee on Rules of Practice and Procedure then solicited the consideration and suggestions of judges and attorneys.[64] The final provisions of the proposed amendment indicate that to some extent the arguments favoring disclosure are becoming more persuasive.

The Proposed Amendment

The proposed amendment[65] directs the court to permit defendant or defense counsel to read the report and comment while providing exceptions to total disclosure for:

(a) recommendations of sentence;

(b) diagnostic opinions which might seriously disrupt a program of rehabilitation;

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the Advisory Committee based its pro-disclosure position upon policy considerations and explicitly stated that defendants do not have a due process right to disclosure. The Advisory Committee simply stated that "[t]he amendment is designed to give the defendant the opportunity to comment on the facts contained in the report without going so far as to compel disclosure of the entire report." Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 31 F.R.D. 665, 687 (1962). Advisory Committee Notes).

[59] The relevant portions of the rule are given in note 4 *supra*.

[60] Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1308 (1966). Some probation officers and other persons with similar interests organized an extensive campaign against the second draft's proposal for compulsory disclosure. A survey was taken of federal judges, from which it was made to appear that 290 judges opposed compulsory disclosure, twenty-five favored compulsory disclosure, and six had no opinion. The Judicial Conference Committee on the Administration of the Probation System voted unanimously against compulsory disclosure. 2 C. Wright, Federal Practice and Procedure § 524. *See* Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—A Survey (1964). The Advisory Committee acknowledged the influence of such objections in its note: "Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. . . . Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel." Fed. R. Crim. P. 32 (1966) (Advisory Committee Notes).

[61] (1) Before imposing sentence the court shall permit the defendant, and his counsel if he is so represented, to read the report of the presentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons, and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(2) If the court is of the view that there is information in the presentence report, disclosure of which, would be harmful to the defendant or to other persons, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 614 (1970).

[62] *See* note 61 *supra*.

[63] *Id.*

[64] 48 F.R.D. 553 (1970).

[65] The proposed amendment provides:

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportu-

(c) sources of information obtained upon a promise of confidentiality;

(d) any information which, if disclosed might result in physical or other harm to defendant or other people.[66]

If the court determines that some information should not be disclosed pursuant to these exceptions, the court is to provide an oral or written summary of the factual information relied upon in determining the sentence and afford an opportunity to comment.[67]

The proposed amendment does not comport with the argument that the presentence report should be disclosed to defendant as a matter of right to due process. However, the Advisory Committee Note to the proposed amendment omits, perhaps significantly, the statement denying a due process right to disclosure.[68] This statement has accompanied its drafts since 1962 and is included in the note to the current rule.[69] In addition, the Advisory Committee speaks of the importance to defendant of the accuracy of information contained in the presentence report.[70] Perhaps, interpreting the note in light of Judge Wright's balancing of competing interests, this brief glimmer of explanation from the Advisory Committee is, in essence, a *sub rosa* acknowledgment of defendant's constitutional right to disclosure under the due process clause.

It is doubtful, however, whether the proposed amendment lends itself to such a recognition of due process rights. Within the Advisory Committee note it appears that the proposed amendment is the product of policy considerations recognizing the importance of accuracy in the sentencing process itself and in correctional treatment and deciding that "[t]he best way of insuring accuracy is disclosure. . . ."[71] Countering some of the policy arguments raised by opponents of disclosure, the Note states that the experience in jurisdictions which practice disclosure has not resulted in less complete reports, nor in unnecessary delay, nor is the probation officer subjected to rigorous examination.[72] The proposed amendment does not give the impression of facilitating a due process right to disclosure since its exceptions to disclosure seem to fall short of the "narrow exceptions" [73] to mandatory disclosure appropriate for the protection of such a right.

Presuming then that the proposed amendment is based upon the balancing of policy considerations, the exceptions to disclosure should be analyzed in view of whether the policy considerations favoring disclosure have prevailed in any meaningful way and whether the divergent practices of the federal courts will, under the proposed amendment, be replaced by uniform disclosure practices.

The proposed amendment excepts from disclosure "diagnostic opinions" which might seriously disrupt a program of rehabilitation.[74] The proposed amendment fails to define what opinions in the presentence report shall be considered diagnostic. Neither is there clarification as to what the court should consider in making the determination that disclosure "might seriously disrupt a program of rehabilitation." [75] This exception should function only as to a diagnostic opinion by a psychiatrist when the psychiatrist certifies that disclosure would harm treatment of

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nity to comment thereon. The statement may be made to the parties in camera. Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 320–21 (1974).

[66] *See* note 65 *supra.*

[67] *Id.*

[68] "It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it". Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 31 F.R.D. 665, 686 (1962) (Advisory Committee Notes); Second Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts 34 F.R.D. 411, 438 (1964) (Advisory Committee Notes); *see also* FED. R. CRIM. P. 32.

[69] *See* note 68 *supra.*

[70] "The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant. . . ." Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 325 (Advisory Committee Notes).

[71] *Id.*

[72] *Id.*

[73] "[M]ost of the legitimate objections to disclosure and comment can be washed away easily by building narrow exceptions into the scope of mandatory disclosure and by setting careful ground rules for the extent of a defendant's adversary comment on the presentence report." United States v. Dockery, 447 F.2d 1178, 1196 (D.C. Cir. 1971) (Wright, J., dissenting).

[74] *See* note 65 *supra.*

[75] *Id.*

defendant.[76] If the exception is not so limited, it is possible that this exception may operate as a catch-all for "diagnostic opinions" offered by probation officers and others without adequately protecting defendant from bias and prejudice together with erroneous information.[77]

Another exception to disclosure concerns the discretion of the court to withhold the presentence report if it contains sources of information obtained upon a promise of confidentiality.[78] It is the current practice, to be continued by the proposed amendment, that the probation service conduct the presentence investigation and compile the report. Since the proposed amendment does not require that the probation officer obtain the court's permission to offer a promise of confidentiality nor establish standards by which to exercise this discretion, it appears that a weighty and unchecked discretionary power has been placed in the hands of the probation officer. When joined with the final exception the result is the creation of the perfect vehicle for the prevention of disclosure of information which may be most influential but should be most suspect in determining the sentence.

The final exception provides for the discretionary withholding of information if the court thinks the information may result in harm to defendant or others.[79] A probation officer may, upon his own discretion, promise defendant's worst enemy not to reveal his identity as the source of particular information. Upon obtaining the presentence report, the judge apparently is bound not to reveal the name of that informant. Unless enlightened by the probation officer as to the informant's antagonism toward defendant the judge will not be in a position to properly evaluate that information since defendant is barred by nondisclosure from assisting the court. In exercising the discretion provided for by the final exception, the judge may withhold the information which was gathered from an informant of questionable reliability. These two exceptions may operate to seriously damage the accuracy of information utilized in sentence determination and effective correctional treatment.

Section 32(3)(b)[80] provides that if the court withholds any information contained in the presentence report, the court is to state orally or in writing a summary of the factual information contained in the report or in the withheld portion relied upon in determining sentence. This provision, however, gives the court a broad degree of unchecked discretion. If the court's summary differs greatly from the report itself, the defendant will be unable to prevent the use of improper information against him, not only by the judge but also by the prison in which he may be incarcerated. The proposed amendment does not sufficiently protect against the possibility of some information being classified as "factual" while perhaps highly damaging information is designated in some other fashion. The defendant, then, will be unable to challenge a sentence on the basis of being given an inaccurate summary.[81]

The proposed amendment, rather than marking the abandonment of an "unsuccessful experiment with discretionary disclosure," [82] would maintain a sentencing procedure still burdened with excessive discretion because of its nondefinitive exceptions to disclosure. Furthermore, by allowing a probation officer to promise secrecy to informants, the proposed amendment may promote the acquisition of particularly unreliable information which still may not be sufficiently revealed to defendant.

The controversy surrounding the disclosure of the presentence report crystalizes the prob-

[76] Judge Skelly Wright makes this recommendation after discussing the dangers of pseudo-scientific characterizations to defendant. United States v. Dockery, 447 F.2d 1178, 1198–99 (D.C. Cir. 1971) (Wright, J., dissenting).

[77] The following is a sample of the information in one presentence report: "Mueller learned to be somewhat of an aristocrat of the German Junker type, arrogant, domineering, clever, aggressive, who in the promulgation of his schemes became insulated from concern for the rights of others. This amalgam of training, opportunity, education, environment, and reversion to the ancestral type has made Mueller what he is as a person today. His ancestral language has a term which about covers his personality. That term is 'schlick'." Evjen, *supra* note 3, at 179.

[78] *See* note 65 *supra*.

[79] *Id.*

[80] *See* note 65 *supra*.

[81] The sample in note 77 *supra* indicates the type of material which would pose difficulties in being adequately summarized.

[82] The commentator apparently felt some optimism for the success of the 1970 proposed amendment 8A. J. Moore, Federal Practice § 32.03(4) at 32–37 (2d ed. 1974).

lems inherent in coping with the broad judicial discretion exercised under the current rule 32(c). The rule has not provided uniformity of disclosure practices among the federal courts and most importantly has not lessened the possibility of miscarriages of justice which could be avoided by disclosure of sentencing information. Given these difficulties under the current discretionary rule and in light of the history of the Advisory Committee's advocacy of disclosure and its stated reasons for promoting disclosure—the significance and insurance of accuracy of sentencing information to defendant and to effective correctional treatment —the proposed amendment seems a curious effort. Apparently, the rejection of bolder proposed amendments, opposition to disclosure within the legal community, and the general consensus among organizations representative of that community have significantly defined for the Advisory Committee the parameters within which it may fashion any limitation upon judicial discretion.

Perhaps, too, the basis for the inadequacies of the proposed amendment, as well as the model sentencing proposals, is the avoidance of acknowledging a full-blown constitutional right of defendants to know what information is being used against them, coupled with an abiding fear that the sentencing process may collapse if deprived of secrecy. The result is a proposed amendment which, though perhaps improving the possibility for meaningful disclosure, does not adequately deal with the difficulties evident under the current rule.

An appropriate disclosure rule should preferably be grounded in the recognition of the constitutional due process right to disclosure of the presentence report. In the alternative, the serious weighing of policy considerations should also support the development of a rule solidly favorable to disclosure. It is clear that the additional information of the presentence report can be invaluable in the determination of a just sentence. Furthermore, the presentence report is subject to continued utilization by the probation service and prisons. Because the sentencing procedure has been allowed to function in secrecy, it is important that habit not influence the continuation of secrecy, furthering a rather anomalous feature in our concept of justice. The Advisory Committee has, through its variety of proposals, attempted to meet the valid concerns opposed to complete mandatory disclosure. The proposed amendment, however, attests to the fact that the judicial system has moved but little beyond that "middle position" taken by the Model Penal Code in 1962.[83]

[83] *See* note 40 *supra.*