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# PROSECUTOR'S DUTY TO DISCLOSE

DAVID J. CANNON\*

In the investigation of a bank robbery, the prosecuting attorney has talked to a number of bank tellers and to customers who have viewed the defendant in a line-up and who have stated, "He's the man!" The prosecutor has also talked to two other customers who observed the robbery, viewed the defendant and stated that they had not seen the defendant on the night in question. Must the prosecutor tell the defendant about this evidence? The United States Court of Appeals for the Second Circuit has said, in *United States v. Wilkins*,<sup>1</sup> that failure to do so is a denial of due process.

The United States Supreme Court, in *Brady v. Maryland*,<sup>2</sup> has ruled that:

[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith, or bad faith of the prosecution.<sup>3</sup>

The rule formulated in *Brady* has caused and will continue to cause great concern among judges, prosecutors and defense attorneys even though most people are in full agreement with the principle of law for which it stands. The difficulties of the rule's application in an adversary system have been myriad. Among the questions raised by the *Brady* decision are the following: Must there be a demand? What is "evidence" for purposes of the *Brady* rule? What constitutes suppression? What evidence is favorable to the accused and who makes the determination? When must the evidence be revealed to the defendant? The purpose of this article is to point out some of the diverse views on these questions.

In recent years, discovery procedures in civil cases have been greatly expanded. Many legal scholars feel that the expanded availability of discovery is one of the most effective means of decreasing the backlog of cases which overburden the courts, particularly in metropolitan areas. If the old adage, "justice delayed is justice denied," has any merit, it is imperative that any method which might alleviate the delay is worthy of consideration by the legal profession.

No right to pre-trial discovery in criminal cases existed until the rather recent past.<sup>4</sup> However, the modern trend has been toward greater

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<sup>1</sup> 326 F.2d 135 (2d Cir. 1964).

<sup>2</sup> 373 U.S. 83 (1963).

<sup>3</sup> *Id.* at 87.

<sup>4</sup> 23 C.J.S. *Criminal Law* § 955 (1961).

ease of discovery and the Federal Rules of Criminal Procedure reflect the trend.<sup>5</sup> It should be pointed out, however, that rules for discovery in criminal cases are fraught with constitutional problems in that no rule may infringe on the right against self-incrimination. Mr. Justice Douglas pointed this out in his statement accompanying the transmittal of the Federal Rules to Congress.<sup>6</sup>

The Second Circuit, in *Wilkins*, extended the *Brady* rule and held that a request by the defendant is not a *sine qua non* to establish a duty to disclose on the prosecutor's part. The court's holding is a logical extension of *Brady* and seems clearly consistent with *Brady's* underlying philosophy. Due process cannot depend upon the request of the defendant. The extension of the rule, however, does place an added burden upon the prosecutor since he must, even in the absence of a request, decide what evidence should be disclosed. It would appear that materiality and relevance of some cases would be dependent upon the theory of the defense which would be unknown to the prosecutor.

Who determines what evidence is favorable? The Court of Appeals for the Fifth Circuit in *Williams v. Dutton*<sup>7</sup> held that the trial court *in camera* should have inspected the demanded evidence to determine whether it was favorable to the defendant. The court pointed out that the right of the accused to have such evidence cannot depend on the benevolence of the prosecutor.<sup>8</sup> The court cautioned, however, that unlimited discovery of the prosecutor's files would unduly impair effective prosecution of criminal cases.<sup>9</sup> This case illustrates the importance of making a demand for evidence. Without the demand, the court has nothing to inspect unless it looks at the entire files of the prosecution.

The Court of Appeals for the Second Circuit in *United States v. Jordan*<sup>10</sup> also held that the determination of what evidence is favorable to the defendant is one for the trial court subject to appellate review. The need to make a proper record of the discovery proceedings is clear; lacking it, the appellate court has nothing to review.

Contrasted with the decisions in *Dutton* and *Jordan* is the holding of the Court of Appeals for the Fourth Circuit in *United States v. Frazier*.<sup>11</sup>

The obligation upon the Government not to suppress favorable evidence . . . and affirmatively to disclose . . . does not make it

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<sup>5</sup> See, e.g., the text of Rule 16 of the Federal Rules of Criminal Procedure in the appendix to this article at page 529, *infra*.

<sup>6</sup> 39 F.R.D. 276 (1966).

<sup>7</sup> 400 F.2d 797 (5th Cir. 1968).

<sup>8</sup> *Id.* at 800.

<sup>9</sup> *Id.* at 801.

<sup>10</sup> 399 F.2d 610 (2d Cir. 1968).

<sup>11</sup> 394 F.2d 258 (4th Cir. 1968).

incumbent upon the trial judge to rummage through the file on behalf of the defendant.<sup>12</sup>

In *Frazier*, the United States Attorney advised the court that the defendant was aware of virtually everything in the government's file and also that there was no information which could be of aid to the defendant.

The Wisconsin Supreme Court appears to have answered the question in yet another manner in *State v. Herrington*.<sup>13</sup> Herrington's defense counsel requested the state to turn over all exculpatory evidence bearing on the issues of guilt or punishment. The trial court, as in *Frazier*, turned to the prosecutor. The court ordered that all exculpatory evidence be turned over to the defense. The prosecutor claimed that all such evidence had been made available to the defendant. On appeal, the defendant asserted that the trial court should have examined all files of the prosecutor and police department to see if its order had been complied with. The court replied:

From an examination of the record, we conclude that the trial court was fully cognizant of the holding in *Brady v. Maryland* and exercised considerable diligence in its proper application.<sup>14</sup>

It is self-evident that this ruling is dependent upon the good faith of the prosecutor. There was nothing in the record for the appellate court to review. It would appear from *Jordan* and *Dutton* that the Second Circuit and the Fifth Circuit, if confronted with the same fact situation, would hold differently.

The cases above point out the dilemma the practitioner encounters as he faces each case. Nowhere is the distinction in legal philosophies more apparent than in the opinions of Mr. Justice Fortas and Mr. Justice Harlan in the case of *Giles v. Maryland*.<sup>15</sup> The defendants in *Giles* were convicted of the rape of a sixteen-year-old girl and they alleged that the failure of the state to disclose the past history of the prosecutrix to the defendants denied them due process of law.

Mr. Justice Fortas, in a concurring opinion, enunciated his philosophy in the following terms:

I believe that deliberate concealment and non-disclosure by the State are not to be distinguished in principle from misrepresentation.<sup>16</sup>

.....

In my view, a supportable conviction requires something more than that the State did not lie. It implies that the prosecution has been fair and honest and that the State has disclosed all informa-

<sup>12</sup> *Id.* at 262.

<sup>13</sup> 41 Wis. 2d 757, 165 N.W.2d 120 (1969).

<sup>14</sup> *Id.* at 774, 165 N.W.2d at 128.

<sup>15</sup> 386 U.S. 66 (1967).

<sup>16</sup> *Id.* at 99.

tion known to it which may have a crucial or important effect on the outcome.<sup>17</sup>

The philosophy of Mr. Justice Harlan is well stated in his dissent:

The Court has held since *Mooney v. Holohan*, 294 U.S. 103, that a State's knowing use of perjured testimony denies a fair trial to the accused. *Mooney* has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta v. Texas*, 355 U.S. 28; *Napue v. Illinois*, 360 U.S. 264. The standard applied in such cases has been whether the testimony "may have had an effect on the outcome of the trial." *Napue v. Illinois, supra*, at 272. These cases were very recently followed and applied in *Miller v. Pate*, [386 U.S. 1 (1967)]. Apart from *dicta* in *Brady v. Maryland*, 373 U.S. 83, the Court has never gone further. Nor in my view, does the Constitution demand more.<sup>18</sup>

Mr. Justice White in his separate opinion in the *Brady* case points out that the due process discussion by the Court in *Brady* was wholly advisory.<sup>19</sup>

Judge Learned Hand expressed what has been called a prosecutor's view<sup>20</sup> of discovery in *United States v. Garsson*.<sup>21</sup>

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the various outline of his defense. He is immune from question or comment on his silence. He cannot be convicted where there is the least fair doubt in the minds of any one of the twelve. Why, in addition, he should in advance have the whole evidence against him to kick over at his leisure and to make his defense fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.<sup>22</sup>

But see the statement of Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia in *Williams v. United States*.<sup>23</sup>

The sporting theory of justice is no longer appropriate in criminal cases; the stakes are far too high, and the sides too unequal. Particularly in the case of an indigent defendant repre-

<sup>17</sup> *Id.* at 101 (concurring opinion).

<sup>18</sup> *Id.* at 116-17 (dissenting opinion).

<sup>19</sup> 373 U.S. at 91.

<sup>20</sup> Remark by Judge Edward C. McLeon of the United States District Court for the Southern District of New York at a panel discussion on "Discovery in Criminal Cases," before the Judicial Conference of the Second Judicial Circuit, September 8, 1967, as reported in 44 F.R.D. 481, at 486.

<sup>21</sup> 291 F. 646 (S.D. N.Y. 1923).

<sup>22</sup> *Id.* at 649.

<sup>23</sup> 393 F.2d 957 (D.C. Cir. 1968).

mented by Court-appointed counsel, the government's resources are overwhelmingly superior.<sup>24</sup>

These opinions reflect clear ideological differences. As Mr. Justice Brennan has pointed out, the issue of pre-trial discovery in criminal cases raises this clash of ideologies.<sup>25</sup> It is not surprising that the debate over discovery has been marked with some bitterness.

Mindful of the risk that this article might be used against me in future cases, I will nonetheless endeavor to set forth my own personal answers to the questions raised at the beginning of the article and to recommend the procedure defense attorneys should follow.

There is no legal requirement that a demand for the evidence be made; however, it is easier for the prosecutor when one is made. In busy metropolitan areas, prosecutors have little more than cursory preparation for the average case. Often the prosecutors are not aware of what the various case files contain. Defense attorneys should make their demands as specific as possible and should follow the specific request with a general request. This procedure will protect the record as well as defense counsel's reputation.

All exculpatory evidence, whether physical, oral or of whatever type, should be disclosed if the rule is to have any meaning. A distinction in this area would emasculate the rule.

To suppress is to refrain from divulging or to leave undisclosed. This would appear to mean that the prosecutor must disclose all he knows which is favorable to the defendant. A logical extension would hold him just as responsible if such information were in the hands of another prosecutor in the office or in the police files. Justice cannot be dependent upon who has the information. These interpretations, however, do not apply to cumulative evidence or evidence obviously within the knowledge of the defendant. Such evidence is not undisclosed and in no way deprives the defendant of a fair trial.

Whether or not evidence is favorable to an accused will often depend on the type of defense asserted. Candor by the defense attorney in conferences with prosecutors and courts will in most cases result in more evidence being disclosed. Those cases where the prosecutor feels that the defendant is setting traps most often result in the hard-line positions of prosecutors.

Who makes the determination of what is favorable to the defendant? In my opinion, the determination should be made by the prosecutor. To hold otherwise, it seems, would place an impossible administrative burden on the court and also would in some cases expose the court to information which would or could prejudice the court against the

<sup>24</sup> *Id.* at 963.

<sup>25</sup> Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U. L.Q. 279.

defendant. This method, however, is completely unsatisfactory if there is an allegation that the prosecutor is deliberately withholding favorable material. In such a situation, the evidence should be studied by a third party, either a judge or special master of some sort appointed by the court. This would protect the record of the trial, prevent law enforcement officials from being unjustly accused and also protect defendants who might be unduly harassed by the rare bad-faith prosecutor.

## APPENDIX

As the principal article states, *Brady v. Maryland* has raised many questions in the area of criminal discovery. What follows is a listing of decisions, articles and annotations which may help to clarify the impact of the *Brady* decision.

### CASES

#### *Must the defendant make a demand?*

The *Brady* decision was not directly concerned with the necessity of a demand and the rule that seems to come out of *Brady* is that "the suppression by prosecution, upon request, violates due process." The impression is left that the defendant must make a request.

Rule 16(f) of the Federal Rules of Criminal Procedure provides that a motion under the rule must be made within 10 days after arraignment or at such reasonable later time as the court may permit.

In addition to the decisions discussed in the principal article, the following cases discuss the necessity of a demand:

Fed.—*Barbie v. Warden*, 331 F.2d 842 (4th Cir. 1964) (Failure of defendant's attorney to ask for results of police department ballistics and fingerprint tests did not excuse prosecutor's failure to inform defendant of such reports.)

Ariz.—*State v. Fowler*, 101 Ariz. 561, 422 P.2d 125 (1967) (Not necessary that defendant request prosecution to disclose knife found at scene of crime.)

Cal.—*People v. Crovedi*, 49 Cal. Rptr. 724 (Dist. Ct. App. 1966) (The defendant's right to discover evidence in the possession of the prosecution must be timely asserted by a proper motion for an order of discovery and reasonably pursued; otherwise, it will be deemed waived.)

Fla.—*Drozewski v. State*, 84 So. 2d 329 (Fla. 1955) (Prior to trial, the defendant requested a list of all witnesses and the court granted the request. However, the defendant subsequently failed to follow this up with another request for the information from the state's attorney and the court held that it was proper for the state to introduce the evidence at trial.)

Ill.—*People v. Hoffman*, 32 Ill. 2d 96, 203 N.E.2d 873 (1965) (In a murder trial, the fact that the defendant's counsel knew of a

report concerning a certain piece of clothing about 3 weeks before trial, but made no request until the trial was in progress, did not render the request untimely. This was so because there was no indication that the production of the clothing would have delayed trial.)

**Iowa**—*State v. Bittner*, 209 Iowa 109, 227 N.W. 601 (1929) (In a murder trial, the refusal of the court to compel state to produce the written confession of an accomplice was not erroneous, in absence of a request for a subpoena duces tecum or adoption of any other means to effectuate the request therefor.)

**Mo.**—*State v. Malone*, 301 S.W.2d 750 (Mo. 1957) (In a murder prosecution, the court upheld the trial court's overruling of the defendant's oral request for the privilege of inspecting any articles taken from the body of the deceased on the ground that the request was untimely.)

**Ohio**—*State v. Hill*, 191 N.E.2d 235 (C.P. Ohio 1963) (The court held that a seasonable request before trial must be made; the circumstances of each case will govern.)

*What is "evidence" for purposes of the Brady Rule?*

The *Brady* decision did not discuss the problem of what evidence is subject to discovery. Many post-*Brady* decisions have been faced with this issue.

**A.** Is the defendant entitled to the work product of the prosecuting attorney? Most courts have said "no":

**Fed.**—*Saunders v. United States*, 316 F.2d 346 (D.C. Cir. 1963) (Where the government attorney has made only a substantial verbatim record of an interview, his notes are not immune from discovery, but where he has recorded his own thoughts such notes will fall within the work-product immunity.)

**Ariz.**—*State ex rel. Corbin v. Superior Court*, 99 Ariz. 382, 409 P.2d 547 (1966) (Reports compiled by law enforcement authorities in the course of their investigations constitute "work product" of the state and, as such, are privileged from pre-trial discovery.)

**Ark.**—*Edens v. State*, 235 Ark. 130, 359 S.W.2d 432 (1962) (The defendant was not entitled to copies of statements which the prosecuting attorney had obtained from state witnesses because they were part of the prosecuting attorney's work product.)

**Colo.**—*Happer v. People*, 152 Colo. 405, 382 P.2d 540 (1963) (Work sheets of the district attorney made in preparation for trial did not come within the coverage of the criminal procedure rule providing for production of statements of witnesses in possession of the prosecution after direct examination.)

**Fla.**—*State v. McCall*, 186 So. 2d 324 (Fla. 1966) (The statute providing for inspection of certain items cannot be applied when the material is clearly the work product of the prosecuting attorney.)

**N.H.**—*State v. Healy*, 106 N.H. 308, 210 A.2d 695 (1965) (Work product is immune from discovery; however, the court held that hos-

pital records made during the defendant's commitment were not part of the work product of the prosecuting attorney.)

N.J.—*State v. Tune*, 24 N.J. Super. 428, 94 A.2d 695 (1953) (Only in the most exceptional case and under the most unusual circumstances does a defendant have a right to discovery of the work product of the prosecutor.)

B. Must statements and documents be made available to the defendant prior to trial?

Fed.—*Gordon v. United States*, 344 U.S. 414 (1952) (Where there is not specific legislation, the question of whether a document would be ordered to be produced for inspection is governed by the principles of common law as interpreted by the courts of the United States in the light of reason and experience.); *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967) (Justice requires that the defendant at a criminal trial obtain prior statements of a witness which relate to his testimony.); *United States v. Gleason*, 265 F. Supp. 880 (S.D. N.Y. 1967) (There is no general requirement that a prosecutor deliver or report to a defendant statements of co-defendants that the defense would or might find helpful.); *United States v. Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D. N.Y. 1967) (Rule 16(b) permits the court to authorize disclosure of a defendant's statement, but the defendant is not relieved of an obligation to show good cause.)

Ariz.—*State ex rel. Helm v. Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961) (The court has an inherent power to order the production and inspection of certain papers, documents and articles when they are essential to the administration of justice; the defendant was given the results of blood alcohol test.)

Ark.—*Stout v. State*, 244 Ark. 676, 426 S.W.2d 800 (1968) (The Supreme Court of Arkansas held that the refusal, in a homicide prosecution, to require, on the defendant's motion, that the prosecuting attorney produce the defendant's written statement, made shortly after the defendant shot the deceased, for determining whether any inconsistency existed between such statements and the defendant's testimony, as the prosecutor claimed, was reversible error.)

Cal.—*People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959) (A defendant in a criminal case can, on proper showing, compel the production of documents in possession of the People which are relevant and material to the case; involved here was a prior statement of a prosecution witness.)

Colo.—*Ortega v. People*, 426 P.2d 180 (Colo. 1967) (Witnesses' statements in possession of police are within the rule which requires the prosecution to produce for the defendant any statement of a witness in possession of prosecuting attorney or under his control which relates to the subject matter to which the witness has testified; the rule includes notes by police which are substantially verbatim.)

Conn.—*State v. Pikul*, 150 Conn. 195, 187 A.2d 442 (1962) (It is within the discretion of the trial court to grant or deny a defendant

the right to inspect prosecution witnesses' statements in possession of the state's attorney.)

Del.—*State v. Hutchins*, 1 Storey 100, 51 Del. 100, 138 A.2d 342 (1957) (A pre-trial disclosure for impeachment purposes should not be directed.)

Fla.—*Scott v. State*, 207 So. 2d 493 (Fla. 1968) (The defense counsel was not entitled to the production of police reports containing statements of one of the state's witnesses.)

Ill.—*People v. Moses*, 11 Ill. 2d 84, 142 N.E.2d 1 (1957) (Where defense counsel has reason to believe that statements of the state's witness made to police officers on the day of the robbery in question are in the prosecution's possession, the defense is entitled to subpoena such records.)

Ind.—*Nuckles v. State*, 236 N.E.2d 818 (Ind. 1968) (The denial of the defendant's request to take depositions of specified police officers who had interrogated the defendant, taking his oral confession, was error, there being no showing by the state of a paramount interest in nondisclosure of the confession.)

La.—*State v. Bigham*, 239 La. 1094, 121 So. 2d 207 (1960) (The defendant in a murder case was entitled to inspect his written confession, but not copies of his oral statements.)

Mass.—*Commonwealth v. Chaplin*, 333 Mass. 610, 132 N.E.2d 404 (1956) (The defendant in murder case is not allowed to inspect a copy of his confession.)

Minn.—*State v. Grunau*, 273 Minn. 315, 141 N.W.2d 815 (1966) (The court held reports by officers, and certain mechanical, stenographic and electronic recordings, may come under the rule that pre-trial statements of witnesses called by prosecution must be produced for examination by the defendant.)

Mo.—*State v. Cody*, 379 S.W.2d 570 (Mo. 1964) (The defendant was not entitled to proceed under a statute respecting production of documents, where he made no showing of good cause; see Mo. REV. STAT. §510.030 (1959).); *State v. Aubuchon*, 381 S.W.2d 807 (Mo. 1964) (No general right of discovery by statute or rule in Missouri in criminal cases; however, the courts have generally held that defense counsel should be permitted to inspect any report or paper to which a witness has referred or used on the stand to refresh his recollection. There should be a showing of probability of materiality of the paper.)

Neb.—*State v. Williams*, 183 Neb. 257, 159 N.W.2d 549 (1968) (Defense counsel has no right to inspect or compel production of evidence in possession of the state; the trial court is invested with broad judicial discretion regarding the requiring of the production of written confessions, statements or other documentary evidence for inspection of defense counsel before trial.)

N.Y.—*State v. Rosario*, 9 N.Y. 2d 286, 173 N.E.2d 881, 213 N.Y.S. 2d 448 (1961) (Defense counsel should have been permitted to examine the prior statements of prosecution witnesses in their entirety for the purpose of cross-examination.)

Okla.—*State ex rel. Sadler v. Lackey*, 319 P.2d 610 (Okla. Crim. 1957) ("In the interest of justice, for good cause shown, where the denial of pre-trial inspection of a report in the possession of the

prosecution might result in a miscarriage of justice, the trial court has the inherent right in the exercise of sound judicial discretion to grant the remedy of pre-trial inspection of a report in the prosecution's possession where the primary source is no longer in existence and the report constitutes the only available source of evidentiary inspection."—FBI analysis of paint scrapings involved.)  
Wis.—*State v. Richards*, 21 Wis. 2d 622, 124 N.W.2d 684 (1963) (Defendants were convicted in circuit court of robbery and they appealed, contending, among other things, that the trial court committed prejudicial error in denying to them the production of prior statements allegedly made to police officers by one of the prosecution's witnesses. The Wisconsin Supreme Court held that a defendant in a criminal case is entitled to inspect statements previously made to the authorities by witnesses called to testify on behalf of the state. The court extended the right only to statements concerning the subject matter of the witnesses' testimony and written or signed by the witnesses or given orally and stenographically or mechanically transcribed. The court did not require that the inspection be afforded before the witnesses testify.)

C. There have been several decisions regarding the availability of records in possession of the prosecution:

Fed.—*United States v. Avella*, 395 F.2d 762 (3d Cir. 1968) (The court held that under *Brady* a defendant is not authorized to obtain a complete discovery of whatever records the government may have without any indication that they contain anything favorable to his case.)

Colo.—*Mendelsohn v. People*, 143 Colo. 397, 353 P.2d 587 (1960) (A defendant's right to inspection is non-existent without the proper statute; thus, it was not error to deny the defendant's motion to return his company's books prior to trial.)

Neb.—*Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947) (By rule of procedure in criminal cases, the court, in exercise of its sound discretion, should, where the prosecution is based upon the correctness or incorrectness of certain records or documents, allow an inspection of such records and documents upon request of the defendant; a lease was the document in question.)

N.H.—*State v. Healey*, 106 N.H. 308, 210 A.2d 486 (1965) (The defendant could, in the discretion of the trial court, be afforded the right of pre-trial inspection of records made by doctors or a hospital during the time the defendant was committed for observation or because of his mental condition.)

N.J.—*State v. Boutsikaris*, 69 N.J. Super. 601, 174 A.2d 653 (1961) (The defendant was entitled to inspect, before trial, an employer's records pertaining to an employee, who was a necessary witness against the defendant, to determine the existence of a report of a psychiatric evaluation of the employee.)

Wis.—*State v. Miller*, 35 Wis. 2d 454, 151 N.W.2d 157 (1967) (Although complaining witness admitted on cross-examination that she had previously falsely accused other men of having sexual intercourse with her, in view of the fact that defense counsel was

permitted wide latitude in his cross-examination of the witness and the fact that there was no indication the witness had ever denied her accusations against the defendant, refusal to require the state to turn over to the defendant whatever records it may have had concerning the mental condition of the witness was not improper; the case also held that Wisconsin does not recognize a right to pre-trial discovery in criminal cases.)

D. A few recent decisions involve the discoverability of evidence other than statements, records, and other documents:

Fed.—United States v. Knohl, 379 F.2d 427 (2d Cir. 1967) (A tape recording made by a prosecution witness of a conversation between her, her attorney, and the defendant was held producible under Rule 16(a)(1), in the discretion of the trial judge.)

Iowa—State v. White, 151 N.W.2d 552 (Iowa 1965) (The defendant was entitled to have an examination of tape recordings of an officer's radio calls and conversation to determine whether they contained information material to his defense that he had been entrapped by an informant working with the police.)

N.H.—State v. Superior Court, 106 N.H. 228, 208 A.2d 832 (1965) (The Supreme Court held that although there existed no right to pre-trial inspection in criminal cases, the trial court, "[I]n the exercise of reasonable discretion and to prevent injustice had power to require the production of specific objects or writings for inspection under appropriate safeguards and at a time appropriately close to the time of trial, if it should appear that otherwise essential rights of the respondents may be endangered or the trial unnecessarily prolonged." The court here allowed the inspection of guns, bullets, clothing, hair, a knife, an automobile, and vacuum sweepings.)

N.J.—State v. Murphy, 36 N.J. 172, 175 A.2d 622 (1961) (A rule relating to pre-trial inspection is not limited to evidence the state intends to use in prosecution; it contemplates pre-trial inspection as a matter of right of everything taken from the defendant other than his statement.)

Wash.—State v. Green, 70 Wash. 2d 955, 425 P.2d 913 (1967) (Whether a defendant is entitled to pre-trial inspection of evidence lies within the discretion of the trial court—a discretion that will not be disturbed unless there was a manifest abuse of that discretion; in this case, the court denied the defendant's request, one week before trial, for all statements, confessions, and physical evidence.)

E. The accused is not usually entitled to inspect the report of an investigating body, such as a grand jury, but inspection has been allowed where refusal might result in a miscarriage of justice:

Fed.—United States v. Bitter, 374 F.2d 744 (7th Cir. 1967) (The defense has the burden of showing particularized need for inspection of grand jury minutes; the case was reversed, apparently on other grounds, in 389 U.S. 15 (1967).)

Ariz.—State *ex rel.* Ronan v. Superior Court, 95 Ariz. 319, 390 P.2d 109 (1964) (There are only three circumstances which justify the trial court in ordering disclosure of testimony given before a grand jury: (1) after the witness has testified at trial, to determine whether the testimony is consistent with that given before the grand jury; (2) where the witness is charged with perjury; and, (3) when permitted by the court in furtherance of justice.)

Ill.—People v. Lighting, 83 Ill. App. 2d 430, 228 N.E.2d 104 (1967) (The defendant's pre-trial motion requesting the disclosure of the grand jury minutes was held to have been properly denied.)

N.M.—State v. Tackett, 78 N.M. 450, 432 P.2d 415 (1967) (A transcript of testimony of witnesses before a grand jury need not be supplied to the defendant in the absence of a showing of particularized need.)

Wis.—State *ex rel.* Johnson v. Coffey, 18 Wis. 2d 529, 118 N.W. 2d 939 (1963) (The Supreme Court quoted a previous decision which concerned grand jury testimony and stated that the same reasons apply for denying John Doe testimony. "[T]here exists the very practical reason, especially applicable to the situation where the jury is continuing to sit, that an inspection of the minutes, if permitted to any defendant for the purpose of preparing his defense, would advise the public of the subject under investigation, afford an opportunity to those interested in thwarting an inquiry into their acts of secreting evidence, tampering with prospective testimony, and generally embarrassing the work to be done by the grand jury, if not entirely defeating the object for which that body is designed." See WIS. STAT. §954.025 (1967).)

#### *What is "suppression?"*

Suppression by the prosecution of material evidence exculpatory to the accused is a violation of due process. It is not yet clear, however, what acts or omissions by the prosecuting attorney will be characterized as suppression. The following cases may be helpful:

Fed.—Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968) (Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, and irrespective of the good or bad faith of the prosecution; the prosecution, in addition, has the affirmative duty to produce, at the appropriate time, the requested evidence which is materially favorable to the accused, either as direct or impeaching evidence.); Ashely v. Texas, 319 F.2d 80 (5th Cir. 1963) (The failure of the district attorney to disclose to the defendant the opinions of both a state psychiatrist and a psychologist that the defendants were legally incompetent amounted to a denial of due process.); Woollomes v. Heinze, 198 F.2d 577 (9th Cir. 1952) (Affidavits by alleged eyewitnesses, which revealed that they had never been questioned by the police and that they had never disclosed what they knew to the defense counsel, was at most newly-discovered evidence and the prisoner was not entitled to a writ of habeas corpus on the ground that the prosecutor had suppressed evidence.)

Cal.—*People v. Mort*, 214 Cal. App. 2d 596, 29 Cal. Rptr. 650 (1963) (Whether the failure of the district attorney to call a particular witness constitutes suppression of evidence necessarily depends on the state of the evidence in a case, measured against facts to which an uncalled witness could testify.)

N.Y.—*People v. Whitmore*, 45 Misc. 2d 506, 247 N.Y.S.2d 787 (1965) (Though it was not unreasonable for the prosecution to believe that an FBI report might be inadmissible, the question of admissibility should have been left to the court, and failure to do so did not relieve the prosecution of its obligation to reveal the report to the defense for whatever usable purpose the defense might think proper.)

#### ARTICLES

Reznek, *The New Federal Rules of Criminal Procedure*, 54 GEO. L. J. 1276 (1966). The author discusses the 1966 amendments to the Federal Rules of Criminal Procedure. His emphasis is on Rule 16, which he feels is the most important amendment. Mr. Reznick states that the defendant is given the opportunity to obtain broader discovery if he makes certain disclosures about his case to the government.

Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHN'S L. REV. 206 (1965). The article discusses the possible effect that United States Supreme Court decisions like *Brady v. Maryland* could have on discovery rights of defendants as established by the Jencks Act. Mr. Wexler seems to feel that the constitutional principles set forth in *Brady* should not be broadly extended to the impeachment discovery rules promulgated by the Jencks Act.

Daggett, *Doctrine of Discovery in Criminal Law Procedure*, 43 N. DAK. L. REV. 333 (1966). The author discusses the recent trend in many states and in the federal courts toward expanded rights of discovery for defendants in criminal cases. He also discusses the problems arising under the present and proposed discovery procedures, especially those problems arising from disclosure at the discretion of the trial judge. The article contains strong arguments in support of the liberal trend.

Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L. J. 136 (1964). This comment contains a detailed discussion of the recent series of 14th Amendment cases involving the suppression of evidence by the prosecutor. The author would require the prosecutor to reveal *all* relevant evidence, not only the evidence that he thinks may be useful for defense purposes. "The prosecutor's job is to present the state's case, not to determine what theories his opponents can use." The author believes that to require the judge to determine what evidence should be disclosed would overburden the courts.

Comment, *The Need for Liberalized Rules of Discovery in Criminal Procedure*, 49 MARQ. L. REV. 736 (1966). The author analyzes dis-

covery practices, both federal and in Wisconsin, up to the date of the article. He also summarizes the arguments for and against liberalized criminal discovery.

*Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430: This article presents a very detailed discussion of the discovery mechanism available in Wisconsin and, in fact, details the criminal procedure from the time the defendant meets the attorney until he is paroled. The discovery portion of the article provides a guide to what should be done to gain and protect the defendant's rights under Wisconsin's strict view of discovery. The relevant state statutes are discussed.

#### ANNOTATIONS

Annot., 33 A.L.R.2d 1407 (1954) ("Suppression of Evidence by Prosecution in Criminal Cases as Vitiating Conviction").

Annot., 5 A.L.R.3d 819 (1966) ("Discovery and Inspection of Prosecution's Evidence Under Federal Rule of Criminal Procedure 16").

Annot., 7 A.L.R.3d 8 (1966) ("Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution").

Annot., 33 F.R.D. 47 (1964) ("Discovery in Federal Criminal Cases").

#### RULE 16

#### FEDERAL RULES OF CRIMINAL PROCEDURE

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 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.