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DISCOVERY OF WITNESS IDENTITY UNDER PRELIMINARY PROPOSED FEDERAL CRIMINAL RULE 16

INTRODUCTION

In 1966, the Judicial Conference of the United States promulgated the first major revision of the Federal Rules of Criminal Procedure.¹ Chief among the changes made by these revisions was the broadened right of discovery accorded an accused under federal indictment or prosecution.² This, however, was but a begrudging concession to the advocates of broad criminal discovery, for it granted the trial court almost unlimited discretion when passing upon defendants' motions for discovery. Consequently, the burden of materiality and reasonableness remained difficult hurdles in the path of the accused, and in numerous problem areas the trial courts were left either to force fit the accused's request into the general language of the rule or to deny the request with little or no comment.³ Nevertheless, there was general agreement that the promulgation of the 1966 version of Rule 16 would allow a workable yet equitable system, providing discovery for the accused while safeguarding the national security and the security of federal police files.⁴

Discovery of the names, addresses and criminal records of prospective government witnesses is of paramount importance in the preparation of an adequate defense. However, notwithstanding the view expressed by C. Allen Wright,⁵ the courts have almost universally denied such

1. *Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 39 F.R.D. 69 (1966). The rules were first enacted under the authority of 18 U.S.C. § 687 (1940), which authorized the Supreme Court to develop rules of pleading, practice and procedure in criminal cases in the federal district courts.

2. The 1946 discovery rule was exclusionary in nature. Aside from its discretionary language, the rule only allowed the accused to inspect and copy certain designated books, papers, documents or tangible objects which had been taken from him or seized by process or otherwise taken from third parties. The accused had to show that the discovery was material to the preparation of a defense and the request was reasonable. The 1946 rule contemplated no right of discovery for the prosecution. *See* 8 MOORE'S FEDERAL PRACTICE § 16.02[2], at 14-16 (1970).

3. *See, e.g., United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967); *United States v. Cobb*, 271 F. Supp. 159, 161 (S.D.N.Y. 1967); *United States v. Crisona*, 271 F. Supp. 150, 158 (S.D.N.Y. 1967).

4. *See* Address by C. Wright, Proceedings of the Twenty-ninth Annual Judicial Conference, Third Judicial Circuit of the United States, Sept. 8, 1966, in 42 F.R.D. 437, 567 (1966). Mr. Wright described discovery under Rule 16(a) as "a matter of right, subject only to the power of the court to issue protective orders in proper cases. . . ."

5. Mr. Wright envisioned the discovery of witnesses' identity under 1966 Rule 16(b). *See* 42 F.R.D. at 569. However, his enthusiasm had waned by 1969, perhaps because of

requests as beyond the scope of Rule 16.⁶ By the time the Advisory Committee (to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) began work on the 1970 Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, it was obvious that this area of discovery needed affirmative treatment.⁷ Hence the proposed amendments contain a completely revised Rule 16. The revised rule will allow nearly unlimited discovery, on motion, of the names, addresses and conviction records of the witnesses the government intends to call.⁸

SCOPE

This note will examine witness lists as a subject of criminal discovery. Primary consideration will be given the preliminary draft of proposed Federal Criminal Rule 16 (a)(1)(VI), (b)(1)(3) and related subsections. These subsections represent the major change in the proposed Rule 16 from earlier revisions and the first affirmative inclusion of wit-

the reception which the requests for such discovery had had in the courts. See C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 254, at 516 (1969).

6. See, e.g., *United States v. Chase*, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907 (1967); *United States v. Westmoreland*, 41 F.R.D. 419, 427 (S.D. Ind. 1967); *United States v. Tanner*, 279 F. Supp. 457, 473 (N.D. Ill. 1967); *United States v. Margeson*, 261 F. Supp. 628, 629 (E.D. Pa. 1966). There is provision made for the discovery of witnesses' names in capital cases. See 18 U.S.C. § 3432 (1964). From the earliest common law the right has never been thought to extend to non-capital cases. For a thorough discussion of section 3432 see Orfield, *Lists of Witnesses and Jurors in Federal Criminal Cases*, 44 F.R.D. 527 (1968).

7. Accord, ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1, at 52 (1969); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Wright *supra* note 5; Comment, *Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16*, 15 VILL. L. REV. 655 (1970).

8. Preliminary Proposed Amended Rule 16(a)(1)(VI), in PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 48 F.R.D. 547, 589-90 (1970) [hereinafter cited as 1970 PROPOSED AMENDMENTS], provides:

Upon motion of the defendant the court may order the attorney for the government to 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 at the trial together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. Names and addresses of government witnesses shall not be subject to disclosure if the attorney for the government certifies that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for the discovery of the names and addresses of witnesses has been made by a defendant, the government may move the court to perpetuate the testimony of such witnesses in a hearing before the court or a United States magistrate in which hearing the defend-

ness lists discovery in the Federal Criminal Rules.⁹ Further, this note will examine procedures of the various states relating to the discovery of witness lists in order to determine whether the shortcomings of existing state practices have been effectively avoided in the draft of the proposed federal rule. Finally, this aspect of the proposed Federal Criminal Rule 16 will be evaluated in light of the rapidly developing trend toward a more liberal criminal discovery, bearing in mind the necessity of protecting the interests of the parties involved.¹⁰

DISCOVERY OF THE WITNESS UNDER PAST AND PRESENT FEDERAL CRIMINAL RULE 16

In 1948, Congress enacted a statute which furnished the defendant in a capital case under federal jurisdiction with a list of witnesses' names and addresses at least three days prior to trial.¹¹ This was a reenacted portion of the Crimes Act of 1790 which had extended to those under indictment for treason.¹² These statutes notwithstanding, it is clear that no right to a witness list existed in noncapital cases at common law.¹³

ant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the government's case in chief in the event the witness has become unavailable without the fault of the government or if the witness has changed his testimony.

Analogous to 16(a)(1)(VI) is the prosecution's right of discovery. Preliminary Proposed Amended Rule 16(b)(1)(III), in 1970 PROPOSED AMENDMENTS, 48 F.R.D. 591-92: "Upon motion of the government, the court shall order the defendant to furnish the government a list of the names and addresses of the witnesses he intends to call at the trial."

9. See 1970 PROPOSED AMENDMENTS, 48 F.R.D. at 603-10.

10. For a general discussion of criminal discovery see Louisell, *supra* note 7; Reznick, *The New Federal Rules of Criminal Procedure*, 54 GEO. L. J. 1276 (1966); *Discovery in Criminal Cases*, 44 F.R.D. 481 (1968). For particular areas bearing on criminal discovery, see Comment, *Rights of a Criminal Defendant to Inspect Papers in the Possession of the State*, 16 BAYLOR L. REV. 51 (1964); *Pre-Trial Discovery in Criminal Cases*, 31 BROOKLYN L. REV. 320 (1965); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967); Note, *Pretrial Criminal Discovery: The Need for Expansion*, 35 U. CIN. L. REV. 195 (1966); Annot., *Discovery and Inspection of Prosecution Evidence Under Federal Rule 16 of Criminal Procedure*, 5 A.L.R.3d 819 (1966); Annot., *Statements and Reports of Government Witnesses Producing in Federal Criminal Case under Jencks Act* (18 U.S.C. § 3500), 5 A.L.R.3d 763 (1966); Annot., *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution*, 5 A.L.R.3d 8 (1966).

11. 18 U.S.C. § 3432 (1948).

12. See Orfield, *supra* note 6.

13. *United States v. Butler*, 25 F. Cas. 213, 216 (No. 14,700) (C.C.D.S.C. 1877); 6 WIGMORE ON EVIDENCE § 1850, at 391 (3d ed. 1940).

Thus, prior to the 1966 amendments to the Federal Criminal Rules, pre-trial discovery by the defendant, in general, was either very limited or non-existent. The dominant thinking was reflected by Judge Learned Hand in *United States v. Garrison*, "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense."¹⁴ This thinking, based upon the accused's right against self-incrimination and the "beyond a reasonable doubt" criteria for conviction, failed to consider the disadvantaged position of the individual defendant in preparing a defense against an adversary with practically unlimited investigatory machinery and resources. Nevertheless, pre-trial discovery for the accused was grounded on the assumption that the defendant was in the advantageous position.¹⁵

The 1966 amended rule contemplated an expanded discovery for the defendant and a reciprocal right of discovery in the prosecution.¹⁶ The overall thrust of the new rule was consistent with the desire to structure criminal procedure and proceedings with a greater emphasis on the quest for truth.¹⁷

The rule, envisioning a complete disclosure of those facts necessary to the preparation of a defense,¹⁸ set forth the general requirements of reasonableness and materiality as a standard for ruling on motions for discovery. Accordingly, at least one commentator immediately urged that defendants be allowed discovery of the names and addresses of all persons having knowledge of pertinent facts. Indeed, the discovery of the names and addresses has been considered to be a prerequisite to

14. 291 F. 646, 649 (1923).

15. The Advisory Committee indicated, however, that it appreciated the government's initial advantage:

While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. . . .

39 F.R.D. 69, 177 (1966).

The mutual disclosure in the committee note is not directed to witness lists, but a new approach is evident.

16. See AMENDMENTS TO RULES OF CRIMINAL PROCEDURE, in 39 F.R.D. 69, 175-76 (1965) (Advisory Committee's note to Rule 16).

17. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L. Q. 279. See generally, Louisell, *supra* note 7.

18. This basic requirement of disclosure was laid out as a principle by Chief Justice Marshall speaking in *United States v. Burr*, 25 F. Cas. 30 (No. 14,692) (C.C.D. Va. 1807). Since then, the principle has acted as a spring-board for the broadening of defense discovery regardless of the stage at which the request is made.

the ability to show reasonableness and materiality under 16(b).¹⁹ This interpretation would have been consistent with the requirement that the government must relinquish to the defendant information favorable to the defendant's case.²⁰

In practice, the 1966 amendment has been much more narrowly construed than the commentators had envisioned. The problem seems to revolve around the broad discretion with which the court is invested to grant or deny motions for discovery under the general criteria set up in the rule. Discretion allowed the trial judges to go beyond the spirit of the rules and close off myriad requests for discovery merely because the requests were not within the judicially construed ambit of the rule or because the requests appeared to the court to constitute an unauthorized rummaging through government files.²¹ A noted commentator, speaking with regard to criminal discovery and judicial discretion, said:

How can the trial judge be rational, and at the same time, sensible? And how can the appellate courts—or legislatures, for that matter—establish guides flexible enough to take account of realities, without committing the matter to the trial judges' unfettered "discretion"—little more than a euphemistic slogan for leaving the trial bench wholly at large and therefore, potentially, wholly arbitrary?²²

Under the present Rule 16, requests for lists of prosecution witnesses appear to be chief among the targets of judicial discretion. The almost universal application of judicial discretion to deny discovery of witness lists has been buttressed by the adamant refusal of appellate courts to

19. Address by C. Wright, *supra* note 4, at 569. Mr. Wright's view is buttressed by the restriction on discovery by the defendant of the statements of prospective government witnesses until they have testified in open court. Jencks Act, 18 U.S.C. § 3500 (1964). It is apparent that this restriction creates a "gap" with regard to the discovery of exculpatory information. Since every person interviewed in the investigation of a crime is a prospective witness for the United States, at least prior to trial, the defendant is denied access to any leads he might have gleaned from an examination of the statements. If the person interviewed is not called, his statement becomes forever an internal government document not open to discovery. To allow the defendant the names and addresses of the prospective witness would allow access to potential exculpatory information without compromising the content of government files. *See generally*, Reznick, *supra* note 10.

20. *See Brady v. Maryland*, 373 U.S. 83 (1963), holding that it is a violation of due process for the prosecution to withhold evidence favorable to the accused where the evidence is material to guilt or punishment.

21. *See* note 6 *supra*.

22. Louisell, *supra* note 7, at 56.

overturn the decisions of trial courts unless the defendant could show a clear abuse of the trial judge's discretion.²³ This reluctance is based upon the practical consideration that the trial judge is in the best position to make a subjective evaluation based upon the criteria of materiality and reasonableness.

The cases are legion which have rejected the defendant's request for discovery of a witness list.²⁴ Without explanation, the trial courts declare that witness lists do not meet the test of materiality or reasonableness. Thus, one court, while generally subscribing to a liberal discovery theory, tenaciously clings to the proposition that the prosecution should not be forced to relinquish witness lists prior to trial.²⁵ This same court has said that information is discoverable by the defendant " 'which the prosecution expects to utilize in proving the charges in this indictment.' " ²⁶ In the next breath, however, the court has denied a motion for discovery of a "certain category of witnesses" as being "clearly improper."²⁷ Will not the prosecution utilize its witnesses in proving the charges in the indictment? The analysis of the court in *United States v. Tanner*, however, is typical of judicial treatment of the present discovery Rule 16.

DISCOVERY OF WITNESS LISTS, STATE CRIMINAL PROCEDURES

Before discussing the nuances of witness list discovery under the proposed federal rule, it is profitable to investigate the approaches to this area of discovery in state criminal procedures. The comments to proposed Rule 16 cite twenty-two state statutes as representative of the state approach to criminal witness discovery.²⁸ However, the statutes of several other states also contain provisions for such discovery. Some of these statutes contain interesting procedural variations. This examination of the state efforts in discovery of criminal witness lists discloses both a definite trend and certain critical deficiencies.

23. See *Hemphill v. United States*, 392 F.2d 45 (8th Cir. 1968). The court in *Hemphill* further held that a guide for determining abuse would be whether or not the lower court's action prejudiced the case against the defendant. See also *Gevinson v. United States*, 358 F.2d 761 (5th Cir.), *cert. denied*, 385 U.S. 823 (1966).

24. See *United States v. Burgio*, 279 F. Supp. 843, 847 (S.D. N.Y. 1968); *United States v. Tanner*, 279 F. Supp. 457, 473 (N.D. Ill. 1967); *United States v. Birrell*, 276 F. Supp. 798, 825 (S.D. N.Y. 1967); *United States v. Westmoreland*, 41 F.R.D. 419, 427 (S.D. Ind. 1967).

25. *United States v. Tanner*, 279 F. Supp. 457, 471 (N.D. Ill. 1967).

26. *Id.* at 470.

27. *Id.* at 473.

28. 1970 PROPOSED AMENDMENTS, 48 F.R.D. at 603-04.

State statutes allowing discovery of the names of prosecution witnesses can be grouped into three general categories: (1) those statutes requiring endorsement of the names—not always addresses—of those witnesses appearing before the grand jury from which the indictment or presentation issued;²⁹ (2) those statutes requiring a list of those witnesses known to the prosecuting attorney;³⁰ and (3) those statutes requiring a list of witnesses the prosecution intends to call to prove its case.³¹

*Statutes Requiring Indorsement of Names of Witnesses
Before Grand Jury*

Seventeen of the twenty-two statutes cited as representative by the Rules Committee in its comment to proposed Rule 16 are of this type.³² Twelve states, in addition to those cited by the Rules Committee, have similar statutes.³³ Most trace their origins to nineteenth century proce-

29. See, e.g., ALASKA R. CRIM. P. 7(c); ARK. STAT. ANN. § 43-1004 (1947); MASS. GEN. LAWS ANN. ch. 277, § 9 (1959).

30. See, e.g., KAN. STAT. ANN. § 62-931 (1964); MICH. STAT. ANN. § 28.980 (Supp. 1969); S.D. COMP. LAWS ANN. § 23-20-4 (1967). South Dakota law differs with regard to informations, which require an indorsement of names known to the prosecution at the time of filing, and indictments, which require indorsement of the names of witnesses examined before the grand jury. See S.D. COMP. LAWS ANN. § 23-31-5 (1967). The different approach with regard to indictments and informations is representative of states which provide for certain crimes which can be prosecuted under each and the separate procedure that can grow up in this regard.

31. See, e.g., ARIZ. R. CRIM. P. 153; MD. R. CRIM. P. 728(a) (3).

32. ALASKA R. CRIM. P. 7(c); ARIZ. R. CRIM. P. 153; ARK. STAT. ANN. § 43-1004 (1964); CAL. PENAL CODE § 995(a) (West 1970); COLO. REV. STAT. ANN. §§ 39-3-6, 39-4-2 (1963); FLA. STAT. ANN. § 906.29 (1944), *superseded by* FLA. R. CRIM. P. 1.220(d); IDAHO CODE ANN. § 19-1404 (1948); IND. ANN. STAT. § 9-903 (1956); IOWA CODE ANN. § 772.3 (1950); KY. R. CRIM. P. 6.08; MINN. STAT. ANN. § 628.08 (1947); MO. ANN. STAT. § 545.070 (1953); NEV. REV. STAT. § 173.045 (1967); OKLA. STAT. tit. 22, § 384 (1969); ORE. REV. STAT. § 132.580 (1968); TENN. CODE ANN. § 40-1708 (1955); UTAH CODE ANN. § 77-20-3 (1953).

33. GA. CODE ANN. 27-1403 (1953); ME. REV. STAT. ANN. tit. 15, § 1317 (1965); MD. R. CRIM. P. 717; MASS. GEN. LAWS ANN. ch. 277, § 9 (1959); N. M. STAT. ANN. § 41-6-47 (1953); N.C. GEN. STAT. § 15-138 (1965); N.D. CENT. CODE § 29-11-57 (1960); PA. STAT. ANN. tit. 19, R. 207 (1964); S.D. COMP. LAWS ANN. § 23-31-5 (1967); TEX. CODE CRIM. P. ANN. art. 20.20 (1966); VA. CODE ANN. § 19.1-157 (Supp. 1960); W. VA. CODE ANN. § 52-2-8 (1966). Maine has an interesting variation on this type of statute. While the statute requires a list of witnesses appearing before the grand jury to be filed with the clerk of court, there is a specific prohibition against releasing this information until trial is had or the case otherwise disposed of. ME. REV. STAT. ANN. tit. 15, § 1317 (1965). On the other hand, ME. R. CRIM. P. 16(a), provides for inspection of written or recorded statements, testimony of witnesses, including transcripts of testimony of witnesses before the grand jury. Rule 16 became effective in 1969, and while not specifically repealing section 1317 it would seem to take precedence except in the case of a misdemeanor charge being heard before the district court or magistrate. Thus, it appears

dural reforms. The objective of these statutes is merely to avoid surprise and, in some instances, to provide limited assistance to the accused in preparation of a defense. In the final analysis, mere discovery of witnesses who appeared before the grand jury can hardly be said to fulfill the accused's right to know his accusers.

Often, this type of statute is construed as only directory in nature.³⁴ As thus construed, the statute has little efficacy because there is no sanction for failure to comply with its terms. In *Johnson v. State*,³⁵ error was assigned because the trial court permitted prosecution witnesses not listed on the indictment to testify. The Texas court, upholding the murder conviction, pointed out that the statute calling for indorsement of grand jury witnesses was directory only and, therefore, could not be construed as confining the prosecution to the witnesses listed on the indictment. The damaging testimony in this case came from unlisted witnesses whose identities were unknown to the defendant prior to trial. Nothing in the opinion indicates that these particular unlisted witnesses had testified before the grand jury, but because of the directory nature of the statute, an unlisted grand jury witness's testimony would have been admissible. The final determination of the admissibility in this situation was left entirely within the discretion of the trial court.³⁶

Furthermore, in states which have statutes requiring indorsement of grand jury witnesses, often it has become common prosecution practice to justify the issuance of an indictment with different witnesses than those utilized to prove the case at trial.³⁷ Thus even the state statutes requiring the indorsement of grand jury witnesses which are mandatory in nature are often rendered nugatory by the admission of the testimony of unlisted witnesses.³⁸

Legislative efforts to liberalize the discovery of witness lists through the use of grand jury indorsement statutes have been subjected to vary-

that discovery of the names of witnesses can be had by resort to Rule 16(a) while a list, as such, would not be available.

34. *E.g.*, TEX. CODE CRIM. P. art 20.20 (1966).

35. 205 S.W.2d 773 (Tex. Cr. App. 1947).

36. *See* Mullins v. State, 425 S.W.2d 354, 356 (Tex. Cr. App. 1968); Pruett v. State, 114 Tex. Crim. 44, 24 S.W.2d 41, 42 (1929).

37. *See, e.g.*, *Legislation, Florida's Proposed Rules of Criminal Discovery—A New Chapter in Criminal Procedure*, 19 U. FLA. L. R. 68, 91 (1966).

38. *See, e.g.*, MINN. STAT. ANN. § 628.08 (1947). *But see* State v. Poelaert, 200 Minn. 30, 273 N.W. 641 (1937), holding that it is not necessary for the state to indorse the names of witnesses other than those appearing before the grand jury and thereby opening the door to the unlisted additional witness; State v. Waddell, 187 Minn. 191, 245 N.W. 140 (1942), holding, in derogation of the prima facie legislative intent of the statute, that failure to indorse all grand jury witnesses was not fatal to the indictment. *See also*

ing interpretations by the state courts. The Oregon statute is typical of this process.³⁹ The Oregon Supreme Court, interpreting the statute in *State v. McDonald*,⁴⁰ has announced that only those witnesses the grand jury believes can give competent evidence, and whose evidence the prosecution expects to use at trial, need be indorsed on the indictment. This construction conceivably could defeat the legislative intent to insure that the defendant knows by whom he is accused. Further, if the prosecution expects to use at trial only some of the witnesses appearing before the grand jury, the accused can be effectively precluded from pursuing leads to exculpatory evidence which might be available from undisclosed witnesses.⁴¹

In states having grand jury indorsement statutes, failure by the prosecution to comply with the terms of the statutes has little effect upon the criminal proceeding. Some statutes require the defendant to request that the court compel the state to indorse the names on the indictment while granting no continuance unless the request is made at the earliest opportunity and only if justice so demands.⁴² Other statutes penalize the state for failure to comply with the statute by foreclosing the possibility of a continuance when an unindorsed state witness is absent on the day of trial.⁴³ The most effective method of enforcing the requirements of a grand jury indorsement statute⁴⁴ has been adopted by California. In that state a second statute provides that when there is a failure to indorse all grand jury witnesses on the indictment, the trial court "shall order them to be so inserted or indorsed. . . ." ⁴⁵

UTAH CODE ANN. § 77-20-3 (1953). The Utah statute is mandatory, *but see* *State v. Redmond*, 19 Utah 2d 272, 430 P.2d 901 (1967) which allowed an unlisted witness to be called where the defendant made no claim that the district attorney failed to list preliminary hearing witnesses nor requested the court for a list of additional witnesses.

39. ORE. REV. STAT. § 132.580 (1959).

40. 231 Ore. 24, 361 P.2d 1001, *cert. denied*, 370 U.S. 903 (1961).

41. *See* Reznick *supra* note 10, at 1286-87. Mr. Reznick makes this same point with regard to federal witness lists and statements affected by the Jencks Act, 18 U.S.C. § 3500 (1964). *See also* Katz, *Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform*, 5 CRIM. L. BULL. 441, 454 (1969).

42. *See* 6 N.M. STAT. ANN. § 41-6-47 (1953); N.D. CENT. CODE § 29-11-57 (1960); MD. R. CRIM. P. 717. Maryland also has an independent discovery rule which allows the accused on motion, after demonstrating materiality and reasonableness of request, to obtain a list of names and addresses of witnesses the prosecution intends to call to prove its case. MD. R. CRIM. P. 728(a) (3).

43. *See* IND. ANN. STAT. § 9-903 (1956); for an uncharacteristically broad application of judicial discretion in construing the limits of this type of statute *see* *Bernard v. State*, 248 Ind. 688, —, 230 N.E.2d 536, 540 (1967).

44. CAL. PENAL CODE § 943 (West 1970).

45. *Id.* § 995A (emphasis added). For a judicial construction of this statute *see* *People v. Carella*, 191 Cal. App. 2d 115, 12 Cal. Rptr. 446 (1961).

It is clear that one of the legitimate goals of progressive criminal procedure, avoidance of surprise, cannot be attained by a statute that: (1) is directory; (2) admits of several and varied constructions; and (3) provides inadequate and discretionary sanctions for noncompliance by the prosecution.

*Statutes Requiring Indorsement of Witnesses Known
to Prosecuting Attorney*

Four of the states cited in the comments to proposed Rule 16 have adopted statutes requiring the indorsement of all witnesses known to the prosecuting attorney on the indictment.⁴⁶ In addition, one other state has a similar provision requiring such indorsements on informations.⁴⁷

Again, the purpose of this type statute is to avoid surprise and to aid the accused in the preparation of a defense.⁴⁸ These statutes place a greater burden upon the prosecution than do the statutes requiring indorsement of only the grand jury witnesses. There is no opportunity, if the statute is strictly construed, to avoid listing a known prosecution witness by keeping him entirely out of the case until trial.

Enforcement of this type of statute ranges from discretionary power subject to reversal for abuse to strict compliance with exceptions.⁴⁹ The sanctions invoked to insure compliance with the statutes in this category are varied. Kansas denies the prosecution a continuance if an unlisted witness is absent from trial.⁵⁰ South Dakota, on the other hand, provides that the indictment or information will be set aside on defendant's motion, if the state has not complied with the indorsement statutes.⁵¹

46. FLA. R. CRIM. P. 1.220(e); KAN. STAT. ANN. §§ 62-802, -931 (1964). MICH. COMP. LAWS ANN. § 767.40 (1968); MONT. REV. CODES ANN. § 95-1503 (1969); NEB. REV. STAT. § 29-1602 (1964).

47. S.D. COMP. LAWS ANN. § 23-20-4 (1967).

48. See *People v. McIntosh*, 6 Mich. App. 62, 148 N.W.2d 220 (1967); *Dolen v. State*, 148 Neb. 317, 27 N.W.2d 264 (1947).

49. Compare *State v. Robertson*, 203 Kan. 647, 455 P.2d 570 (1969) (where the state could endorse additional witnesses within the discretion of the courts) with *State v. Pappenga*, 76 S.D. 37, 83 N.W.2d 518, 520 (1957) (where the defendant had to allege surprise along with a motion for a continuance upon the endorsement of an additional witness, and absent such procedure no prejudice would be presumed), and *People v. McIntosh*, 6 Mich. App. 62, 148 N.W.2d 220 (1967) (where the right to indorsement is said to be substantive), and *People v. Dickinson*, 2 Mich. App. 646, 141 N.W.2d 360 (1966) (where failure to indorse a *res gestae* witness, with exceptions, is prejudicial error).

50. KAN. STAT. ANN. § 62-931 (1964).

51. S.D. COMP. LAWS ANN. § 23-36-1 (1967). This statute is modified in the case of rebuttal witnesses who may be indorsed after the state rests. *State v. Weinandt*, — S.D. —, 171 N.W.2d 73 (1969). The allowance made for indorsement of rebuttal witnesses

Michigan presents one of the most interesting statutes because it represents the most comprehensive approach in its judicial enforcement. The statute was drafted for use in prosecutions by information and, aside from prescribing that all witnesses known to the state must be indorsed, the statute also provides, "Names of additional witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."⁵² Because the statute provides that all witnesses *known* to the prosecution must be indorsed, in the first instance, meaningful discovery of the names of witnesses depends in large measure upon the good faith and charity of the prosecution. Later, if the defense happens to discover the existence of an unidentified witness, or the prosecution seeks to introduce an additional witness, both sides are at the mercy of judicial discretion. This discretion determines, *inter alia*, the right to use the witness, the time for disclosure, and the possibility of a continuance to meet the unexpected witness's testimony. Overall, however, the Michigan judiciary seems to have exercised discretion in the interest of discovery and, therefore, in an atypical manner.

As has been pointed out, in Michigan the right to the witness's identity has been construed as a substantive right.⁵³ Where, however, the unindorsed witness is not a *res gestae* witness, *e.g.*, a witness whose testimony goes to identity, he need not be indorsed.⁵⁴ There is also authority which indicates that rebuttal witnesses must be indorsed under penalty of reversal, even though their names are known.⁵⁵ Thus, the Michigan procedure provides a relatively useful tool for the avoidance of surprise and the preparation of a defense.

In the final analysis, this type of statute comes closer to open discovery than the grand jury statute. It must be pointed out, however, that, as construed by most states, even these statutes are inadequate as

after trial has commenced is common to most states regardless of the type of statute they have. *See, e.g.*, *Thompson v. State*, 230 Md. 113, 186 A.2d 461 (1962); *State v. Washington*, 383 S.W.2d 518 (Mo. 1964).

52. MICH. COMP. LAWS ANN. § 767.40 (1968).

53. *People v. McIntosh*, 6 Mich. App. 62, 148 N.W.2d 220 (1967).

54. *People v. Kern*, 6 Mich. App. 406, 149 N.W.2d 216 (1967). This case also held that where the prosecutor indorses the name of other than a *res gestae* witness, he must produce him just as he must produce a *res gestae* witness. The prosecutor may escape the duty of production so long as he demonstrates due diligence in an effort to secure the witness's presence at trial.

55. *See People v. Rose*, 268 Mich. 529, 256 N.W. 536 (1934). This case was cited with approval in *People v. Sacharczyk*, 16 Mich. App. 710, 168 N.W.2d 639 (1969), which held it reversible error to introduce, in rebuttal, the testimony of two *res gestae* witnesses without first indorsing their names.

discovery devices. In securing a full application of the right conferred, too much is left to judicial discretion and prosecutorial good faith. On the other hand, unlike the grand jury indorsement statute, these statutes under the proper circumstances do grant the accused the right to the identity of at least some of the prosecution's material witnesses; at best, full disclosure of all of the witnesses for the state would be mandated.

*Statutes Requiring List of Witnesses which
Prosecution Intends to Use at Trial*

Indorsement statutes involving the list of witnesses which the prosecution intends to use at trial come closest to the spirit of the proposed amended Federal Rule 16(a)(1)(VI). Two of the state statutes cited by the advisory committee in their comment to proposed amended Rule 16, those of Arizona and Illinois, are of this type,⁵⁶ while four other states have enacted similar discovery provisions.⁵⁷

Arizona and North Dakota take a similar approach, requiring by statute the indorsement of witnesses in regard to an appearance before the grand jury, and compelling by rule of court the indorsement of the names of witnesses to be called by the prosecution. No penalty for a failure by the state to indorse is prescribed. The statutes provide, however, that on motion by the defendant, the court *shall* direct that the names be indorsed. The only sanction mentioned in the statutes is directed against the defendant, denying a continuance when the state calls an unlisted witness if the defense's request for the continuance is not timely and necessary to insure justice.

The purpose of the Arizona statute is to enable the accused to better prepare a defense.⁵⁸ The failure to indorse the name of a witness will not of itself disqualify him,⁵⁹ and the prosecution is under no affirmative duty to call all listed witnesses.⁶⁰

Maryland's rule 728(a)(3) is another variation of this type of stat-

56. ARIZ. R. CRIM. P. 153; ILL. ANN. STAT. ch. 38, § 114-9 (Smith-Hurd 1964).

57. N.J. REV. RULES 3:13-3(c-d); MD. R. CRIM. P. 728(a)(3); N.D. CENT. CODE § 29-11-57 (1960); WASH. REV. CODE § 10.37.030 (1961).

58. *State v. King*, 66 Ariz. 42, 182 P.2d 915 (1947).

59. *State v. Thorp*, 70 Ariz. 80, 216 P.2d 415 (1950). North Dakota's statute, N.D. CENT. CODE § 29-11-57 (1960), has been similarly construed. *State v. Hopperstad*, 69 N.D. 65, 283 N.W. 785 (1939).

60. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446, cert. denied, 357 U.S. 932 (1958); *State v. Lowell*, 97 Ariz. 269, 399 P.2d 674 (1965).

ute.⁶¹ This procedural rule is designed to aid the defense in the preparation of its case and to avoid surprise.⁶²

The Washington statute provides reciprocal discovery of witnesses intended to be used at trial.⁶³ However, either party may add any additional witnesses, as the court may permit, until the day of trial. The purposes of this statute are to enable the defense to prepare for trial and to safeguard the state against surprise.⁶⁴ Unfortunately, the statute's provisions are not mandatory. Failure to comply must result in great injury to the defendant or an abuse of discretion by the trial court in order to justify reversal.⁶⁵

This third type of statute appears to be of great benefit to the criminally accused defendant. Generally, however, one shortcoming is the lack of a corresponding discovery right for the state. The few states having provisions for reciprocal discovery, with the exception of Washington, grant a discovery to the accused different in kind and effect from that made available to the prosecution. There is a great deal of difference between allowing the prosecution to discover the witnesses the defense *intends* to call and granting the defense access to the witnesses *known* to the prosecution. The state is able to count on a

61. See also ILL. ANN. STAT. § 114-9(e) (1964), which is similar to Maryland's statute. The right is secured on motion of the defendant, but there is no requirement of reasonableness or materiality. The court has statutorily granted discretion to allow unlisted witnesses to testify where the prosecution shows that it did not know of them nor would diligence have disclosed them prior to trial.

62. *Brunson v. State*, 9 Md. App. 1, 261 A.2d 794 (1970). There is no sanction against the state for failure to include a name in the witness list. *Bieber v. State*, 8 Md. App. 522, 261 A.2d 202 (1970).

63. Florida has a similar, albeit hybrid, rule. FLA. R. CRIM. P. 1.220 (e). The Florida statute is also reciprocal, but the reciprocity is far from equal. This rule can be used by an accused in addition to or as an alternative to a motion by the defendant for endorsement of the names and addresses of witnesses upon which the indictment or information is based. *Id.* 1.220(d), *incorporating* FLA. STAT. ANN. § 906.29 (1944). The reciprocal process is initiated by the defendant who offers to the prosecution a list of the witnesses he intends to rely upon at trial. The prosecution must then reciprocate with a list of witnesses known to the state.

New Jersey on the other hand, provides that on motion by the defendant, and in the absence of good cause to the contrary, the state will disclose the names and addresses of persons the state *knows* to have information *and* indicate which of those persons the state intends to call. If the court grants discovery to the defendant, then it *may* condition its order by allowing the state to discover the names and addresses of persons *known* to the accused and whom he intends to call. N.J. REV. RULES 3:13-3(c-d). The concept of reciprocity presents a constitutional question with regard to the right against self-incrimination. The question will be discussed in considering Preliminary Proposed Rule 16(a)(1)(VI) *infra*.

64. *State v. White*, 74 Wash.2d 392, 444 P.2d 661 (1968).

65. *State v. Jones*, 70 Wash.2d 591, 424 P.2d 665 (1967).

defense that is somewhat defined. The defense, however, must either guess which witnesses will be utilized or rely upon a prosecutorial gratuity to indicate which people will appear as witnesses in the cause. There is a trend in modern criminal procedure toward a corresponding discovery right for the prosecution and the defense.⁶⁶ Nevertheless, it is submitted that without equality both as to kind and effect of discovery for both parties, the value of the discovery right will remain limited.

The positive effect of these statutes, like their grand jury indorsement and prosecutorial knowledge counterparts, is further minimized by undefined discretion and undefined sanctions for failure to comply. The statutory purposes are invariably said to be the avoidance of surprise and to aid in the preparation of a defense. These purposes, however, often are defeated by allowing the trial judge to entertain motions for the addition of witnesses. And, conceivably, that same judge could then deny a motion for a continuance, which would have enabled the defense to meet the testimony of the new witnesses, because, in his judgment, the request was not timely or failed to meet the abstract criteria of "furthering the interest of justice."

Finally, if we are to give force and effect to the trend toward pre-trial disclosure of facts in an effort to get at truth, if we are to make the disclosure of opposition witnesses an integral part of the goal of openness, we must develop rules that minimize variables and give positive criteria in weighing the efficacy of this type of discovery in a given case. These among other considerations, taken together, go a long way toward achieving the desired effect, to wit: the creation of a criminal proceeding that is designed not to produce convictions for convictions' sake but to produce justice in light of all relevant facts.

DISCOVERY OF WITNESSES UNDER PROPOSED FEDERAL CRIMINAL RULE 16

A cursory reading of the preliminary draft of the proposed amendments demonstrates the broad departure which the Advisory Committee has taken from the underlying discovery theory of the present Rule 16. The committee, at least with regard to witness lists, has relied heavily on the trend established in the states. The state statutes, however, have failed to produce the consistent discovery of witnesses at the pre-trial stage. The purpose of the proposed amended Rule 16 is the achievement of a broader right of discovery for both prosecution and

66. See, e.g., *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); *Brennen*, *supra* note 17.

defense. The committee has also expressed the view that broader discovery for the defense is dependent upon granting a broader right of discovery to the prosecution.⁶⁷

Discovery of Government Witnesses

Proposed amended Rule 16 (a) (1) (VI) provides that the court *may*, upon motion, order the government to disclose to the defendant a list of the names and addresses of *all* witnesses that the government intends to call at the trial. Further, the government must include any record of prior felony convictions of witnesses which is within the knowledge of the attorney for the government.⁶⁸

Under the present rule, judges consistently have exercised their discretion to stifle disclosure of information to the accused.⁶⁹ Similarly, state statutory purposes often have been frustrated by allowing unfettered discretion to rest in the trial court. However, the proposed rule does not require a showing of materiality, reasonableness, or need when making the motion for discovery under 16(a)(1)(VI).⁷⁰ While these criteria are abstract at best, they give trial courts some frame of reference for considering the efficacy of a particular motion for discovery. This unqualified discretion in the court, without any criteria for its exercise, could leave the court, in the words of Louisell, ". . . wholly at large and therefore, potentially, wholly arbitrary."⁷¹

It is submitted that the elimination of discretionary language in the rule would promote a willingness on the part of the courts to grant the discovery of witnesses' identities and would go a long way toward inculcating this type of discovery in our federal criminal procedure. This is plausible because the dangers to witnesses from a bad faith use of the discovered information is minimized by the ability of the court to deny discovery when the prosecution certifies that discovery in a particular instance could subject the witness to "substantial physical or economic harm or coercion."⁷²

Initially, one other problem arises with regard to the latitude of Rule

67. 1970 PROPOSED AMENDMENTS, 40 F.R.D. at 595-96.

68. *Id.* at 589.

69. *See, e.g.,* *Hemphill v. United States*, 392 F.2d 45 (8th Cir. 1968).

70. *Contra*, FED. R. CRIM. P. 16(b).

71. Louisell, *supra* note 7, at 56.

72. 1970 PROPOSED AMENDMENTS, 48 F.R.D. at 589-90. Further protection against a bad faith defendant can be had by resort to the protective order section of the rule hereinafter discussed. The bad faith defendant is also inhibited by the government's right of discovery which will be, in each instance, equal if not reciprocal.

16. As with the states that provide for the discovery of witnesses the prosecution intends to call, there can be a gap created, because some witnesses the prosecution may not choose to call could provide valuable leads to exculpatory information. The problem is compounded in the federal courts where the movant must contend with the Jencks Act which protects a witness's statements from discovery until the witness has testified in open court.⁷³ Oftentimes, certain grand jury witnesses are not relied upon to prove the case in chief. Under the present construction of the preliminary proposed rule these witnesses could go undiscovered, absent the charity of the prosecutor in disclosing the unused witnesses' identity, because the new rule in no way vitiates the effect of the Jencks Act on discovery of the statements of unused government witnesses. And while in some instances the testimony of a witness before the grand jury might be discoverable, the defendant must sustain the heavy burden of demonstrating a particularized need out-weighing the policy of secrecy.⁷⁴

By the same token, should discovery of grand jury testimony be granted, reading the responses to particular questions would not always be as valuable as a conversation with the individual. In this way, some information, comprehensible only to the accused or his counsel, might come to light and, when pursued, might lead to important facts bearing on the guilt of the accused. This one exclusion from the rule is illustrative of the need for modification in order to achieve *complete* and therefore *meaningful* discovery of the witnesses for the government.

The rule includes as discoverable the felony convictions of witnesses which are within the knowledge of the prosecuting attorney. This type of discovery has heretofore been within the discretion of the court.⁷⁵ One commentator has pointed out that, unless some alternate means is devised to bring false replies to questions on cross examination with regard to prior convictions to the attention of the court, then this type of discovery is essential.⁷⁶ If the rule is given full effect, the wording

73. 18 U.S.C. § 3500 (1964). See Address by C. Wright, *supra* note 4, at 569.

74. *United States v. Wolfson*, 294 F. Supp. 267 (D. Del. 1968); *United States v. Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967).

75. See *United States v. Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967). For a case denying the right to discover a witness's conviction record along with discovery of government witnesses under the present Rule 16, see *United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967).

76. Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L. J. 477, 510. See also Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 47, 87-88 (1964); Reznick, *supra* note 10, at 1285. For a state statute granting discovery of conviction records of state witnesses, see N. J. REV. R. CRIM. P. 3:13-3(c).

should be adequate to insure the discovery of the conviction records of all the witnesses the government intends to call. This is because, in all likelihood, the conviction record will be a part of the information concerning the prospective witness which the prosecution will want to keep close at hand.

Discovery of Defense Witnesses

The Advisory Committee, in promulgating the proposed Rule 16, was convinced that the discovery available to the prosecution must correspond to that of the defense, and therefore, the committee included a right to discover the names and addresses of the witnesses the defense intended to call.⁷⁷ This has been the chief problem in the state statutes calling for a reciprocal discovery right to be given to the prosecution. For on the whole, the right has been an unequal one. For instance, in Florida the defense must offer a list of witnesses it intends to call, while the prosecution is only required to divulge the names of the witnesses known to it at the time of filing.⁷⁸ This problem would not be confronted under the proposed rule.

The constitutionality of any provision which grants discovery to the prosecution is questionable in light of the accused's privilege against self-incrimination,⁷⁹ and the fact that there is no federal case in point with regard to self-incrimination and the discovery of the names and addresses of defense witnesses. In order to overcome the problem, the concept of reciprocal discovery was developed. This theory provides that when the defendant makes application for discovery he thereby waives his right to invoke the self-incrimination privilege to defeat corresponding prosecutorial discovery.⁸⁰ This necessitates waiving the privilege in order to gain discovery. In this way the defendant is compelled to allow discovery. This is apparently done without considera-

77. 1970 PROPOSED AMENDMENTS, R. 16(b) (1) (III), 48 F.R.D. at 592. The rule appears in an alternative form. The first proposal is for an independent right of discovery of the names and addresses of defense witnesses. This approach is preferred by the Advisory Committee. The second proposal allows government discovery of defense witnesses only after the defense has applied for discovery. For a similar state approach, see FLA. R. CRIM. P. 1.220(e).

78. See FLA. R. CRIM. P. 1.220(e).

79. At least one state court has concluded that the discovery of the identity of an expert witness, whom the defendant contemplates calling at trial, is not a violation of the privilege. *Jones v. Superior Court*, 58 Cal.2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). See also Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965).

80. B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 256 (1969).

tion of the fact that in an analogous situation compulsory disclosure of a defendant's private information has been condemned as violative of the fourth amendment right against unauthorized search and seizure.⁸¹

An independent right to discovery on the part of the government, however, would allow the defendant to exercise his right to discovery while preserving his right against self-incrimination. The protective order under proposed Rule 16(d)(1) would afford the motion judge an opportunity to bar discovery information that is self-incriminatory in nature.⁸² While the protective order would be available regardless of whether prosecutorial discovery was independent or reciprocal, an independent theory would enable the defendant to exercise his right of discovery without raising the question of relinquishment of the right against self-incrimination. In any event, one commentator has indicated that the discovery of defense witnesses could escape all questions of violation of the right, because such discovery would only be anticipating a later revelation of the identity of defense witnesses on the trial of the cause.⁸³ This argument finds support under the new rule, since the only disclosure of witnesses that the prosecution can seek is the names of witnesses the defense *intends* to call.

In summary, then, the independent right of discovery of witnesses by the prosecution seems to be the preferred approach. Under an independent discovery theory, infringement of the right against self-incrimination is much less likely to occur. Discovery by the defense and discovery by the prosecution, which are consistent with pursuit of the goal of openness in the ascertainment of fact, proceed from different frames of reference, are motivated by different interests, and, in so far as the defense is concerned, must take cognizance of fundamental rights secured to the accused. Mr. Justice Douglas best summarized the case for independent discovery 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

81. *Boyd v. United States*, 116 U.S. 616 (1885). See also dissent of Mr. Justice Douglas to the 1966 Amendments of the Federal Rules of Criminal Procedure, H.R. Doc. No. 390, 89th Cong., 2d Sess. 14-15 (1966).

82. Protective orders will be dealt with later. It should be noted, however, that the issuance of the order under proposed rule 16(d)(1) would be within the discretion of the court and after the defendant had sustained the burden of a "proper showing." No showing is required for prosecutorial discovery and there is no apparent discretion in the court to deny discovery of witnesses by the government under 16(b)(1)(3).

83. B. GEORGE, *supra* note 80, at 256.

defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.⁸⁴

*Protective Non-Disclosure, Preservation of
Testimony and the Protective Order*

The preliminary draft of proposed Rule 16 embodies a threefold approach toward protection against abuse in the discovery of witnesses' names and addresses. Two of the enumerated safeguards, protective nondisclosure and the preservation of testimony, are for the exclusive use of the government.⁸⁵ The third, the protective order, has been expanded to allow its use by the defense as well as the government.⁸⁶

To invoke protective non-disclosure, the attorney for the government need only certify to the court that discovery of the identity of government witnesses may subject the witness or others to "physical or substantial economic harm or coercion."⁸⁷ The court must prevent discovery when the government invokes this provision. This power lodged in the prosecution is analogous to the widely criticized provisions of the present rule which subject discovery to the unfettered discretion of the court. It is true that that prosecution, should it act in bad faith, could frustrate the purpose of the rule. However, it would be presumptuous to impute bad faith to a government prosecutor by denying such a right, especially in consideration of the compelling state interest which he must protect.

The major argument against a right of discovery of the identity of government witnesses has been the fear of the defendant who would abuse the right by suborning perjury and threatening witnesses.⁸⁸ This problem can become particularly acute when the accused is a member of a ruthless criminal syndicate.⁸⁹ Uncontrolled witness intimidation

84. Douglas, *supra* note 81, at 15.

85. Both of these devices are included in 1970 PROPOSED AMENDMENTS, R. 16(a)(1) (IV), 48 F.R.D. at 589-90.

86. This change is reflected in the substitution of "a party" wherever "the government" had heretofore been used. 1970 PROPOSED AMENDMENTS, R. 16(d)(1), 48 F.R.D. at 593.

87. *Id.* 16(a)(1)(VI), 48 F.R.D. at 589-90.

88. See Brennen, *supra* note 17.

89. Beyond protective non-disclosure another means for protecting against abuse by the criminal syndicate and its "house counsel" has been proposed by Harris Steinberg. He feels that the good faith defendant should not suffer by limited discovery because of abuse of discovery by syndicate lawyers.

If you are talking in terms of an unworthy bar, let's whip the crooks out of the temple of justice, but let's not use discovery to do it, let's use disbarment here. I say to you that lawyers should be treated as lawyers . . .

could subvert the entire system of criminal justice.⁹⁰ Further, as one noted authority has indicated, ". . . to explain why you are fearful, is very likely to disclose the very information that will subject your witness to danger."⁹¹ For any system of criminal justice to meet its goal of removing the criminal from society, the free flow to enforcement officials of information regarding criminal activity must be preserved. If adequate protection is not given to informers, there is not likely to be a continuation of their services.⁹²

If criminal discovery is to be efficacious, it must be predicated upon an adversary situation wherein both prosecution and defense are sincere in their efforts to pursue the truth. Absent this intent, there must be available strong safeguards against abuse.⁹³

The second weapon in the prosecution's arsenal of safeguards is the right of the government to move for the preservation of its witnesses' testimony after the accused has moved for the discovery of their identities.⁹⁴ The Advisory Committee has indicated that this procedure is an alternative to protective nondisclosure.⁹⁵ In order to utilize this

if they do unbecoming things, they should be disciplined, on proof, before a referee. . . . I think that a few well directed, well-chosen, vigorously-administered disbarment hearings will have a wonderful effect and will relieve the District Attorney of making these deep psychological insight evaluations of lawyers before they give discovery.

Remarks by Harris Steinberg in a panel discussion before the Judicial Conference of the Second Judicial Circuit, Sept. 8, 1967, *Discovery in Criminal Cases*, in 44 F.R.D. 481, 524 (1967).

90. The Advisory Committee has cited two extreme cases involving witness intimidation; however, it is not the criminal defendant's nature that is critical, rather, whatever his nature, the criminal defendant is capable of abuse of discovery and any rule must recognize the potentials for abuse and guard against them. See *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962).

91. Remarks by Jon O. Newman in a panel discussion before the Judicial Conference of the Second Judicial Circuit, Sept. 8, 1967, *Discovery in Criminal Cases*, in 44 F.R.D. 481, 499 (1967).

92. See *United States v. Estep*, 151 F. Supp. 668, 672-73 (N.D. Tex. 1957).

93. Strong support for protective non-disclosure is given by the ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.5(b) (1969), which grants this power of protection in the *discretion* of the court. Even though the STANDARDS do not go as far as the Preliminary Proposed Rules, which give the right to the prosecution without benefit of judicial discretion, the ABA approach is noteworthy because the STANDARDS represent the least discretionary and most liberal approach to criminal discovery to date.

94. The provision for a hearing to preserve the testimony of government witnesses is contained within Proposed Rule 16(a)(1)(VI) as is the option for protective non-disclosure.

95. 1970 PROPOSED AMENDMENTS, 48 F.R.D. at 605.

safeguard, the prosecution moves the court to preserve the testimony of any or all witnesses. The testimony is taken at a separate hearing where the defendant has the right to cross-examine the witness. The preserved testimony is admissible to prove the prosecution's case in chief in the event the witness is unavailable at the time of trial, without government fault, or has changed his testimony.

The clear purpose of this device is to minimize the incidence of subornation of perjury and intimidation of witnesses.⁹⁶ By preservation, it is thought that there will be no impetus for witness intimidation, because the testimony will be available no matter what happens to the witness. However, even though the preserved testimony is available to the prosecution, testimony in this form will not be as convincing to a jury as testimony delivered willingly and clearly by the witness at trial. Also, as this part of Rule 16(a)(1)(VI) is now constructed there is no protection for the witness. The government ends up with their admissible testimony, but the witness is left with his identity revealed to potential detractors, or even assailants. Further, there is nothing to prevent a bad faith defendant or his confederates from "getting to the witness" at or just before the preservation hearing thereby inducing perjured testimony because of fear.⁹⁷ This is a most important consideration in light of the Supreme Court decisions which hold that the defendant and his counsel must have an adequate opportunity to cross-examine the witness for the government.⁹⁸ It is not likely that the government will make great use of the right to preserve testimony unless it is clear that the witness will be unavailable for trial through no fault of his own or unless there is little chance that the accused or his counsel will engage in intimidation or suborning of perjury. When safeguards are needed, a prosecutor is most likely to choose the protection most comprehensive, protective nondisclosure.

If the prosecution should choose to exercise its right to preserve testimony, the courts will be constrained to rule whether the use of the

96. *Id.*

97. See Remarks of Jon O. Newman, *supra* note 91, at 499. Cf. Brennan, *supra* note 88, at 99-101.

98. See *Bruton v. United States*, 391 U.S. 123 (1968); *Pointer v. Texas*, 380 U.S. 400 (1964). It is obvious that "an opportunity" to cross-examine, when viewed in the context of preserving testimony under Rule 16, will necessitate adequate notice as to time and place of hearing, the purpose for which the witness is called and, probably, the identity of the witness in order for the defendant to be able to meet the government's attack in the same way he would meet it at trial. The interlude between the motion to preserve and the hearing could afford the bad faith defendant or his confederates with the opportunity they need to engage in intimidation.

preserved testimony meets the requirements of the confrontation clause of the Constitution. Currently, the doctrine that is controlling with regard to confrontation and pre-trial hearings appears in *California v. Green*.⁹⁹ Read in light of *Green*, the provision made for the preservation of testimony in the proposed rules seems to meet every requisite of the confrontation clause of the Constitution.

The third safeguard accorded by proposed Rule 16 is the provision for the issuance of protective orders by the court under 16(d)(1).¹⁰⁰ The significant change from the protective order under present Rule 16 is that the amended version opens up the use of the protective order to the defense.¹⁰¹ While it is of little consequence to the defendant in the area of witness lists,¹⁰² the order can be invaluable where the government has sought discovery of a letter, document or other object that is self-incriminatory and therefore privileged. It is mentioned here because it illustrates the emphasis which the Advisory Committee places upon equality of discovery, not only as to disclosure, but also as to protection for both litigants. While the order issues in the discretion of the court after an affirmative showing, a similar procedure has been countenanced in a recent Supreme Court decision.¹⁰³

99. 90 S. Ct. 1930 (1970). In *Green* a witness's pre-trial hearing testimony was admitted to contradict his testimony in court. The testimony had been given in the presence of defendant's counsel who had an opportunity to cross-examine the witness at the hearing. The California Supreme Court reversed *Green*'s conviction because it construed the confrontation clause as not being satisfied by either cross-examination at the preliminary hearing or at the trial relative to prior testimony. *People v. Green*, 70 Cal.2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1968). Mr. Justice White, speaking for the majority, reversed the California Supreme Court observing that the witness, Porter, was

. . . [u]nder oath; respondent was represented by counsel . . . respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. . . . [W]e do not think a different result should follow where the witness is actually produced.

90 S. Ct. at 1938-39.

100. See 1970 PROPOSED AMENDMENTS, 48 F.R.D. at 593, 610.

101. See AMENDMENTS TO RULES OF CRIMINAL PROCEDURE, 39 F.R.D. 69, 175, 178 (1966) (Advisory Committee's Note to Rule 16).

102. It goes without saying, that the efficacy of the system of criminal justice in general, and discovery in particular, is dependent upon the uncompromising integrity of the government. Therefore, the system would fail completely if a safeguard were needed against government intimidation of witnesses or suborning of perjury.

103. See *Alderman v. United States*, 394 U.S. 165, 182 n. 14 (1969).

Continuing Duty to Disclose

The Advisory Committee has wisely included in proposed Rule 16 a section dealing with the continuing duty to disclose the names of additional witnesses and evidence that has come to light.¹⁰⁴ When the new witness or information become available, the party against whom discovery has been utilized then notifies the other party, his attorney, or the court of the existence of such additional evidence or witness. The burden then shifts to the court to modify its previous order, or to the other party to move for additional discovery. The approach is sound, because it requires affirmative acts in the interest of discovery from all parties concerned, including the court which presumably would act without further application if justice required.

Failure to Comply and Failure to Call

One of the greatest shortcomings of similar state procedures for discovery of witnesses is the lack of sanctions for failure to comply. This shortcoming appears in a majority of the states discussed. The unfortunate result is that the question of sanction is left entirely in the court's hands. The court must decide whether to penalize the non-complying party, and if so, what action to take, without the benefit of any statutory guidance. Here, the Advisory Committee has wisely left the sanctions for noncompliance to the discretion of the court.¹⁰⁵ The discretion, however, is not unfettered. Rather, it is a discretion to act in accordance with the circumstances that resulted in nondisclosure.¹⁰⁶

Proposed Rule 16 allows no comment at the trial regarding the failure to call a witness whom a party has indicated he expects to call.¹⁰⁷ The policy is clear that neither side should be required to use every detail of the case which he has planned. Both sides must be left free to meet exigencies not anticipated when the trial began. Thus, to force the calling of all listed witnesses would inhibit the ability to make use of tactical advantage as it arises. Likewise, to comment upon the failure to call the witness could prejudice the case because such comment has

104. See 1970 PROPOSED AMENDMENTS, R. 16(c), 48 F.R.D. at 592.

105. See *Id.* 16(d) (3), 48 F.R.D. at 593.

106. For a clear understanding of the reasoning behind the inclusion of such broad discretion for this area of enforcement in a rule that makes a patent effort to define and limit discretion, see AMENDMENTS TO RULES OF CRIMINAL PROCEDURE, 39 F.R.D. 69, 178 (1966) (Advisory Committee Note to Rule 16).

107. See 1970 PROPOSED AMENDMENTS, R. 16(a) (4), 16(b) (3), 48 F.R.D. at 590-91, 592, with regard to witnesses the defense has listed and failed to call.

the potential of raising an inference in the factfinder's mind that the witness, and therefore the litigant, is unreliable. Finally, the provision barring comment on the failure to call achieves the purpose of the rule in granting a liberal measure of discovery for fact ascertainment in preparation for the trial. The disposition of the case, however, is left to the evidence produced at trial.

CONCLUSION

This note has dealt with only one area that is part of the overall concern of criminal discovery, and the myriad rules and applications made by the various states to secure to defendants at least nominal discovery of the all important witness list.

One commentator has remarked, "The dilemma of criminal discovery is real and viable solutions to its many complex problems are not easily drafted."¹⁰⁸ And so it must be asked if the discovery of witnesses under the proposed amended rules presents a viable solution to the confusion of the states. Do 16(a)(1)(VI), 16(b)(1)(III), and the other subsections create a rule susceptible of uniform application in the interest of pre-trial fact ascertainment regardless of who is seeking the discovery? These questions, of course, will remain conjectural until the rule is adopted and the courts are given an opportunity to construe it.¹⁰⁹ In any event, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in drafting proposed amended Rule 16, and in particular the sections concerning the discovery of witnesses, has met the complex problems of discovery and affirmatively drafted a rule designed to alleviate the problem. More drafting will be needed before broad and liberal discovery is realized in criminal procedure. The trend, however, appears clear, and the disclosure of prosecution and defense witnesses, upon adoption of proposed amended Rule 16, will stand as one of the important achievements along the way.

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108. Comment, *Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16*, 15 VILL. L. REV. 655, 689 (1970).

109. Remarks by B. Kostelanetz in a panel discussion before the Judicial Conference of the Second Judicial Circuit, Sept. 8, 1967, *Discovery in Criminal Cases*, in 44 F.R.D. 481, 490-91 (1967). Speaking of the Federal Rules of Criminal Procedure, Mr. Kostelanetz said that "... the rules ... are ... what the motion judges—and more particularly the motion judge hearing your case says they are."