

1966

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### Recommended Citation

*Discovery in Federal Criminal Cases—Rule 16 and the Privilege Against Self-Incrimination*, 35 Fordham L. Rev. 315 (1966).

Available at: <https://ir.lawnet.fordham.edu/flr/vol35/iss2/4>

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## DISCOVERY IN FEDERAL CRIMINAL CASES—RULE 16 AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

The enactment of the new Federal Rules of Criminal Procedure indicates the change in the conduct of our criminal trials from a "sporting event" to a "quest for truth."<sup>1</sup> If the proper purpose of a trial is the ascertainment of truth,<sup>2</sup> then the reduction of surprise should be the aim of trial procedure. The new Federal Rule 16<sup>3</sup> provides, in theory, for mutual discovery, a precedented,<sup>4</sup> yet bold, step forward in reducing the role of the surprise tactic. There would appear, however, to be a serious problem of constitutional law raised by the rule which would allow discovery of a defendant's case.<sup>5</sup> Mr. Justice Black, for example, has written: "[S]ome of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself."<sup>6</sup> Yet, discovery by the prosecution has existed in various degrees in both federal and state courts.

### I. PREVIOUS METHODS OF DISCOVERY BY THE PROSECUTION

Legislation has been enacted by fourteen states requiring the defendant to give notice to the prosecution if he intends to rely upon an alibi as a defense.<sup>7</sup> Some states require a list of witnesses who will be called to support the defense.<sup>8</sup> Others simply require the defendant to specify his whereabouts at the time of the crime.<sup>9</sup>

The California supreme court, despite the absence of legislation, has held that the prosecution is entitled to discovery of the names and addresses of the witnesses that the defendant intends to call and to the production of reports

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1. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279; see Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 Geo. L.J. 675, 688-90 (1964).

2. *Tehan v. United States ex. rel. Shott*, 382 U.S. 406, 416 (1966).

3. The new Federal Rule is reprinted at pp. 335-36 *infra*.

4. *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

5. See *United States v. Brodson*, 136 F. Supp. 158, 166 (E.D. Wis. 1955), *rev'd on other grounds*, 241 F.2d 107 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957).

6. Justice Black's Statement on the Transmittal of the Amendments to the Federal Rules of Civil and Criminal Procedure [hereinafter cited as *Transmittal Statement*], 39 F.R.D. 69, 272 (1966); see Hoffman, *What Next in Federal Criminal Rules?*, 21 Wash. & Lee L. Rev. 1 (1964); Koplovitz, *New Amendments to the Federal Rules of Criminal Procedure*, 2 *Crim. L. Bull.*, May 1966, p. 3, at 6-7.

7. See 6 Wigmore, *Evidence* § 1855(b) (3d ed. 1940) [hereinafter cited *Wigmore*]; *Annot.*, 30 A.L.R.2d 480 (1953); 15 *Stan. L. Rev.* 700, 701 n.7 (1963) (listing various state alibi statutes). England requires notice of a plea of alibi and a list of witnesses. 6 *Wigmore* § 1855(b) (Supp. 1964). The Advisory Committee proposed requiring notice of an alibi. See *Proposed Amendments to Rules of Criminal Procedure*, Fed. R. Crim. P. 12(a) (Preliminary Draft Dec. 1962). Several states have similar statutes for the defense of insanity. See, e.g., N.Y. Code Crim. Proc. § 336.

8. 15 *Stan. L. Rev.* 700, 702 (1963).

9. 63 *Colum. L. Rev.* 361, 363 (1963); 15 *Stan. L. Rev.* 700, 701 n.7 (1963).

and x-rays that the accused intends to produce.<sup>10</sup> The state of Washington has also adopted this view.<sup>11</sup>

For over one hundred years, federal procedure has required an indigent who seeks to have the government subpoena and pay the expenses of his witnesses to submit an affidavit stating the names of the witnesses and what he expects to prove by their testimony.<sup>12</sup>

While these three methods<sup>13</sup> vary in scope, the basic tenet of each is that the defendant may be required, to some extent, to state his defense prior to trial.

## II. THE NEW RULE 16

Formerly, under the Federal Rules of Criminal Procedure, discovery by the defendant was limited to papers, documents, reports or tangible objects obtained from the defendant or obtained from others by seizure or process.<sup>14</sup> The former rule was also restrictive in that it required the defendant to show that the items sought were material to his case and that his request was reasonable.<sup>15</sup> The new rule seeks to assure the defendant a minimum of disclosure and to make it possible for him to gain further discovery,<sup>16</sup> perhaps conditional on his granting discovery of some aspects of his own case.<sup>17</sup>

Rule 16 is divided into three subsections. Subsection (a) empowers the court to grant the defendant discovery of his own admissions, confessions, or testimony before a grand jury. Since the rule sets forth no requirement that the defendant justify, particularize or show the materiality of the information sought,<sup>18</sup> there seems to be no basis for denial of such discovery.<sup>19</sup> Thus the accused is assured this minimum of discovery. The subsection also provides for discovery of reports of physical, mental, or scientific tests made in connection with the particular case. Such discovery, however, may be conditioned<sup>20</sup> and consequently is not assured to the defendant.

Subsection (b) outlines the maximum discovery that the defendant may acquire.<sup>21</sup> The court may allow the accused to inspect, copy or photograph "books, papers, documents, tangible objects, buildings or places" which are in

10. *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

11. *State v. Grove*, 65 Wash. 2d 525, 398 P.2d 170 (1965).

12. Act of Aug. 8, 1846, ch. 98, § 11, 9 Stat. 74, as amended, Fed. R. Crim. P. 17(b).

13. It should be noted that complete discovery may also result when a defendant is given a new trial.

14. Fed. R. Crim. P. 16, 335 U.S. 953 (1948).

15. *Ibid.*

16. Reznick, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276 (1966).

17. The court may refuse to condition the defendant's discovery, with the result that defendant is given maximum disclosure. See Fed. R. Crim. P. 16(c).

18. Fed. R. Crim. P. 16(a).

19. See *Koplovitz*, *supra* note 6, at 4 & n.8. Under the old rule the courts were in conflict as to whether a defendant could obtain a statement made to the government prior to trial. Compare *United States v. Murray*, 297 F.2d 812, 819-22 (2d Cir.), cert. denied, 369 U.S. 828 (1962), with *United States v. Fancher*, 195 F. Supp. 448 (D. Conn. 1961).

20. Fed. R. Crim. P. 16(c).

21. See also *Brady v. Maryland*, 373 U.S. 83 (1963). This case may be the source of further discovery. See text accompanying notes 130-32 *infra*.

the custody of the government.<sup>22</sup> There is a requirement that the information sought be material to the preparation of the defense and that the request be reasonable.<sup>23</sup> The application of this section may be further restricted by the prosecution's invocation of subsection (c).

Subsection (c) makes possible discovery by the government.<sup>24</sup> The court does not have the authority to order disclosure by the defendant, but it does have the power to deny the accused certain discovery privileges unless he consents to mutual disclosure.<sup>25</sup> When the court has ordered the prosecution to submit to discovery of items other than the defendant's own admissions, confessions, or testimony before the grand jury, it may, upon a motion by the government, condition its order upon the defendant permitting the prosecution to inspect, copy, or photograph, in whole or in part, those scientific or medical reports, books, papers, documents, or tangible objects which the defendant intends to produce at trial.<sup>26</sup> The government bears the burden of showing that the information sought is material to the preparation of its case and that the request is reasonable.<sup>27</sup>

The purpose of subsection (c) is to encourage mutual disclosure,<sup>28</sup> but it should be noted that the rule provides that the trial court "may" condition its order. Therefore, the prosecution does not have a right to discovery and mutual discovery is to be the rare, rather than common, occurrence.<sup>29</sup> Normally the government has the ability to secure the information necessary for trial,<sup>30</sup> and as a result mutual disclosure would not be warranted or desirable.<sup>31</sup> Some situa-

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22. Fed. R. Crim. P. 16(b). The rule excludes defendant's discovery of "reports, memoranda, or other internal documents made by the government agents in connection with the investigation or prosecution of the case" and "statements made by government witnesses . . . (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

23. Fed. R. Crim. P. 16(b). For discussion of the meaning of "material" and "reasonable," see Advisory Committee on Criminal Rules, Notes to the Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts [hereinafter cited as Advisory Committee Notes], 39 F.R.D. 69, 177 (1966); Reznick, *supra* note 16, at 1279-80.

24. See also *State v. Grove*, 65 Wash. 2d 525, 398 P.2d 170 (1965); *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), where the defendants were ordered to submit to discovery.

25. Fed. R. Crim. P. 16(c).

26. *Ibid.* The new rule does not provide for an exchange of the identity of witnesses. The United States Attorney, in Connecticut, has made such an exchange possible. See *N.Y. Times*, Sept. 19, 1966, p. 1, col. 1.

27. Fed. R. Crim. P. 16(c).

28. Advisory Committee Notes, 39 F.R.D. at 177.

29. *Ibid.*

30. *Ibid.*

31. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 *Calif. L. Rev.* 56, 95 (1961), where Professor Louisell, foreseeing the possible abuse, states: "if the zeal in preparing one's own case diminishes according as he is able to raid his opponent's workshop—then, indeed, in such indolence would there be danger that we would end with unilateral inquiry only into the facts. The essence of the adversary principle would be gone."

tions, however, demand mutual disclosure to prevent surprise. For example, if both the prosecution and the defense have employed experts to make psychiatric examinations, "it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses."<sup>32</sup> The determination of when mutual discovery is necessary is left to the discretion of the trial court.<sup>33</sup>

### III. CONSTITUTIONAL OBJECTIONS

The main objection to discovery by the prosecution is that it would violate the privilege against self-incrimination and the right to remain silent.<sup>34</sup> The problem of self-incrimination would be eliminated if the trial court ordered the defendant to disclose to the prosecution only non-incriminatory evidence. If at trial the defendant attempted to introduce evidence that was not disclosed to the prosecution, the trial court could grant the prosecution a continuance where it found the evidence incriminatory or where there were reasonable grounds to believe the evidence was incriminatory. Where the evidence is patently non-incriminatory, the trial court could exclude it. Surprise tactics would thus be prevented and the defendant's constitutional rights would be respected. Where the trial court fails to limit discovery by the prosecution to non-incriminatory evidence, the problem of self-incrimination arises.

In theory, the privilege against self-incrimination is clear and simple<sup>35</sup>—no person shall be compelled in any criminal case to be a witness against himself.<sup>36</sup> The right to remain silent apparently had its origins in the privilege against self-incrimination and, in federal criminal cases, in the federal statute<sup>37</sup> which removed the common law disqualification of the defendant as a witness.<sup>38</sup> The Constitution guarantees the accused that he will not be compelled to testify against himself;<sup>39</sup> the statute guaranteed him that he would not be called to the witness stand against his will.<sup>40</sup> A literal interpretation of the statute is that

32. Advisory Committee Notes, 39 F.R.D. at 177.

33. Fed. R. Crim. P. 16(c); Advisory Committee Notes, 39 F.R.D. at 177.

34. See *Jones v. Superior Court*, 58 Cal. 2d 56, 62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962) (separate opinion); Transmittal Statement 273.

35. See generally Griswold, *The 5th Amendment Today* (1955); Hook, *Common Sense and the Fifth Amendment* (1957); Maguire, *Evidence of Guilt* (1959); 8 Wigmore, *Evidence* §§ 2250-84 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore]; Orfield, *The Privilege Against Self-Incrimination in Federal Cases*, 25 U. Pitt. L. Rev. 503 (1964).

36. U.S. Const. amend. V.

37. 18 U.S.C. § 3481 (1964).

38. See *Ferguson v. Georgia*, 365 U.S. 570 (1961); cf. *Jones v. Superior Court*, 58 Cal. 2d 56, 62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962) (separate opinion).

39. U.S. Const. amend. V.

40. Act of March 16, 1878, ch. 37, 20 Stat. 30, as amended, 18 U.S.C. § 3481 (1964). "In the trial of all indictments, informations, complaints . . . in the United States courts . . . the person so charged shall, at his own request but not otherwise, be a competent witness." See *Griffin v. California*, 380 U.S. 609, 613-14 (1965) (dictum), where the Court stated the privilege against self-incrimination encompassed the federal act. It would appear that the

it has no application to procedure prior to trial.<sup>41</sup> It would appear then that there is no independent right to stand silent prior to trial; it is but an expression that indicates that the self-incrimination privilege applies.<sup>42</sup>

In order to invoke the privilege the accused must be in some reasonable apprehension of self-incrimination. The privilege is not afforded recognition on the mere assertion of the pleader<sup>43</sup> that he is in danger of incriminating himself;<sup>44</sup> the witness cannot be the sole judge of what is incriminatory.<sup>45</sup> However, if the witness is required to prove the hazard in the ordinary course of legal procedure, he would in effect be denied the constitutional protection he seeks.<sup>46</sup> It is the trial judge who decides whether the privilege is properly invoked. Stating the test to be applied by the trial judge, Mr. Justice Clark has written: "To sustain the privilege, it need only be evident from the implications of the question, in the setting . . . asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."<sup>47</sup> In the same case, the Court said it must be "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate."<sup>48</sup> The phrase "cannot possibly" may be interpreted to mean that

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Court did not follow the distinction that Justice Peters drew in the Jones case. See *Jones v. Superior Court*, 58 Cal. 2d 56, 62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962) (separate opinion).

41. 18 U.S.C. § 3481.

42. See 8 Wigmore § 2260 stating that "the accused in a criminal case . . . is exempt from all answers whatever, for, at least on the prosecution's assumption, they are incriminating." (Footnote omitted.)

43. Since the defendant, by statutory right, could not be forced to answer either exculpatory or inculpatory questions at trial unless he consented, it is necessary to refer to cases where the person invoking the privilege is not a defendant, to determine if the privilege against self-incrimination guaranties an absolute right to silence. The defendant should have no greater constitutional protection under the self-incrimination privilege than any other individual.

44. *Mason v. United States*, 244 U.S. 362 (1917). Defendant's attempt to claim the privilege before a grand jury, when questioned as to whether a game of cards was being played at the table where he was sitting or any other table, was denied. In *Brown v. Walker*, 161 U.S. 591 (1896), petitioner claimed the privilege and refused to answer even though given immunity. The Court held that the immunity statute validly deprived him of his right to refuse to answer. Cf. *Heike v. United States*, 227 U.S. 131 (1913).

45. *Hoffman v. United States*, 341 U.S. 479 (1951). In this case, a witness before a grand jury asserted the privilege as to questions concerning his occupation. The privilege was upheld. In *Malloy v. Hogan*, 378 U.S. 1 (1964), defendant had pleaded guilty to a gambling misdemeanor, and, when questioned concerning his arrest and conviction, he invoked the privilege. In sustaining the privilege the Court said it was apparent that if the defendant were forced to disclose the name of the head of the gambling operation, such disclosure might furnish a link to connect the defendant with a more recent crime.

46. *United States v. Reynolds*, 345 U.S. 1, 8-9 (1953) (dictum).

47. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

48. *Id.* at 488. See *United States v. Coffey*, 198 F.2d 438 (3d Cir. 1952), where the court said: "We think the problem is what to do about apparently innocuous questions, the

the proponent of the question has to guarantee the impossibility of incrimination.<sup>40</sup> Since the protection of the privilege is not limited to answers that would in themselves be the basis of guilt, but extends to protect the facts which "would have furnished a link in the chain of evidence,"<sup>50</sup> it is obvious that one cannot guarantee the effects of any question. The most trivial question could become a link.<sup>51</sup> However, the test does indicate that the witness does not have the absolute right to remain silent.<sup>52</sup> The circumstances and question must produce a real, though not necessarily obvious, danger to sustain the privilege.<sup>53</sup> If the court feels the conditions do not indicate or make feasible such detriment, the privilege will be denied.<sup>54</sup>

The courts have been less lenient in their application of the privilege to records, books and papers.<sup>55</sup> While the production of documents or chattels for the government may be refused due to the invocation of the privilege,<sup>56</sup> it is the

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answers to which are admittedly not incriminating in themselves, where there are no additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States . . . and (2) that this . . . linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant." *Id.* at 440. (Footnote omitted.) The latter part of this quotation was cited with approval by the Supreme Court in *Emspak v. United States*, 349 U.S. 190, 198 n.18 (1955).

49. *Rogers v. United States*, 340 U.S. 367, 379 (1951) (Black, J., dissenting).

50. *Blau v. United States*, 340 U.S. 159, 161 (1950). Petitioner refused to answer questions concerning her employment by the Communist Party. The invocation of the privilege was sustained.

51. See *Hoffman v. United States*, 341 U.S. 479 (1951). In *Simpson v. United States*, 355 U.S. 7 (1957) (*per curiam*), the Court reversed three convictions for failure to disclose home address on the confession of error by the Solicitor General and on the authority of *Hoffman*.

52. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). Mr. Justice White, concurring, stated: "For the privilege does not convey an absolute right to remain silent. It protects a witness from being compelled to furnish evidence that could result in his being subjected to a criminal sanction . . . if, but only if, after the disclosure the witness will be in greater danger of prosecution and conviction." *Id.* at 100. (Citations omitted.)

53. Compare *Rogers v. United States*, 340 U.S. 367 (1951), with *Emspak v. United States*, 349 U.S. 190, 198 n.18 (1955).

54. *Rogers v. United States*, 340 U.S. 367 (1951).

55. The privilege is a personal one and may not be claimed by an agent or officer of a corporation or labor union, either in its behalf or in his own behalf as regards books and papers of the corporation or labor union. E.g., *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906). If discovery were held to violate the privilege against self-incrimination, whether a corporation could claim that discovery violated its rights would appear to raise another problem.

56. *Boyd v. United States*, 116 U.S. 616 (1886).

defendant's duty to produce the papers in order that the court might satisfy itself as to whether they contain matters that might tend to incriminate.<sup>57</sup> The court reaffirmed the basic proposition that an "individual citizen may not resolve himself into a court and himself determine [a question of privilege as to] the contents of books and papers required to be produced."<sup>58</sup>

If the obvious requirement for invocation of the privilege against self-incrimination is that the pleader be in reasonable apprehension of incrimination, then the constitutional validity of the new rule can be viewed by determining whether mutual discovery would have the tendency of soliciting incriminatory statements or links from the accused. The answer would appear to be in the negative.<sup>59</sup> The defendant cannot be forced into any possible self-incrimination since the court is not empowered under the rule to order disclosure.<sup>60</sup> The court may only condition the defendant's discovery upon disclosure.<sup>61</sup> The accused is only being asked to produce at an earlier date that which he intends to produce at a later date.<sup>62</sup> In addition, absolute control rests in the hands of the defendant as to what will be shown to the prosecution. There is no mechanism under the rule allowing the government to select items or exhibits which it thinks will be the source of evidence for its case.<sup>63</sup> The most compelling reason for holding that mutual discovery will not result in self-incrimination is the assumption that the

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57. *Brown v. United States*, 276 U.S. 134 (1928). Petitioner, served with a subpoena duces tecum, claimed the privilege. A conviction of contempt was sustained not on the grounds that the privilege did not apply, but because of refusal to let the court inspect the books to see if the privilege was applicable. In *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956), a subpoena duces tecum was served upon an attorney by a grand jury looking into corruption. The defendant claimed the attorney-client privilege but the court held the books had to be presented to the court for inspection to see if the privilege applied. In *Corretjer v. Draughon*, 88 F.2d 116 (1st Cir. 1937), defendant was held in contempt for refusal to permit the judge to inspect minutes of a political party for purposes of determining if the privilege applied.

58. *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 3, 169 S.W. 517, 518 (1914), rev'd on other grounds, 167 Ky. 480, 180 S.W. 839 (1915), as quoted in *Brown*, supra note 57, at 145, and in *Schwimmer v. United States*, supra note 57, at 864.

59. See *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964).

60. The Advisory Committee had considered limited discovery by the government independently of discovery sought by the defendant. The following was an alternative to subdivision (c) of the new rule: "Discovery by the Government. On motion of the government, the court may order the defendant to permit the government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control." Proposed Amendments to Rules of Criminal Procedure, Fed. R. Crim. P. 16(c) (1964).

61. Fed. R. Crim. P. 16(c). As to whether this conditioning device amounts to compulsion, see text accompanying notes 118-26 *infra*.

62. *Jones v. Superior Court*, 58 Cal. 2d 56, 62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962); Traynor, supra note 59, at 247; see Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435 (1934).

63. Fed. R. Crim. P. 16(c).

defendant does not intend to introduce any papers, books, documents, tangible objects or reports that would tend to incriminate him.<sup>64</sup> Yet some commentators maintain that this assumption "entirely overlooks the possibility that evidence which would be a defense against one criminal charge may also implicate a defendant in connection with some other crime."<sup>65</sup> Granting the possibility,<sup>66</sup> it would appear that the defendant has adequate alternatives with which to protect the evidence.<sup>67</sup> First, the accused may seek maximum discovery and if the order is conditioned he may petition the court to rescind the order as to this particular evidence by claiming the privilege and submitting the documents to the court for inspection.<sup>68</sup> If the incrimination is not evident, an explanation to the judge in chambers might be desirable. If such an explanation would itself violate the privilege,<sup>69</sup> or if the production of the evidence to the court would be an infringement,<sup>70</sup> then another alternative would be to seek maximum discovery and comply with the order except with respect to the incriminatory evidence. At trial the defendant may seek to introduce the evidence with an explanation to the judge, who, when one party fails to comply with a conditional order, may make any appropriate order.<sup>71</sup> One could hardly complain that an explanation to the judge would violate the privilege when at that exact time he is pleading with the court to allow him to disclose it.<sup>72</sup> The other alternative, albeit unsatisfactory, is to seek limited discovery without maximum disclosure.

This speculation as to alternatives seems to be of importance only where the defendant has not yet decided whether the use of incriminatory evidence will be necessary. In all other situations, if the accused is given such protection, it is only temporary since by the defendant's own admission he intends to produce such documents at trial and thereby waive his constitutional privilege.<sup>73</sup> At trial, when the defendant seeks to introduce the evidence the prosecution may ask for, and be granted, a continuance. The constitutionality of a continuance to prevent surprise is undoubted.<sup>74</sup> It has been asserted that all the defendant really protects

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64. See *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). Accord, *People v. Schade*, 161 Misc. 212, 292 N. Y. Supp. 612 (Queens County Ct. 1936).

65. 15 Stan. L. Rev. 700, 703 (1963).

66. For example, a defendant may have a deposition from a dead witness which would place him in the vicinity of a bank robbery instead of the area where a murder was committed.

67. See Fed. R. Crim. P. 16.

68. See Fed. R. Crim. P. 16(e).

69. See 8 Wigmore § 2271, stating that "it is true that the disclosure could be made without the hearing of the jury (as questions involving the admissibility of evidence are usually presented by counsel), but nonetheless the disclosure would have been compelled, and by judicial compulsion; so that this expedient, which is adequate to solve other questions of privilege, seems here inappropriate and has never found favor." (Footnote omitted.) Compare Wigmore with cases cited in note 57 *supra*. See note 48 *supra* where it is suggested that counsel show hypothetically how incrimination could result.

70. *Contra*, cases cited note 57 *supra*.

71. Fed. R. Crim. P. 16(g).

72. See 8 Wigmore § 2276 (waiving the privilege by testifying).

73. *Ibid*.

74. Traynor, *supra* note 59, at 248.

by invoking the privilege is the possible advantage of surprising the prosecution and this will be lost by the probability of a continuance.<sup>75</sup> Some commentators have asserted that the accused has more to protect than a surprise tactic.<sup>76</sup> If the defendant were left free to choose his defenses and exhibits until the last possible moment, it might become apparent during the trial that the prosecution's case is insufficient for conviction, making it unnecessary to introduce the incriminatory evidence.

In response, it has been argued that if the defendant were given complete pre-trial discovery, he could reasonably judge the sufficiency of the prosecution's case for conviction.<sup>77</sup> Consequently he would be able to decide if it was necessary to introduce the incriminating evidence, and such a decision prior to trial would not harm the defendant. Such an argument would be valid only in those rare cases where the defendant can be confident of obtaining a dismissal of the charge or an acquittal without the incriminatory evidence; or where it is clear that the prosecution can obtain a conviction regardless of whether the defendant introduces the incriminatory evidence. Such certainty, however, is not present in the majority of cases, and may not be helpful even when it is. For example, suppose an accused is charged with murder and has an affidavit from a deceased witness which will implicate him in a petty theft at the time the murder was committed. Through pretrial discovery, the defendant has learned that the entire case of the prosecution rests on the testimony of one witness. Defendant knows that witness to be insane. The defendant can be reasonably sure that the case will be dismissed once it is shown that the prosecution's witness is insane, but the defendant would be foolish to risk conviction for murder by failing to disclose the affidavit to the prosecution. If defendant's predictions are accurate, then the disclosure

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75. *Ibid.* *Contra*, 15 *Stan. L. Rev.* 700, 703 (1963).

76. *Ibid.*

77. Traynor, *supra* note 59, at 249. Justice Traynor took this position because the defendant in California is permitted "pretrial discovery of the names and addresses of witnesses, photographs, results of scientific and other investigations . . ." *Id.* at 244. (Footnotes omitted.) While the new rule does not provide for an exchange of the names of witnesses, the defendant could obtain a copy of the grand jury minutes under section (b) of the rule. See *Fed. R. Crim. P.* 6(e). Consequently the accused would not only have the names and addresses of the prosecution's witnesses but also the substance of their testimony.

The possibility does exist that the prosecution could mitigate such discovery by presenting to the grand jury only as much information as is necessary to secure an indictment. The new rule also exempts statements made by government witnesses to agents of the government except as provided for in the Jencks Act, 18 U.S.C. § 3500 (1964). The government may also apply for a protective order which might deny the defense names of prosecution witnesses. *Fed. R. Crim. P.* 16(e); *Advisory Committee Notes*, 39 *F.R.D.* at 178 (1966). See *Fed. R. Crim. P.* 17.1 (allowing pretrial conferences); *Advisory Committee Notes*, 39 *F.R.D.* at 180; *Koplovitz*, *New Amendments to the Federal Rules of Criminal Procedure*, 2 *Crim. L. Bull.*, May, 1966, p. 3, at 6-7. But see *State ex rel. Anaya v. Scarborough*, 75 *N.M.* 702, 410 *P.2d* 732 (1966), where the court found it was error to hold pretrial conferences, stating: "It is difficult to imagine how the Constitutional guarantees to one charged with a crime can be made effective in any kind of proceeding wherein admissions, concessions or agreements of any kind are made by an accused before proof is presented to establish a *prima facie* case." *Id.* at 704, 410 *P.2d* at 735.

rule has worked to cause the defendant to incriminate himself. Such a situation could not arise if the court had framed the discovery order to include only non-incriminatory evidence.

In situations where the defendant's defense will not incriminate him, there appears to be no valid objection to the new rule on the grounds of self-incrimination. Since the field of constitutional law is practically barren of precedents concerning discovery and the privilege against self-incrimination, it is necessary to look to analogous situations where the defendant was required to state his defense prior to trial.

While not designated as discovery, the procedural requirement of an affidavit by an indigent<sup>78</sup> extends beyond what is designated as discovery by the government under the new rule.<sup>79</sup> Such defendants could not complain that they were required to give the government attorney a statement as to what each witness would testify to when called.<sup>80</sup> Only twice<sup>81</sup> has the question of self-incrimination been raised. In *Smith v. United States*,<sup>82</sup> the defendant argued that the use of the affidavit was error because the statement was "compelled testimony" and hence it violated his privilege against self-incrimination. The court rejected this argument, stating, however, that the "contention would be well founded if appellant had been compelled to make the statements in the affidavit."<sup>83</sup> Recognizing that the accused was under a duty to show that he needed the testimony of the named witnesses and that their testimony was relevant to the issues, the court reasoned that "appellant was called upon to make a showing which a non-indigent is not required to make, but he was not compelled to make a false statement."<sup>84</sup> It would appear that the court saw no violation of the privilege against self-incrimination requiring the accused to state the defenses he intended to use.<sup>85</sup>

In *Tucker v. United States*,<sup>86</sup> the Supreme Court dealt with virtually the same problem<sup>87</sup> and reached the same conclusion. The Court allowed the use of the

78. See former Fed. R. Crim. P. 17(b). The new rules have dropped the requirement of an affidavit. See Advisory Committee Notes, 39 F.R.D. at 179.

79. Compare the former Fed. R. Crim. P. 17(b) with the new Fed. R. Crim. P. 16(b).

80. *Thomas v. United States*, 168 F.2d 707 (5th Cir. 1948).

81. *Tucker v. United States*, 151 U.S. 164 (1894) (privilege against self-incrimination not directly in issue); *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962) (per curiam). There is no reported case where the objection was raised that the defendant had the right to remain silent.

82. 312 F.2d 867 (D.C. Cir. 1962) (per curiam).

83. 312 F.2d at 870. (Emphasis and footnote omitted.)

84. *Ibid.* (Footnote omitted.)

85. *Contra, Smith v. United States*, 312 F.2d 867, 871 (D.C. Cir. 1962) (separate opinion). "Rule 17(b) apparently presents an indigent with Hobson's choice: either make no defense or disclose his whole case to the Government before his trial. It is questionable whether in 1962 this choice meets the current standard of due process considered in light of the Fifth Amendment . . ." *Id.* at 872. (Footnotes omitted.)

86. 151 U.S. 164 (1894).

87. The defendant had filed a similar affidavit and contended that a federal statute, Rev. Stat. § 860 (1875), prevented the use of the affidavit. The statute prohibited the use of any

affidavit, saying: "Nor is it obtained from him by any judicial process, which he is obliged to obey. But it is made of his own motion; and it states such facts, and such only, as he, being in no way interrogated or cross-examined may choose to state."<sup>88</sup> The Court's rationale that the indigent was not forced to file the affidavit is of questionable validity. If he had not submitted the statement the government would not be under any obligation to subpoena the witnesses he desired.<sup>89</sup> While it is true that the accused had the alternative of not filing the affidavit, the consequence of not filing gave the accused no real choice but to file.

In the two cases where objection based on the fifth amendment was raised, the incriminatory statements resulted not from the fact that the indigents had made an affidavit but from the fact that they had made an inconsistent<sup>90</sup> or false<sup>91</sup> statement. The lack of litigation is interesting, for it is difficult to explain unless we infer that the accused did not believe the statements were going to incriminate him. The possibility that a defendant's defense will implicate him in another crime has not yet been fulfilled, at least among indigents.<sup>92</sup> The case of *Hartman v. United States*,<sup>93</sup> where the defendant was prosecuted for failure to answer questions of a subcommittee of the House Committee on Un-American Activities, is of interest. While the defendant did not specifically invoke the self-incrimination privilege, he did maintain that his constitutional rights were being violated. At no time, however, did he object to the requirement of the affidavit for subpoenas, and, in fact, he filed more than one such affidavit.<sup>94</sup>

The Supreme Court has passed on the question of forcing the defendant to produce documents in *Boyd v. United States*.<sup>95</sup> There the Court held unconstitutional an 1874 revenue statute<sup>96</sup> which required the defendant or claimant, on

pleading of a party, discovery or evidence obtained from a party or witness by means of a judicial proceeding. The Court in speaking of the statute said it was "conceived in the same spirit as the Fifth Amendment . . ." 151 U.S. at 168.

88. *Id.* at 169.

89. E.g., *United States v. Shields*, 291 F.2d 798 (6th Cir. 1961); *United States v. Pacione*, 224 F.2d 801 (2d Cir.) (per curiam), cert. denied, 350 U.S. 896 (1955); *Word v. United States*, 199 F.2d 625 (10th Cir. 1952), cert. denied, 345 U.S. 936 (1953). In *Meeks v. United States*, 179 F.2d 319 (9th Cir. 1950), the court's refusal to subpoena witnesses because of defendant's failure to file an affidavit was upheld.

90. *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962) (per curiam).

91. *Tucker v. United States*, 151 U.S. 164 (1894).

92. See 15 Stan. L. Rev. 700, 703 (1963).

93. 290 F.2d 460 (9th Cir. 1961), rev'd on other grounds per curiam, 370 U.S. 724 (1962).

94. 290 F.2d at 470.

95. 116 U.S. 616 (1886).

96. Act of June 22, 1874, ch. 391, § 5, 18 Stat. 187, which stated: "That in all suits and proceedings other than criminal arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court . . . may, at its discretion, issue a notice . . . to produce . . . and

motion of the government, to produce his private books, invoices or papers, on penalty of the allegations of the government being taken as confessed. The opinion of the Court proceeded upon a complex interpretation of the fourth amendment, taken as intertwined in its purpose and historical origin with the fifth amendment.<sup>97</sup> Under that view "a compulsory production of the private books and papers of the owner . . . is compelling him to be a witness against himself within the meaning of the Fifth Amendment . . ."<sup>98</sup> and is also violative of the fourth amendment because it results in an unreasonable search and seizure.<sup>99</sup>

This case is distinguishable from any that might result under the new rule. In *Boyd*, the statute sought to aid the government in proving its case,<sup>100</sup> while the new rule seeks to prevent surprise. In *Boyd*, the government could employ the statute only when the papers it sought were incriminating. But the basic assumption under the new rule is that the accused will not introduce incriminating evidence and the government is allowed only to examine the evidence that the defendant intends to produce at trial. In addition, the accused had no choice but to comply with the order in *Boyd*, while the new rule would never directly force the defendant to submit to discovery. Moreover, in *Boyd* the defendant had no control over what documents the government would see, while under the new rule he has absolute control.

Several states have encountered the constitutional problem of discovery by the prosecution in the form of an alibi statute. Such statutes have been held constitutional by state courts whenever questioned.<sup>101</sup> The reasoning in such cases has ranged from a strict policy argument<sup>102</sup> to a denial of compulsion.<sup>103</sup> In *People v. Schade*,<sup>104</sup> a New York court combined the policy argument with a discussion of the possibility of incrimination. The information sought under the statute is "not as to matters which the defendant says may incriminate him but as to matters which the defendant says will exonerate him."<sup>105</sup> Aware of the

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if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in said motion shall be taken as confessed . . ."

97. 116 U.S. at 633.

98. *Id.* at 634-35. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gouled v. United States*, 255 U.S. 298 (1921).

99. 116 U.S. at 635.

100. Compare statute cited in note 96 *supra* with Fed. R. Crim. P. 16.

101. *State v. Stump*, 254 Iowa 1181, 119 N.W.2d 210, cert. denied, 375 U.S. 853 (1963); *People v. Wudarski*, 253 Mich. 83, 234 N.W. 157 (1931) (by implication); *People v. Shulenberg*, 279 App. Div. 1115, 112 N.Y.S.2d 374 (3d Dep't 1952) (memorandum decision); *People v. Schade*, 161 Misc. 212, 292 N.Y. Supp. 612 (Queens County Ct. 1936); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931); *State v. Cunningham*, 89 Ohio L. Abs. 206, 185 N.E.2d 327 (Ct. App. 1961) (per curiam); *State v. Kopacka*, 261 Wis. 70, 51 N.W.2d 495 (1952).

102. *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931).

103. *People v. Schade*, 161 Misc. 212, 292 N.Y. Supp. 612 (Queens County Ct. 1936).

104. *Ibid.*

105. *Id.* at 215, 292 N.Y. Supp. at 615.

possibility that injurious data may be disclosed,<sup>106</sup> the court rebuffed the contention that there was any compulsion under the statute.<sup>107</sup> The law merely gives the district attorney the right to demand certain information with regard to an alibi defense and directs the accused to answer if and only if "he voluntarily and for his own benefit intends to use an alibi defense."<sup>108</sup> He alone is the judge of what he is going to do and it is "equally certain that the activities of criminals in manufacturing alibi defenses will be seriously checked . . ." <sup>109</sup>

The most recent attack, in the Iowa case of *State v. Stump*,<sup>110</sup> was the claim that the statute denied the defendant due process. In reference to the procedure whereby the state must furnish the defendant with a list of the witnesses it will call and the defendant is required to submit such a list if he relies on an alibi defense, the court stated that "we see nothing unfair nor violative of due process of law . . ." <sup>111</sup> On the issue of discovery, the court, approving the concept, stated: "There is nothing essentially unconstitutional about requiring pretrial disclosure of the names of witnesses whose testimony the other side may be called on to refute. The modern trend in discovery is to broaden access to material facts and reduce belated surprise."<sup>112</sup> Objections to the alibi statutes and the procedure for indigents have been limited to the privilege against self-incrimination and due process; the right to remain silent has never been used as the basis for objection.

#### A. *The Right To Remain Silent*

Assuming that such an independent right exists,<sup>113</sup> the new rule does not force

106. *Ibid.*

107. Where an alibi may be incriminating, the defendant does not know if it will be necessary to use the evidence until the court has ruled on his motion to dismiss. The problem may be solved by the exercise of judicial discretion. See text accompanying notes 34-35 *supra*.

108. 161 Misc. at 215, 292 N.Y. Supp. at 615.

109. *Id.* at 218, 292 N.Y. Supp. at 619.

110. 254 Iowa 1181, 119 N.W.2d 210, cert. denied, 375 U.S. 853 (1963).

111. *Id.* at 1198, 119 N.W.2d at 220.

112. *Id.* at 1197-98, 119 N.W.2d at 220.

113. See *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), where the court was in conflict as to the meaning of the right to remain silent. The majority viewed the right to mean that the defendant did not have to assert any defense, but if he planned to assert any defense, he must disclose it. The minority viewed the right to mean that the defendant could not be forced to make any statement, inculpatory or exculpatory, before the prosecution has presented its case. But see *Schmerber v. California*, 384 U.S. 757 (1966), where the Court viewed the right to remain silent as founded in the fifth amendment. Quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), the Court said that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 384 U.S. at 760-61. The Court then went on to state the right to silence was not absolute: "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ." *Id.* at 761. (Footnote omitted.) It would appear that the Court does not think the privilege applies to all communications, but only to those

the accused to break his silence.<sup>114</sup> If the accused wishes maximum discovery, the rule requires only that he give notice of the fact that he intends to remain silent. More specifically his silence may be interpreted to mean that he does not reserve the right to introduce exhibits.<sup>115</sup> Obscured beneath the time element facade is the previous objection that the defendant should be informed of all the prosecution's case before he should be required to make a choice as to whether he wishes to remain silent or assert defenses. "Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defenses."<sup>116</sup> To reason otherwise is to compel the court to continue granting time consuming continuances.<sup>117</sup> The accused has in his power the option to retain the status quo by ignoring maximum discovery<sup>118</sup> and waiting until trial to see what the prosecution has in its arsenal. This option permits the defendant to refuse to state whether or not he intends to remain silent.

### B. *Compulsion*

Another objection to the new rule is that the defendant may be compelled to waive his constitutional guarantees in order to enjoy the benefits of maximum discovery. Compulsion may be defined as the direct or indirect pressure which denies the defendant the free exercise of his will.<sup>119</sup> If the defendant refuses to comply with a conditional order, then, in effect, he is being denied the benefits of maximum discovery. Such discovery would give the defendant advance knowledge of certain aspects of the prosecution's case. This knowledge is valuable in that it gives the defendant time to prepare a rebuttal. However, the defendant still has resort to continuances<sup>120</sup> if he is surprised by the prosecution.<sup>121</sup> While it must be considered that a continuance lies in the discretion of

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which would serve as evidence against the defendant. The Court also recognized that there can be limitations on the state's duty "to shoulder the entire load." *Id.* at 762. See *Ullmann v. United States*, 350 U.S. 422 (1956) (immunity statutes validly deny the right to silence).

114. *Jones v. Superior Court*, 58 Cal. 2d 56, 61-62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962).

115. Failure to comply with a conditional order can result in the exclusion of the evidence. Fed. R. Crim. P. 16(g).

116. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 248 (1964).

117. *Id.* at 249.

118. See Fed. R. Crim. P. 16.

119. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

120. See Traynor, *supra* note 116, at 249, stating that if the prosecution is denied discovery, the prosecution will resort to continuances. While Justice Traynor does not discuss the defendant's right to request a continuance if he does not participate in discovery, there is no reason to believe that the defendant will be prevented from resorting to continuances. See Fed. R. Crim. P. 16(g) which provides that if one party fails to comply with a conditional order, the court may grant a continuance.

121. See 4 Barron, *Federal Practice and Procedure* § 2575, at 453 (1951).

the trial judge,<sup>122</sup> it should be remembered that a discovery order is also discretionary.<sup>123</sup>

The purpose and effect of a continuance is similar to discovery.<sup>124</sup> Discovery seeks to prevent surprise at trial<sup>125</sup> while continuances serve to allow the opposing party time to investigate evidence that takes him by surprise.<sup>126</sup> The effect of both is to mitigate the role of surprise tactics in our criminal trials. Rather than denying the accused the ability to investigate the prosecution's case or prepare a rebuttal, the new rule requires that the accused, if he does not want mutual discovery, employ the method of continuance, rather than choose between two alternative methods.

### C. Denial of Privileges

Some cases have held that when an individual insists upon his privilege against self-incrimination, the government may deny him various benefits.<sup>127</sup> This may have the effect of compelling the individual to incriminate himself. The new rule presents an analogous situation since a defendant may be forced to either incriminate himself by granting discovery to the prosecution or waive his right to discovery of the prosecution's case. It is clear that one constitutional right should not be made contingent upon the waiver of another constitutional right.<sup>128</sup> However, it would appear that the defendant has no right to discovery. The Supreme Court has held that in the absence of a showing of prejudice to the defendant, it is not a violation of due process to deny counsel an opportunity before trial to inspect his client's confession.<sup>129</sup> However, in *Brady v.*

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122. *Ibid.*

123. Fed. R. Crim. P. 16.

124. See Fed. R. Crim. P. 16(g), providing that failure to comply with a conditional order can be remedied by granting a continuance.

125. See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279.

126. See Traynor, *supra* note 116, at 248.

127. See *Kimm v. Rosenberg*, 363 U.S. 405 (1960) (*per curiam*) (refusal to suspend deportation of an alien); *Lerner v. Casey*, 357 U.S. 468 (1958) (discharge of subway conductor for "doubtful trust and reliability" after invoking the privilege); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958) (discharge of school teacher for incompetency after invoking the privilege); *Regan v. New York*, 349 U.S. 58 (1955) (policeman forced to choose between waiving his immunity or losing his job); *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (suspension of a physician's license); *Orloff v. Willoughby*, 345 U.S. 83 (1953) (refusal to grant a physician a commission in the army after he invoked the privilege); *Maryland v. Soper*, 270 U.S. 9 (1926) (denial of a petition for removal of a state case to the federal courts); *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949) (refusal to grant discharge in bankruptcy after invocation of privilege); Maguire, *Evidence of Guilt* 59 (1959).

128. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 Vand. L. Rev. 921, 927 n.30 (1961).

129. *Cicenia v. Lagay*, 357 U.S. 504 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952). Another holding of the *Cicenia* case was explicitly overruled in *Miranda v. Arizona*, 384 U.S. 436, 479 n.48 (1966).

*Maryland*,<sup>130</sup> the court made this statement: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>131</sup> The case has been used to argue that failure of the prosecution to make available evidence that would impeach the credibility of the prosecution's witnesses amounts to a denial of due process.<sup>132</sup> However, even under *Brady*, there is no support for the proposition that the accused has a constitutional right to discovery of unfavorable evidence.

In all cases but one,<sup>133</sup> where the courts held that such a denial did not amount to a violation of due process, some vital interest was involved: security,<sup>134</sup> corruption<sup>135</sup> or the preservation of a government function.<sup>136</sup> The reduction of surprise and continuances is a legitimate concern,<sup>137</sup> but it does not appear to be a comparable interest for which the defendant may be denied the privilege of discovery.

It seems inconsistent to suggest that our concern for fair trials is so vital that we will deny the defendant his constitutional rights to insure a fair trial. Therefore, if the new rule compels the defendant to incriminate himself by withholding the benefits of discovery, it is unconstitutional because there is no vital governmental interest at stake. However, the problem of self-incrimination and compulsion may be eliminated if orders are framed so as to allow the prosecution discovery of only non-incriminatory evidence.

Another approach, predicated on the fact that the defendant is being compelled to incriminate himself, maintains that the constitutional privilege can be replaced by provision for an adequate substitute. For example, a witness can be compelled to answer incriminating questions if granted immunity.<sup>138</sup> "It would seem that a discovery order in defendant's favor, conditioned, for example, upon defendant's disclosure of data of roughly equivalent probative value, would be constitutionally permissible . . ." <sup>139</sup> While all analogies limp, the one that

130. 373 U.S. 83 (1963).

131. *Id.* at 87.

132. *Link v. United States*, 352 F.2d 207, 212 (8th Cir. 1965), cert. denied, 383 U.S. 915 (1966). The court held that for such suppression to be violative of due process, the evidence must have been "of such inherent significance as to represent fundamental unfairness." *Ibid.*

133. *Maryland v. Soper*, 270 U.S. 9 (1926).

134. *Kimm v. Rosenberg*, 363 U.S. 405 (1960); *Orloff v. Willoughby*, 345 U.S. 83 (1953).

135. *Regan v. New York*, 349 U.S. 58 (1955).

136. *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958); *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949).

137. Mr. Justice Stewart in *Griffin v. California*, 380 U.S. 609, 622 (1965) (dissenting opinion), stated: "Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial . . . and to shape a legal process designed to ascertain the truth."

138. See 8 Wigmore §§ 22, 81-84.

139. *Louisell, Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 90 (1961) (Footnote omitted.); see *Pye, Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 Geo. L.J. 675, 689-90 (1964).

would compare a conditioning device with an immunity statute is especially crippled. An immunity statute is adequate to circumscribe the privilege because it removes the possibility of incrimination,<sup>140</sup> while a conditioning device provides no such protection.<sup>141</sup> It suggests only a barter for the privilege and not a substitution of protection. The belief that it is permissible to ask the accused to waive his privilege for other benefits is inconsistent with the Supreme Court's philosophy that the state may not force an individual to incriminate himself directly,<sup>142</sup> and that it shall not accomplish the same end indirectly by promises and threats. The accused must have "the unfettered exercise of his own will."<sup>143</sup> If the new rule compels the defendant to incriminate himself, then it is unconstitutional.

#### IV. CALIFORNIA GRANTS DISCOVERY TO THE PROSECUTION

California, which led in allowing discovery of the prosecutor's case,<sup>144</sup> has pioneered the concept of discovery by the prosecution. In *Jones v. Superior Court*,<sup>145</sup> the defendant, charged with rape, petitioned the court for a continuance, alleging that he was impotent. The prosecution moved for discovery, requesting the production by the petitioner of the names and addresses of those doctors whom defendant had subpoenaed and those who had treated the accused prior to trial, and all reports and x-rays relating to the injuries that petitioner alleged resulted in his impotency.

After the trial court granted the production motion, defendant obtained a writ of prohibition from an appellate court.<sup>146</sup> On appeal a new writ was issued. The prosecution's discovery was limited to the names and addresses of the witnesses that petitioner intended to call and to the production of reports and x-rays that the defendant intended to introduce into evidence.<sup>147</sup>

Asserting that discovery should not be a "one-way street," the court stated that "absent the privilege against self-crimination [sic] or other privileges . . . the

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140. See 8 Wigmore § 2281.

141. See Fed. R. Crim. P. 16(c). There is no provision that if incriminating evidence is disclosed, it will not be used against the defendant.

142. *Boyd v. United States*, 116 U.S. 616 (1886).

143. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

144. *Louisell*, supra note 139, at 74.

145. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). The case was decided under the court's interpretation of the California privilege against self-incrimination. *Malloy v. Hogan*, 378 U.S. 1 (1964), which made the fifth amendment applicable to the states, had not yet been decided.

146. *Jones v. Superior Court*, 17 Cal. Rptr. 575 (Dist. Ct. App. 1961). The appellate court stated that "the possibility of self-incrimination is sufficient to require a denial of the discovery order." *Id.* at 576. The court took the view that *Mapp v. Ohio*, 367 U.S. 643 (1961), had extended the fifth amendment to the states.

147. 58 Cal. 2d at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882. Those reports made by physicians to whom defendant was sent by his attorney were held to be beyond discovery. Such discovery, the court held, "would violate the attorney-client privilege, for such reports are communications from petitioner to his attorneys through such physicians." *Id.* at 61, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-82.

defendant . . . has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case."<sup>148</sup> Drawing upon the analogy presented by alibi statutes,<sup>149</sup> the majority stated that "although such discovery may require a defendant to disclose information that would lead to effective rebuttal of his defense . . ." <sup>150</sup> such statutes have uniformly been upheld as constitutional by state courts.<sup>151</sup> In a common sense approach, the opinion reasoned that since the accused was going to reveal the evidence in any event, "learning the identity of the defense witnesses and of such reports and X-rays in advance merely enables the prosecution to perform its function at the trial more effectively."<sup>152</sup> Discovery sets up a "wholly reasonable rule of pleading"<sup>153</sup> which in no way has the effect of compelling the defendant to produce any evidence other than that which he will voluntarily use at trial.<sup>154</sup>

Apparently recognizing the existence of the right to stand silent,<sup>155</sup> the court failed to see any impairment resulting from discovery. Recognizing that the defendant need only disclose that which he will subsequently put into evidence,<sup>156</sup> the court dispensed with constitutional objections since the defendant may always choose to remain silent.<sup>157</sup>

The dissent attacked the majority's "one-way street" approach, stating that "the simple fact is that our system of criminal prosecution is founded upon the

148. *Id.* at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.

149. See text accompanying notes 101-12 *supra*. The Jones court was aware that discovery might harm the defendant. "The prosecution seeks more than to require petitioner tacitly to admit that the materials are those requested; it seeks the benefit of his knowledge of the existence of possible . . . reports and X-rays for the purpose of preparing its case against him." 58 Cal. 2d at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881. *Contra*, Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 *Clev. B.A.J.* 91, 98-99 (1954), stating: "The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. Equals, meeting in battle, owe no such duty to one another, regardless of the obligations that they may be under prior to battle. A sovereign state has the right to defend itself, and within the limits of accepted procedure, to punish infractions of the rules that govern its relationships with its sovereign individuals. But it has no right to compel the sovereign individual to surrender or impair his right of self-defense."

150. 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

151. *Ibid.*

152. *Ibid.*

153. See *ibid.* The court was referring to alibi statutes but the court considered discovery as analogous to the alibi statutes.

154. *Ibid.*

155. See *id.* at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

156. *Id.* at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882. The court quoted extensively from Dean, *Advance Specifications of Defense in Criminal Cases*, 20 *A.B.A.J.* 435 (1934).

157. *The state of Washington, in State v. Grove*, 65 Wash. 2d 525, 398 P.2d 170 (1965), accepted California's view of discovery stating the "inherent power of the trial court to grant discovery . . . is not limited to that which benefits the defendant." *Id.* at 528, 398 P.2d at 172. (Citation omitted.) *Contra*, *State v. Superior Court*, 2 *Ariz. App.* 458, 409 P.2d 742 (1966) (*dictum*). But see *State v. Martin*, 2 *Ariz. App.* 510, 410 P.2d 132 (1966) (upholding the exclusion of alibi evidence for failure to comply with the statute). See also *State ex. rel. Anaya v. Scarborough*, 75 *N.M.* 702, 707, 410 P.2d 732, 735 (1966).

principle that the ascertainment of the facts is a 'one-way street.'"<sup>158</sup> The right to stand silent, the privilege against self-incrimination and the right to a presumption of innocence completely refute the majority's argument. The dissent accused the majority of confusing the privilege against self-incrimination with the right to remain silent.<sup>159</sup> The constitution of California provides that "no person shall . . . be compelled, in any criminal case, to be a witness against himself . . ." <sup>160</sup> and the Penal Code states "the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness."<sup>161</sup> Under these provisions, the dissent argued, the right of the accused to stand silent until a prima facie case has been made is absolute, except that the prosecution may comment upon the defendant's failure to take the stand.<sup>162</sup> Discovery contravenes that right and is therefore unconstitutional.

The discovery granted to the prosecution in the *Jones* decision is greater in scope than that contemplated by the new federal rule. There the prosecution was given discovery of the names and addresses of the witnesses that defendant intended to call. Under the new rule the defendant may be able to secure a list of the prosecution's witnesses but the prosecution is not able to secure a list of the defendant's witnesses.

#### V. CONCLUSION

Does the defendant have any legitimate interest in delaying the inevitable choice between standing silent or asserting defenses? If not, discovery under the new rule should be permitted because it is a limited method of preventing surprise. Surely the Constitution should not be construed to protect surprise tactics on the theory that the defendant has the right to defend himself with any means whatsoever.

The only time the accused has a valid interest to protect, by delaying the inevitable choice, is when he must decide if it is necessary to introduce incriminatory evidence.

The constitutional problem of self-incrimination is avoided if the trial court frames its order to grant the prosecution discovery of only non-incriminatory evidence. Where the trial court has not restricted its order, the problem of the constitutionality of the rule arises in two situations. First, where the defendant has submitted to discovery of incriminating evidence prior to trial and later the defendant realizes it was not necessary to submit to discovery either because his

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158. *Jones v. Superior Court*, 58 Cal. 2d 56, 64, 372 P.2d 919, 924, 22 Cal. Rptr. 879, 884 (1962) (separate opinion).

159. The dissent also maintained that discovery violated the privilege against self-incrimination but the main objection was based upon the belief that the defendant had an absolute right to silence. *Id.* at 65, 372 P.2d at 924-25, 22 Cal. Rptr. 884-85.

160. Cal. Const. art. 1, § 13.

161. Cal. Stats. 1953, ch. 50, § 1. This section was repealed in 1965. Cal. Stats. 1965, ch. 299, § 147.

162. The constitution of California permitted comment on the defendant's failure to testify. Cal. Const. art. 1, § 13. The Supreme Court, in *Griffin v. California*, 380 U.S. 609 (1965), held such comment violated the privilege against self-incrimination.

motion to dismiss was granted or he was not given full discovery upon which to base his decision, and secondly, where the defendant refuses to participate in discovery in order to protect the incriminatory evidence.

Since there is no compulsion under the new Rule because the defendant may resort to continuances, the incrimination results from the defendant's voluntary participation in discovery. In the second case the defendant has been denied no benefits because he may resort to a continuance which will provide him with the benefits that he would have received under discovery. In all other cases there appears to be no legitimate interest to protect and the defendant should not be permitted to delay the inevitable for the sake of a surprise tactic.

## APPENDIX

### Rule 16

#### DISCOVERY AND INSPECTION

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) 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, (2) 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, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. 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.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) 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 motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the 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.

(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.

(g) *Continuing Duty to Disclose; Failure to Comply.* If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. 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.