Law and Tactics
in Criminal Cases

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~~Contributing~~

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VI. MOTION FOR DISCLOSURE OF EXCULPATORY EVIDENCE [NEW]

A. INTRODUCTORY

This is a new section of the book's consideration of pretrial motions available for discovery. It is an interpretative section concerning the hitherto largely overlooked constitutional requirements of discovery in criminal cases. Most of the cases considered here deal with post-trial discovery of information which was available to the prosecution but not to the defendant and holding the prosecutorial failure to disclose a violation of due process. This section analyzes those cases and attempts a synthesis. It suggests that the rights inherent in the cases should be available before trial by appropriate procedural mechanisms. However, demands for disclosure in certain cases may only be successful if made at the trial itself. Because more often the matter should be resolved before trial, this section is included in our consideration of pretrial motions.

B. HISTORICAL DEVELOPMENT—FROM *BURR* TO *BRADY*

An understanding of the evolution of constitutional requirements of criminal discovery is important to the preparation and persuasive arguments of the motion for disclosure of exculpatory evidence and thus we outline extensively this historical development.

As we read the rather unambiguous words of the Bill of Rights, an easily understood framework for the prosecution of criminal offenses appears established. The balance is struck in favor of the accused citizen, not the state. The accused is entitled to prompt notice of any official charge and a speedy trial, but not so speedy as to deprive him of a reasonable opportunity to prepare his defense. He is entitled to know both the nature and cause of his accusation, to confront his accusers, and to enjoy both the assistance of counsel and the compulsory process of court in securing his evidence.

In the face of such assurances, the real practice of criminal procedure has become such that lawyers and jurists alike are shaken whenever a court requires the observance of those lofty principles so often preached and so seldom practiced. Today's combat veteran of the criminal courtroom is shocked to hear that the Supreme Court is requiring prosecutors to voluntarily turn over to the accused all evi-

dence favorable to his defense, whether such information bears directly upon his innocence or indirectly by impeachment of government witnesses. This doctrine elevates to constitutional status the ethical precept of Canon 5 of the American Bar Association's Canons of Professional Ethics:

> . . . the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible . . .

Canon 5

The legal requirement of disclosure of all information which might aid the accused in seeking an acquittal has been a gradual evolution of fits and starts. Its first beneficiary was former Vice President Aaron Burr. At that time no distinction between exculpatory and inculpatory information was made because lawyers believed that the Constitution meant what it plainly said in the phrase that the accused shall enjoy the right "to be informed of the nature and cause of the accusation." [213] To the extent that a distinction can be made the consideration here is solely of exculpatory material, not the circumstances of the accusation. This includes material of potential impeachment value. In *United States v. Burr*,[214] the defense sought the letter sent to President Jefferson by General Wilkerson which apparently contained information accusing Burr of treason. They wanted the letter for use in impeaching Wilkerson who was expected to be a chief witness against Burr. The government objected upon the grounds that the defense had not shown the letter to be material, and in any event, no subpoena *duces tecum* could issue before the indictment was found. Chief Justice Marshall, sitting as a trial judge found both objections untenable and unconstitutional: [215]

Burr

> So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his de-

[213] "The law does not expect a man to be prepared to defend every act of his life which may suddenly and without notice be alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him." United States v. Burr, 4 Cranch 470 at 489 (1807).

[214] 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[215] *Id.* at 32–33.

fense, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive.

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The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The . . . constitution gives to the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court.

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Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it.

Without tracing the evolution of the constitutional principles, it is clear that the ideals expressed by Justice Marshall in *United States v. Burr* enjoyed a short life, especially with respect to state criminal proceedings. By 1923, the accepted concept was that all a state defendant was entitled to by virtue of the Constitution was a formal hearing with notice and the opportunity to be heard. It was only over strong dissent that Justice Holmes prevailed in *Moore v. Demsey*,[218] in establishing the principle that even though there may have been the form of a trial, due process requires that justice be more than a

[218] 261 U.S. 86 (1923).

"mask." Twelve years later, the prosecution again was before the Court denying that "the acts or omissions of a prosecuting attorney can ever, in and by themselves, amount . . . to a denial of due process of law." [217] The Court held that the deliberate use of perjured testimony and suppression of evidence which could have impeached the testimony used against the accused was indeed a violation of due process. Thus, only thirty years ago, the first hesitant steps of *Mooney v. Holohan*,[218] initiated the march to a fair trial requiring disclosure by the prosecution of all exculpatory evidence. Thereafter, the Court determined in *Pyle v. Kansas*,[219] that the same reasoning applied when a state witness allegedly had testified falsely under threat of prosecution and that a later trial against an accomplice for the same crime yielded different testimony and evidence. A real advance, largely overlooked since, occurred in *Griffin v. United States*,[220] when the Court remanded a case because it could not be determined whether the denial of a new trial was based upon judicial discretion or upon the inadmissibility of the evidence. The Court found that if the evidence were admissible under District of Columbia law, a new trial should result because the prosecution failed to disclose to the defense that the deceased, when examined at the morgue, was discovered by the prosecution to have an open pen-knife in his pocket. The defense relied upon self-defense in justification, but the prosecution did not advise defense counsel of the pen-knife because the prosecutor did not believe the evidence admissible. In the Supreme Court, four justices would have reversed the case out of hand, but the majority remanded. On rehearing, the United States Court of Appeals for the District of Columbia reversed, saying:

> It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion. . . . However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.[221]

[217] Mooney v. Holohan, 294 U.S. 103, at 111–12 (1935).
[218] *Ibid.*
[219] 317 U.S. 213 (1942).
[220] 336 U.S. 704 (1949).
[221] Griffin v. United States, 183 F.2d 990, at 992–93 (D.C. Cir. 1950).

Two years later the Third Circuit overlooked *Griffin* in favor of *Mooney v. Holohan*, *supra*, and *Pyle v. Kansas*, *supra*, which were cited in support of the Court's finding a denial of due process when the prosecution had deliberately suppressed the evidence of two bullets which could have demonstrated that the policeman was killed by another policeman rather than by the defendant—thus increasing the likelihood of a life, rather than death, sentence. *United States ex. rel. Almeida v. Baldi.*[222]

The trend being established in these cases received further Supreme Court support in a different context in 1953. In *Bowman Dairy Co. v. United States*,[223] the discovery afforded under Rule 16 was exhausted by the defense which then attempted further discovery through the mechanism of a subpoena *duces tecum* served upon the United States Attorney. The Court *rejected the government argument that pretrial discovery was limited* to the procedures afforded by Rule 16, noting:

> There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena.[224]

Unfortunately, the Court did not go beyond an interpretation of the FEDERAL RULES OF CRIMINAL PROCEDURE, and it is unclear whether the *Bowman* decision was bottomed upon constitutional provisions. The Court's dictum in *United States v. Reynolds*,[225] a Federal Tort Claims Act case in which the government claimed immunity from disclosure of privileged information, came much closer:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake

[222] 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904.
[223] 341 U.S. 214 (1951).
[224] *Id.* at 220.
[225] 345 U.S. 1 (1953).

> prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.[226]

The evolution of these principles caused an explosion in 1957 which is still having uncertain reverberations. Three decisions were rendered by the Court that year. In *Roviaro v. United States*,[227] the majority opinion by Mr. Justice Burton considered the scope of the governmental privilege to withhold disclosure of an informant's name. The particular informant had played an integral part in the narcotics transaction. After discussing the scope and function of the privilege, the Court went further:

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.[228]

The relevance of *Roviaro* is not so much its holding in the narrow context of the so-called informer's privilege, but that it recognized the need for disclosure in the interests of constitutional fairness. While the word "constitutional" does not appear, no other meaning can logically be ascribed to the term "fundamental requirements of fairness," and the critical point seems to be whether the information sought is "relevant and helpful to the accused, *or* is essential to a fair determination of the cause," not that the particular information sought in that case concerned the informer's privilege. The significance of *Roviaro* has been largely lost in the emotional wake of *Jencks v. United States*[229] decided three months later, which held that the defendant was entitled to an order directing governmental disclosure of all reports of two government witnesses to the F.B.I. which touched upon the events and activities to which they had testified at trial. Because this was a Communist Party case in which disclosure of confidential government files affecting national security was involved, the case created a great controversy which ultimately

[226] *Id.* at 12.
[227] 353 U.S. 53 (1957).
[228] *Id.* at 60–61.
[229] 353 U.S. 657 (1957).

resulted in the so-called Jencks Act.[230] The opinion has been read as announcing standards for the "administration of criminal justice in the federal courts" [231] rather than resting upon constitutional grounds. But the Court also said "Justice requires no less",[232] cited *United States v. Burr, supra, United States v. Reynolds, supra,* and *Roviaro.* Chief Justice Marshall's opinion rested flatly on constitutional grounds and involved very similar issues of disclosure, *Reynolds* said in dictum it would be "unconscionable to . . . deprive the accused of anything which might be material to his defense," [233] and *Roviaro* rested its disclosure upon "fundamental requirements of fairness." All this demonstrated that constitutional considerations, at least in part, prompted the *Jencks* holding. (This probably accounts for the rather cautious limits imposed later by the Jencks Act.) By November, another case was before the Court in which the by-now familiar principles regarding the disclosure of exculpatory information in state criminal prosecutions were repeated. In *Alcorta v. Texas* [234] the Court held it a violation of due process for the state prosecutor to instruct the witness not to volunteer anything about his illicit relations with the deceased, but to tell the truth if specifically asked. At trial, the State elicited testimony indicating only a casual friendship which was in contradiction to the accused's testimony that he killed his wife in a fiit of passion upon finding her kissing the government witness at 2 a.m. in the morning. The prosecutor's knowledge of the illicit relation, reflected in his separately kept notes, might have reduced the degree of the offense and the conviction was reversed. Similarly, two years later in *Napue v. Illinois,*[235] the conviction was reversed on due process grounds where the prosecutor had promised the key identification witness that efforts would be made to have his sentence reduced if he testified for the prosecution. When the prosecutor let the witness deny without correction that any such promises had been made, a violation of due process occurred—not because the prosecution solicited false testimony, but because such testimony rendered the trial unfair. The jury might well have turned the issue

[230] 18 U.S.C. 3500.
[231] 353 U.S. at 668.
[232] *Id.* at 669.
[233] 345 U.S. at 12.
[234] 355 U.S. 28 (1957).
[235] 360 U.S. 264 (1959).

of guilt or innocence upon its evaluation of credibility of the government witnesses.

One week later, without mentioning the cases evolving in the area of state criminal disclosure, the Court rendered on the same day two decisions which temporarily called a halt to expanding discovery rights. By a five-to-four split, the Court rendered decisions in *Palermo v. United States*,[236] and *Pittsburgh Plate Glass Co. v. United States*.[237] It would be easy to gloss over these two decisions with the comment that *Palermo* exempted agent's "summaries" of verbatim statements from the Jencks Act, and that *Pittsburgh Plate Glass* held that no absolute right to disclosure of grand jury minutes existed. More is involved. *Palermo* clearly reflected the Court's concern with the public storm created by the *Jencks* decision; Mr. Justice Frankfurter went far beyond the necessities of the case in establishing his view of the proper guidelines for the administration of the Jencks Act as the *exclusive* device to secure witnesses' statements in federal criminal trials. The four concurring justices noted the lack of necessity for such *obiter*, and carefully pointed out that though the *Jencks* decision was not rendered upon constitutional grounds, "it would be idle to say that the commands of the Constitution were not close to the surface of the decision. . . ." [238] The concurring opinion had added weight since its author was also the opinion writer in *Jencks*. The major objection of the concurring justices was that the Jencks Act could not constitutionally be regarded as the exclusive instrument for disclosure of such documents. *Pittsburgh Plate Glass* is principally significant in this context because of much later history. With the change of Court membership and the acquisition of additional experience through the passage of seven years, the Court in *Dennis v. United States* [239] found it necessary to limit *Pittsburgh Plate Glass* to its facts, cited the dissenting opinion, and to note:

> . . . the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. . . . [This realization] is also reflected in the expanding body of materials, judicial and

[236] 360 U.S. 348 (1959).
[237] 360 U.S. 395 (1959).
[238] 360 U.S. at 362–63.
[239] 384 U.S. 855 (1966).

otherwise, favoring disclosure in criminal cases analogous to the civil practice.[240]

The vulnerability of the Frankfurter majority in *Palermo* lies in its necessarily inconsistent treatment of discovery in state criminal proceedings as opposed to federal cases. This is illustrated by the saga of William K. Powell. Powell's *pro se* petition for a writ of *certiorari* won him [almost four months to a day after *Palermo*] a *per curiam* reversal and order for a full hearing below upon his contentions. His contentions were based upon the absence of counsel at arraignment and the State's suppression of vital evidence at his trial. On the latter point the Fifth Circuit reversed his conviction primarily because the prosecutor had not disclosed a written statement that he had taken from a state witness which would have been useful in impeaching the witness.[241] Additionally, the prosecutor did not disclose a letter from a Michigan lawyer indicating that the witness was unstable and had been confined in mental institutions in three different states. It appears that one, and perhaps both, of these documents would not have qualified for production under the Jencks Act in a federal criminal prosecution, but in a state prosecution, the failure to disclose them was "... such fundamental unfairness as to amount to a denial of due process of law."[242] Ironically, the defense only found out about the documents as a result of the federal district court's issuance of a subpoena *duces tecum*, over the State's objection, in the habeas corpus proceeding.[243] Similarly, in *Ashley v. Texas*,[244] the failure to disclose to defense counsel that the psychiatrist and psychologist who examined the accused for the State believed him legally incompetent was a violation of due process even though no request for disclosure was made. Again, since the State did not call such witnesses at the trial, the *Palermo* dictum, if applied to this fact situation in a federal prosecution, would have prevented disclosure.

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[240] *Id.* at 870–871.

[241] Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961).

[242] *Id.* at 281.

[243] This, of course, illustrates the basic problem. Why should the critical subpoena only be available after conviction and years of litigation and incarceration? Powell had already served five years and had less than one year remaining to serve when he received his justice.

[244] 319 F.2d 80 (5th Cir. 1963).

It was at this stage that *Brady v. Maryland*[246] reached the Court. Pursuant to the defendant's pretrial requests the prosecution had turned over several of the co-defendant's extrajudicial confessions, but had withheld the critical one in which the accomplice admitted the actual killing. As this might bear upon the issue of punishment, the Maryland Court of Appeals concluded the failure to disclose was a violation of constitutional due process required by the fourteenth amendment.[248] On *certiorari*, in an opinion by Mr. Justice Douglas, the evolution of the disclosure cases was partly outlined and approved. The holdings of the Third Circuit in *United States ex. rel. Almeida v. Baldi, supra*, and *United States ex. rel. Thompson v. Dye*,[247] were agreed to have stated the "correct constitutional rule" that "suppression of evidence favorable to the accused was itself sufficient to amount to a denial of due process." [248] Noting that "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears" [249], the Court concluded this point of the opinion with:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principles of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to an accused. Society wins not only when the guilty are convicted but when criminal trials are fair.[250]

In a separate opinion, Mr. Justice White prophetically stated his reluctance, "I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery." [251] Whether *Brady* was in fact a dramatic extension of prior law is debatable, but there can be little debate that it quickly became the touchstone upon which a rash of immediately successive decisions rested. Within two years eight cases from six circuits relied upon its

[246] 373 U.S. 83 (1963).
[248] 226 Md. 422 (1961).
[247] 221 F.2d 763 (3d Cir.) *cert. denied, sub nom* Pennsylvania v. United States *ex rel.* Thompson, 350 U.S. 875 (1955).
[248] 373 U.S. at 86, 87.
[249] *Id.* at 87.
[250] *Ibid.*
[251] 373 U.S. at 92.

learning and most of them extended its holding to new factual situation.[252] Artificial distinctions are being swept aside in favor of a simple rule of fairness which requires the prosecution to disclose to the accused all information which is favorable to the defense.[253] It seems very likely that this rule of fairness will be equally applicable to federal and state proceedings. And consequently, the *Palermo* dictum regarding the "exclusiveness" of the Jencks Act in securing production only of statements meeting the requirements of the Act must be abandoned. Many statements may well be helpful to the accused which do not fall within the Act, and these cannot, consistent with constitutional requirements, be suppressed.[254]

C. LOWER COURT EXTENSIONS OF BRADY

Immediately following *Brady*, the Third Circuit had occasion to invoke its application in *United States ex. rel. Butler v. Maroney*,[255] when by habeas corpus the defendant challenged his death sentence following conviction of first degree murder of the sheriff who was transporting him to prison. The only eye witness, other than the defendant, had made a statement to the prosecutor which was at variance with his trial testimony but was not disclosed to the defense. *Brady* alone was sufficient authority for the court to find a violation of due process for the statement could well have corroborated the defendant's account of the struggle and served to impeach the state witness,

[252] United States ex rel. Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); United States ex rel. Drew v. Myers, 327 F.2d 174 (3d Cir. 1964); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); Ellis v. United States, 345 F.2d 961 (D.C. Cir. 1965); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965); United States v. Abraham, 347 F.2d 395 (7th Cir. 1965); United States ex rel. Bund v. LaValle, 344 F.2d 313 (2d Cir. 1965).

[253] Commentators are beginning to recognize the relationship of these developments to the federal procedure under the Jencks Act, and that the constitutional rule far exceeds the narrow ambit of that act. Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHNS LAW REV. 206 (May 1966). While the Court has yet to consider the incongruity, its most recent decisions clearly point toward further advances which should ultimately return us to Chief Justice Marshall's opinion in *United States v. Burr, supra*, and a constitutional rule which requires equally free discovery whether the proceeding be civil or criminal. *Dennis v. United States, supra.*

[254] Such a recognition may eliminate the tendency of law enforcement officers to modify their note taking to prevent production under the Jencks Act—i.e., taking statements which are not substantially verbatim and not approved by the witness.

[255] 319 F.2d 622 (3d Cir. 1963).

thereby increasing the likelihood of a more lenient sentence. Early in 1964, the Second Circuit in *United States ex. rel. Meers v. Wilkins*,[256] was confronted with a case in which no false evidence had been used; the prosecution simply failed to tell the defendant about the two eye witnesses who positively stated defendant was not the robber, and used in their place two other eye witnesses who identified the accused as the offender. In finding a violation of the fairness required by due process, the case extended *Brady* because here there was no request from the defense. Again, the contrast with federal procedure in which one has no right even to know the names of government witnesses except in a capital case and then only three days before trial[257] is marked. One of the most thorough and persuasive analysis following *Brady* flowed from the pen of Chief Judge Sobeloff in *Barbee v. Warden*[258] in which the Fourth Circuit rejected four arguments of the prosecution: (1) the non-disclosed ballistics and fingerprint reports were not probative because the prosecution did not introduce the subjects of the scientific analysis into evidence. The gun was merely "marked for identification purposes" as looking like the gun which the gunman used to shoot the policeman, but was not introduced into evidence. (The gun so identified was admittedly owned by the accused.); (2) there was no request of any sort for disclosure; (3) the prosecutor did not even know of the reports, such knowledge reposed exclusively in the police; and (4) in any event, the nondisclosure was not prejudicial. In rejecting the "non-probative" argument, the court noted the obvious inference to be drawn from the prosecutor's tactic in displaying a gun before the jury while identifying it as "like" the gun which shot the policeman when the police reports showed conclusively that the gun had nothing to do with the crime. The court quoted *Griffin v. United States, supra*, that disclosure of all evidence reasonably considered admissible was required—". . . the prosecution is not to decide for the court what is admissible or for the defense what is useful."[259] In rejecting the contention that the defense must request that which it does not know about, the court said, "In gauging the nondisclosure in terms of due process,

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[256] 326 F.2d 135 (2d Cir. 1964).

[257] 18 U.S.C. 3432; see pages 139–40, *supra*. One may speculate as to the view of the current Solicitor General who authored the Meers opinion.

[258] 331 F.2d 842 (4th Cir. 1964).

[259] *Id.* at 845.

the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." [260] The absence of prosecutorial knowledge was not more helpful to the State:

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution. . . . "The cruelest lies are often told in silence." [261]

Finally, the prejudicial effect of the non-disclosure was sufficient to meet the Supreme Court test of *Fahy v. Connecticut.*[262] "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." [263] Aside from the excellent consideration of these recurring points, the opinion is significant in that it extended *Brady* to (1) *potentially* evidentiary materials, and (2) information in the hands of the police but not in the hands of the prosecutor. Aside from cases of collateral importance,[264] one other major case remains for consideration. In *Ellis v. United States,*[265] *Brady* provided the basis for a remand for lower court determination of facts. It was conceded that the deceased died a week after the accused was alleged to have struck him on the head with a board, the accused alleged that the arresting officer had told him that the deceased had been released from the hospital the same night and was arrested for drunkenness the day of his death. The absence of defense counsel's effort in securing the hospital records or exploring the information in the possession of the accused did not detract from the prosecutorial duty of disclosure.

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[260] *Id.* at 846.

[261] *Ibid. See also,* Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958).

[262] 375 U.S. 85, at 86–87 (1963).

[263] 331 F.2d at 847.

[264] United States ex. rel. Drew v. Myers, 327 F.2d 174 (3d Cir. 1964) holding possible due process violation by the cumulative effect of withholding names of eye witness until day of trial, court's refusals of continuance before and at trial; Thomas v. United States, 343 F.2d 49 (9th Cir. 1965). Government disclosed pretrial name and statement of witness who was in prison, so no denial of due process; United States v. Abraham, 347 F.2d 395 (7th Cir. 1965); United States ex. rel. Bund v. LaValle, 344 F.2d 313 (2d Cir. 1965) Grand Jury minutes may be subject to due process requirements of disclosure aside from Jencks Act production.

[265] 345 F.2d 961 (D.C. Cir. 1965).

D. PROCEDURAL DEVICES FOR IMPLEMENTING DISCLOSURE

Two basic methods are suggested to secure pretrial disclosure in federal criminal cases: (1) a combined motion under the authority of Rule 16, Rule 17(c) and the due process requirements of the Constitution; or (2) use of Rule 16 preliminarily, and when discovery is exhausted thereunder, the motion for a subpoena *duces tecum* pursuant to the authority of Rule 17(c) and the various constitutional provisions discussed earlier. At trial verbal demands will suffice, the more particular the demand the better.

The subpoena *duces tecum* was approved in *United States v. Burr*, *supra*, and later in the *Bowman Dairy* case. It lends itself to rule evolution on a case-by-case basis. Hence, it should be a favorite vehicle.

Lest there be any ambiguity, it is recognized that the discussion of this chapter represents an interpretation of a trend, and suggests further change. It is the authors' view that a proper construction of the Constitution would require free pretrial discovery in criminal cases similar to that enjoyed in civil cases. Two basic justifications are usually given for the restrictive criminal discovery: (1) the defendant's privilege against self-incrimination justifies secrecy on the part of the state, and (2) if the accused knew the witnesses and evidence against him, he would destroy the same. However, the Constitution contains no hint that its framers intended that the price of the privilege against self-incrimination would be the right to refuse disclosure of evidence on the part of the state. The proper construction seems quite the contrary. Even if the argument were valid, it makes no sense to deny disclosure when the accused is willing to waive his privilege in return for disclosure. The second argument reverses the presumption of innocence and rests upon the assumption that the accused is a criminal who will destroy evidence if he knows about it. The fact is that the innocent are the persons who need discovery most and who are least likely to intimidate witnesses. The guilty far more commonly know the evidence against them. The argument also assumes *sub silento* that the defense lawyer will cooperate in the suppression of evidence and intimidation of witnesses.

We would hope that Justice Fortas' remarks in *Dennis v. United States*, *supra*, will prove prophetic, and that we will soon find ". . . disclosure in criminal cases analogous to the civil practice." [268] Until

[268] 384 U.S. 855, 870–871 (1966).

this occurs, the disquieting fact will remain that a few fundamentally unfair trials will be corrected by the fortunate post-trial discovery of suppressed evidence, but an undeterminable number of undiscovered cases will be uncorrected. For the twenty-one appellate cases considered here which have been decided since 1950, how many other cases went undiscovered? Aside from the innocent who is wrongfully convicted, we must observe that the conviction of the guilty through fundamentally unfair methods diminishes our ability to rehabilitate the offender, erodes our morality, and corrupts a fundamental symbol of a free and democratic society—a fair trial.

E. ITEMS DISCOVERABLE

The list below is chronological. It is limited to federal appellate cases and does not include state court cases or lower federal court decisions.[267]

1. *Letter.*—from General Wilkerson to President Jefferson, was thought to contain allegations of treason; Wilkerson expected to be star prosecution witness in Burr treason trial; subpoena *duces tecum* permitted before indictment; letter sought for purposes of impeachment. *United States v. Burr*, 25 F.2d Cases 30, Fed. Cas. 30 (No. 14,692 d) (C.C.D. Va. 1807). (Marshall, C.J.).

2. *Pen-knife.*—that deceased was found to have open in his pocket when examined at morgue. *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950) (Edgerton, J., on remand from 336 U.S. 704).

3. *Bullets.*—police found .45 caliber bullet lodged in ceiling of store, bloody .38 caliber bullet outside near the slain officer; accused had only fired one shot (.45 caliber) and police had fired several times (.38 caliber); non-disclosed bullets supported defense theory that policeman accidentally shot by another policeman and that jury should give sentence of life, not death. *United States ex. rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1962), *cert. denied*, 345 U.S. 904.

4. *Documents and Other Materials.*—although constitutional considerations were not stated to be a basis for the holding, the Supreme Court held that ". . . any document or other materials admissible as evidence, obtained by the Government by solicitation or voluntarily

[267] For state cases, see *Right of Accused in State Court to Inspection or Disclosure of Evidence in Possession of Prosecution*, 7 A.L.R. 3rd 8 (1966); *Right of Defendant in Criminal Case to Inspection of Statement of Prosecution's Witness for Purposes of Cross-examination or Impeachment*, 7 A.L.R. 3rd 181 (1966)

for third parties is subject to the subpoena . . ." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). It is significant that the Court apparently approved the following language (which counsel may choose to use as a model) of the *Bowman* subpoena:

> All documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner than by seizure or process, (a) in the course of the investigation by the Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this case, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; . . . or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. 341 U.S. at 217.

5. *Statement.*—of police officer that accused appeared drunk at time of arrest. Another arresting officer testified that accused appeared normal in every respect. At close, prosecutor offered to call the other arresting officers who were in court, but stated their testimony would be corroborative. Murder conviction reversed. *United States ex. rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.), *cert. denied, sub nom Pennsylvania v. United States ex. rel. Thompson*, 350 U.S. 875 (1955).

6. *Informer's Name and Address.*—who played an integral part in the narcotics transaction and could *possibly* furnish evidence of entrapment or other defense on merits. Information secured by bill of particulars because of "fundamental requirements of fairness." *Roviaro v. United States*, 353 U.S. 53 at 60–61 (1957).

7. *Pretrial Statements Relating to Trial Testimony.*—Government was required to produce for defense inspection and use all pretrial statement made over a period of years by two government witnesses to the F.B.I., so long as statements touched upon the events of the trial testimony of the witnesses. *Jencks v. United States*, 353 U.S. 657 (1957). (Brennan, J.) Although decision historically read as

"supervisory" over lower federal courts, it was rendered before the distinction between requirements of fairness in federal and state proceedings was virtually eliminated with *Mapp v. Ohio*, 367 U.S. 643 (1961). Later the author of the *Jencks* opinion was to write that it would be idle not to recognize that constitutional considerations lay near the surface in that decision. In view of later cases, *Jencks* should probably be recognized as a due process case now.

8. *Statement.*—of key government witness to prosecutor who kept it in a separate file; admitted illicit relationship with deceased who was killed at 2 a.m. in the morning by defendant/husband when found in the company of the witness. *Alcorta v. Texas*, 355 U.S. 28 (1957).

9. *Fact That Pretrial Statements Destroyed.*—police destroyed all but one of the statements given pretrial by the accused and then perjured themselves at trial saying there was only one statement given. Rape conviction reversed later when police explained testimony on grounds that destroyed statements were no different from one produced. *Curran v. Delaware*, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959). Biggs, J.:

> "... we state that the trial of a capital case, or indeed any other trial, no longer can be a considered properly a game of wits and skill. It is clear that men on trial for their lives are entitled to all pertinent facts relating to their defense and that no witness is entitled to constitute himself the judge of what the court shall hear." *Id.* at 711.

10. *Prosecutor's promise.*—that if key identification witness testified, he would attempt to get his sentence reduced. *Napue v. Illinois*, 360 U.S. 264 (1959).

11. *Two Eye Witnesses.*—whose existence was unknown to the defense and who would have exonerated him. *Wilde v. Wyoming*, 362 U.S. 607 (1960).

12. *Written Statement.*—by state witness to prosecutor which contained inconsistencies with his trial testimony. *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961).

13. *Letter.*—from lawyer in foreign state informing prosecutor that his key witness had been confined in mental institutions in three states. *Powell v. Wiman, supra.* (Documents discovered over objection by subpoena *duces tecum* in later federal habeas corpus proceeding.)

14. *Psychiatric and Psychological Reports.*—of psychiatrist and psychologist who examined accused for state and found him incompetent. Defense of insanity not raised because defense mental examination indicated otherwise. No request for disclosure or misrepresentation. *Ashley v. Texas*, 319 F.2d 80 (5th Cir.) *cert. denied*, 375 U.S. 931 (1963).

15. *Written but Unsigned Statement.*—of accomplice in which he admitted the act of killing; statement would have been relevant to punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Douglas, J. "... suppression ... of evidence favorable to an accused ..." violates due process.

16. *Written Statement.*—of eye witness in possession of prosecutor at variance with his trial testimony that no struggle had taken place before the sheriff was shot. Statement corroborated struggle and defense version used in plea for leniency. *United States ex. rel. Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963).

17. *Existence and Statements of Two Eye Witnesses.*—who denied that the accused was the offender; prosecutor used two other witnesses who identified accused as offender. *United States ex. rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964). Marshall, J.:

> "Finally, the state argues that there was no suppression since Meers' counsel might have learned of the Colosantis in advance of the trial, just as he in fact learned of them shortly thereafter. We agree that the availability of witnesses to the defense through its own investigations is a relevant consideration, but we do not think it is ordinarily determinative." *Id.* at 140.

In *Virgin Islands v. Lovell*, 410 F.2d 307 (3rd Cir. 1969), a case where the majority held that detectives' reports reflecting contradictory pre-trial statements of a non-testifying witness were not producible under the Jencks Act, the dissent argued that such reports should have been produced as evidence favorable to the accused under the *Brady* principle.

18. *Ballistics and Fingerprint Reports.*—unknown to prosecutor, but in possession of police, which demonstrated *inter alia* that the gun belonging to the defendant and identified at trial as looking like the gun used to shoot policeman was not in fact the crime weapon. *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (Sobeloff, C.J.).

19. *Existence and Name of Eye Witness.*—withheld until trial testi-

mony and then continuance to secure his presence denied. Coupled with other circumstances to find cumulative indication of violation of due process. Remanded to Pennsylvania courts to afford them opportunity to rectify situation. *United States ex. rel. Drew v. Myers*, 327 F.2d 174 (3d Cir. 1964).

20. *Statement.*—of prisoner that he had stolen the guns introduced into evidence at the trial of the accused to show his linkage with the interstate transportation of stolen checks. Disclosure recognized as required by "The well-recognized rule . . . that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant." No reversal because prosecutor had made pretrial disclosure and evidence regarding guns was stricken by trial judge. *Thomas v. United States*, 343 F.2d 49, at 53 (9th Cir. 1965).

21. *Hospital Records and Police Statement.*—deceased struck by accused with board one week prior to death. Defendant testified at trial that police officer had told him that deceased had been released from hospital same night after defendant hit him and was picked up a week later for drunkenness. Remanded for hearing in *per curiam* in reliance on *Brady;* little discussion of defense diligence or facts, if any, regarding prosecutorial suppression. *Ellis v. United States*, 345 F.2d 961 (D.C. Cir. 1965).

22. *Grand Jury Minutes.*—testimony before grand jury inconsistent with trial testimony may require disclosure even if both versions inculpatory to defendant. *United States ex. rel. Bund v. LaValle*, 344 F.2d 313 (2d Cir. 1965).