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DISCOVERY IN CRIMINAL CASES — A SURVEY OF THE PROPOSED RULE CHANGES

By Joseph Fontana*

I. INTRODUCTION

It is generally agreed that the dominant policy in criminal procedure is the ascertainment of truth. The argument that the true facts are developed only by the prosecutor and the defendant must not be allowed to require the prosecutor to disclose before trial the evidence he expects to offer is out-of-date and untenable. As entertaining as they were, the days of a criminal trial as a "sporting event" should now be numbered.1

Criminal procedure must be designed in fact, as well as in theory, to present as accurate a portrayal of the alleged crime as possible and should minimize the opportunities for falsification in that portrayal. It is clear that the truth can only become available under our system of law if the defense has an equal opportunity with the prosecution to develop the facts.2 Justice Brennan, after noting that in practice there has been considerable disclosure by prosecutors, stated the problem succinctly: "I think we must all agree that the opportunity for discovery on equal terms should either be the right of all accused, or the right of none."3 If this principle be correct, it would seem to follow that to arrive at the truth at trial, it is necessary for the parties to disclose fully before trial, consistent with constitutional guarantees afforded the defendant, the evidence to be submitted. The "spirit of concealment" has no place in a criminal trial.4

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1. "Those of us of the Bench and Bar who adhor and deplore procedural change in any form, and those who yet cling to the idea that the trial of a case is a sporting game of skill and chance have difficulty in adjusting ourselves to a new concept in the juridical search for truth, which is justice." Murrah, The Pretrial Conference: Conceptions and Misconceptions, 12 Wyo. L.J. 226 (1958). See also Frank, Courts on Trial 91 (1949); and Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279.

2. The extent to which the prosecutor's professional responsibility requires him to disclose exculpatory information to the defendant in advance of trial — in order to insure a fair trial — has always been a matter of conjecture. See Comment, 60 Colum. L.R. 858, 860-61 (1961).


4. "[T]he common law originally was very strict in confining each party to his own means of proof, and ... regarded a trial as a cock fight, wherein he won whose advocate was the gamest bird with the longest spurs." Ulrich v. McConaughey, 63 Nebr. 10, 20; 88 N.W. 150, 154 (1901). "It considered a law suit a game between skilled antagonists with the judge serving merely as an umpire to see that the rules of the game are observed, and the judgment going to the more skillful." Yankwich, Concealment or Revealment, 3 F.R.D. 209 (1943). See also Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56, 102 (1961). The sporting theory of justice is criticized by Pound, Criminal Justice in America 163 (1930).
It is apparent why a defendant needs liberal pre-trial disclosure in a criminal case. He is often without adequate means and represented only by assigned counsel or a public defender. He may be barred from any initial fact-gathering efforts by the simple reality of being in custody. The police are usually the first at the scene of the alleged crime and therefore come into possession of most of the physical evidence. The government is well-equipped with scientific detection apparatus and trained investigators; the defendant is not so endowed.

An exploration of the policy considerations against full disclosure, i.e., that discovery “will lead not to honest fact finding but on the contrary to perjury and suppression of evidence,” leads this writer to conclude that whatever relevance that argument once had, it is now illusory. If experience with the civil discovery rules can be any guide, then such above-mentioned abuses are not likely to occur. Liberal discovery in civil cases has not encouraged fabrication or destruction of evidence or created an opportunity for intimidation of witnesses.

The present Federal Rules of Criminal Procedure already provide for a certain amount of discovery before trial. Rule 16, relating to inspection of papers and objects in the hands of the government belonging to the defendant or obtained by seizure or process, is the most


6. The Criminal Justice Act of 1964 will achieve a certain balance in this regard by allowing counsel assigned to the defendant to request the court to authorize investigative, expert, or other services “necessary to an adequate defense.” 18 U.S.C. § 3006A(e) (Supp. 1964).

7. State v. Tune, 13 N.J. 203, 210; 98 A.2d 881, 884 (1953), cert. denied, 349 U.S. 907 (1953), noted in 38 Minn. L. Rev. 397 (1954). Chief Justice Vanderbilt’s argument in State v. Tune was made years before in an English case, Rex v. Holland, 100 Eng. Rep. 1248, 1249 (1792). Therein, pretrial inspection of documents was sought by an official of the East India Company. The official, charged with malfeasance and corruption, was denied access to the documents on the theory that the granting of such a request would “subvert the whole system of criminal law.” This case is no longer the law in England, see Devlin, The Criminal Prosecution in England 112 (1958); nor is State v. Tune the law in New Jersey, State v. Johnson, 28 N.J. 133, 145 A.2d 313, 318 (1958). See also Freed, The Rules of Criminal Procedure, An Appraisal Based On A Year’s Experience, 33 A.B.A.J. 1010, 1012 (1947).

8. Many states have adopted the Federal Rules of Civil Procedure relating to discovery. The Rules, 26-37, are discussed in 4 Moore, Federal Practice, § 26-37 (2d ed. 1950). The “perjury” argument was prevalent prior to the adoption of the civil rules. See Sunderland, Scope and Method of Discovery Before Trial, 42 Yale L.J. 863 (1933).

The importance of a liberal approach to discovery is pointed out when its chief benefits are considered. Professor Moore has enumerated them as follows:

“1. It is of great assistance in ascertaining the truth and in checking and preventing perjury.

“2. It is an effective means of detecting and exposing false, fraudulent, and sham claims and defenses.

“3. It makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with great difficulty and sometimes not at all.

“4. It educates the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements out of court.

“5. It expedites the disposal of litigation, saves the time of the courts, and clears the docket of many cases by settlements and dismissals which otherwise would have to be tried.

“6. It safeguards against surprise at the trial, prevents delays, and narrows and simplifies the issues to be tried, thereby expediting the trial.

“7. It facilitates both the preparation and the trial of cases.” Moore, supra at 1014-16.
significant discovery provision. Rule 6(e) allows for disclosure of grand jury matters by order of court; rule 7(f) provides for a bill of particulars, and rule 17(c) makes subpoena powers available to the defense.9

Prior to these rules little discovery was available in the federal courts.10 The federal system followed the orthodox common law rule of minimal or no discovery in criminal cases. Although there were instances of some form of discovery allowance,11 discovery prior to the Federal Rules was always in doubt.12 While the present rules provide a good beginning, discovery is far from complete under them. The courts have been highly restrictive in their interpretation of the rules and thus, even today, the right to broad discovery in criminal cases does not exist.13 Past surveys of the cases interpreting the current criminal discovery rules point to the limited availability of discovery to the defendant.14

Discovery in a criminal case is limited in the belief that it would be a one-sided affair benefiting only the defendant, who, the theory suggests, is already being given too much protection. Such safeguards as rights against self-incrimination, unreasonable searches and seizures, testimony of accomplices, circumstantial evidence, double jeopardy, entrapment, and rules concerning burden of proof and presumption of evidence all favor the defendant.15 However, the balance in criminal

9. Rule 15, on depositions, is not a discovery measure at all; its sole function is to enable the defendant to obtain the testimony of a witness who is unable to appear at a trial or hearing. It may not be used for general discovery purposes. United States v. Grado, 154 F. Supp. 878 (W.D. Mo. 1957). Also to be distinguished from the Federal Rules devices is an application for a list of prosecution witnesses, which is not covered by the Rules. References to state law on criminal discovery are not made in this article. For an excellent summary, see Fletcher, Pretrial Discovery in State Criminal Cases, 12 STAN. L. REV. 293 (1960).

10. For a good historical review of the Federal Rules of Criminal Procedure, see Orfield, Discovery and Inspection in Federal Criminal Procedure, 59 W. VA. L. REV. 221 (1957). See also 2 WHARTON, CRIMINAL EVIDENCE, § 671 (12th ed. 1955). Orfield cites as the first case on federal discovery allowance United States v. Burr, 25 Fed. Cas. 30 (1807), where Chief Justice Marshall (as Circuit Judge) upheld a subpoena duces tecum issued before indictment and before arraignment. This case involved the prosecution of Aaron Burr. Burr's attorney made a request for pretrial inspection of a letter addressed to the President of the United States and in the possession of the United States Attorney. The request was granted by the trial judge.

11. United States v. Warren, 53 F. Supp. 435 (D. Conn. 1944), holding that the defendant was entitled to inspection of the contents of a package alleged to have been sent through the mails containing a threatening letter; United States v. B. Goedde & Co., 40 F. Supp. 523, 524 (E.D. Ill. 1941), granting an order to the defendant to inspect impounded documents belonging to him.

12. United States v. Rosenfeld, 57 F.2d 74, 76 (2d Cir.), cert. denied, 286 U.S. 556 (1932). Note that the sole case cited by the Supreme Court did not provide for a broad rule against discovery. See United States v. Maryland and Virginia Milk Producers' Association, 9 F.R.D. 509 (D.D.C. 1950). Therein, District Judge Holtzoff noted that, "It is well settled that in a criminal case, unlike a civil action, a right to broad discovery does not exist." Id. at 510.

trials still lies with the government.\textsuperscript{16} Certain procedural practices work to the benefit of the prosecution and consequent disadvantage to the defendant, \textit{e.g.}, the current trend to eliminate precise pleading and relax various requirements, the general present unavailability to the defendant of a bill of particulars, the deficiencies of the preliminary hearing as a discovery device, and the availability of the grand jury to take depositions. And it should always be remembered that the generating force in a criminal case is the prosecution. It is the prosecution that gathers the evidence, and there can be no room for doubt that law enforcement agencies are far more effective in gathering their evidence than the accused. Further, in a great majority of cases the prosecution obtains the confession of the accused before he can consult counsel.\textsuperscript{17} Regardless of the concept of mutuality — that the defense should give up "something" in return for discovery of the prosecutor's evidence — criminal prosecution is not designed to see who is the better combatant.

\section*{II. The Proposed Discovery Rule Amendments}

To liberalize the discovery process now available to the defendant, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has released for consideration of the bench and bar the second preliminary draft of proposed amendments to the Rules of Criminal Procedure for the United States District Courts.\textsuperscript{18} These amendments include important changes in the rules relating to discovery, especially in Rule 16, \textit{Discovery and Inspection}. Minor but significant changes are proposed in Rules 6(e), \textit{The Grand Jury — Secrecy of Proceedings and Disclosure}, and 7(f), \textit{The Indictment and Information — Bill of Particulars}. A new Rule 17.1, \textit{Pre-Trial Procedure}, is also suggested. The text of the proposals is set forth in the Appendix to this article.

The major substantive changes occur in Rule 16. The provision in present Rule 16 which limits discovery to items "obtained from or belonging to the defendant or obtained from others by seizure or process" is generally restrictive and appears to be inadequate. The scope of the rule was stated in \textit{United States v. Haug}\textsuperscript{19}: "The history of the rule indicates that it was intended to provide for only a limited question or comment on his silence: he cannot be convicted when there is the least fair doubt in the minds of anyone of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or fouly. I have never been able to see..." \textit{United States v. Garsson}, 291 Fed. 646, at 649 (S.D.N.Y. 1923). See also Yankwich, \textit{Concealment or Revealment}, \textit{supra} note 4, at 209ff.


\textsuperscript{17} In \textit{Escobedo v. Illinois}, 378 U.S. 478 (1964), the Supreme Court held (5-4) that the accused's statements made during police interrogation and before he could have advice of counsel were inadmissible as evidence in the subsequent trial. The refusal to honor the defendant's request to consult with his attorney constituted a denial of his right to assistance of counsel under the Sixth and Fourteenth Amendments.

\textsuperscript{18} Drafts are available on request from the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Supreme Court Building, Washington, D.C. 20544.

\textsuperscript{19} 21 \textit{F.R.D.} 22 (N.D. Ohio 1957).
This rule has been narrowly construed to include only those tangible items in existence at the time they were obtained by the government.21

Basically, the proposed amendment would expand and modify Rule 16 in order to overcome those court decisions which have limited its effectiveness. Under the suggested amendments, the defendant will no longer be required to show that the material is in the possession of the government; the court will have the power to require the prosecution to disclose defendant's own statements or confessions; and the court will also have the power to require the disclosure by the prosecution of the results of reports of physical examinations, scientific tests, experiments and comparisons. The discovery or inspection of internal government documents and statements or reports made by government witnesses or prospective witnesses other than the defendant to agents of the government is to be allowed only as authorized by the Jencks Act.22

Proposed Rule 17.1 would permit pre-trial conferences in criminal cases. Although a similar proposal in 1944 was not adopted by the Supreme Court when the Criminal Rules were originally promulgated, many judges have, despite the absence of a rule, held such conferences in special types of criminal cases such as mail fraud, and have found such conferences extremely beneficial.

The requirements for obtaining a bill of particulars is liberalized by the deletion of the words "for cause" from Rule 7(f). This change is proposed "to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions. . . ."23

A. Statements of the Accused

Whether the defendant is entitled to inspection of his own statements made to police or agents of the government, or confessions, written or recorded, in the hands of the prosecution, has always been a matter of great contention.24 There seems to be no valid reason why the person who made a statement should not have a copy of that statement.

Since the most significant part of the preparation of a defendant's case may be an analysis of his confession, it seems elementary that the discovery of a confession prior to the trial is necessary to enable counsel for the defense to adequately prepare his case.25 Yet, the majority

20. Id. at 26.
25. A few courts have granted such motions, United States v. Fancher, 195 F. Supp. 448 (D. Conn. 1961); United States v. Singer, 19 F.R.D. 90 (S.D.N.Y. 1956);
follow the contrary rule as enunciated in *United States v. Murray.* There, the Court of Appeals for the Second Circuit ruled that statements voluntarily given by the defendants to the Internal Revenue Service were not discoverable under Rule 16, because those statements had no "existence" before he made them; therefore, they did not "belong" to him, and Rule 16 could not be used. A different view was intimated in *Leland v. Oregon,* where the Supreme Court said that the lower court's refusal to require the district attorney to make one of an accused murderer's confessions available to his counsel before trial was not a denial of due process. However, the Court said, "while it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition, the trial judge offered further time for that purpose but it was refused." 

Subsection (a) of proposed Rule 16 recognizes the significance of such discovery and would extend it to any "written or recorded statements or confessions made by the defendant, or copies thereof..." The court "may" allow such discovery, although no standard is established in the Advisory Committee's draft. The amendment limits the discovery of defendant's statements to those "which are known by the attorney for the government to be within the possession, custody or control of the government." The burden would be obviously unreasonable if the government attorney had to search all the government files to find possibly relevant statements. The adoption of this amendment would go far toward alleviating the unjustifiable situation whereby the defendant is not allowed a copy of his own statement.

B. Lists of Witnesses

There is no right to disclosure of witnesses in criminal cases. Requests for such lists are made under Rules 7(f), 16, and 17(c). Such motions are generally denied, because it is believed the defendant will tamper with witnesses if he is allowed to reach them. Were this premise correct, then tampering would be most likely in those cases involving the death penalty — and yet, in this instance, witnesses' names are available by virtue of a specific federal statute. The federal courts, in line with their general policy against disclosure, have refused to extend this right to other categories of defendants. But does this seem logical?

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27. 343 U.S. 790 (1952).
28. Id. at 801. (Emphasis supplied.)
29. 18 U.S.C. § 3432. This statute does not, however, require lists of witnesses before grand juries to be disclosed in capital cases.
Some courts have made exceptions to this present rigid rule. A demand for the names of all people with knowledge of facts relevant to the transactions in the indictment has been granted.\(^{31}\) Also, by way of granting motions for bills of particulars under Rule 7(f), requests have been granted for the names of people present at the origin of the scheme,\(^{32}\) for names of persons to whom defendant sold narcotics,\(^{33}\) for names of alleged co-conspirators,\(^{34}\) and for the name of a government decoy.\(^{35}\)

Motions under Rules 16 and 17(c) for witnesses' names and addresses are usually denied, the courts reasoning that "defendants are not entitled to be provided with a list of witnesses except in capital cases."\(^{36}\) The proposed amendments to Rule 16 would not alter court rulings of this nature. Therefore, a change in the basic statute would be desirable.

C. Statements of Witnesses

Before the Supreme Court decision in *Jencks v. United States*,\(^{37}\) discovery of statements of potential witnesses which were in the possession of the prosecution was not possible.\(^{38}\) Such discovery did not meet the "seizure" requirement of Rule 16, nor the "evidentiary" test of Rule 17(c) as outlined in *Bowman Dairy Co. v. United States*.\(^{39}\) Congress thereafter by statute made such discovery partly possible.\(^{40}\) The value of obtaining inspection of witnesses' statements is evident; counsel for the defense needs such statements in order to intelligently impeach the witness on cross-examination.

In a decision of far-reaching importance, the *Jencks* Court decided that a defendant was entitled to inspect reports and statements of government witnesses. Since this case has been discussed in many exhaustive articles, a brief summary will suffice.\(^{41}\)

The government's principal witnesses in *Jencks*, Matusow and Ford, had been paid by the Federal Bureau of Investigation to make reports to that agency on the party activities in which they participated. Jencks was convicted, and on appeal the Supreme Court reversed the conviction on the ground that the trial court refused to direct the government to produce the prior reports by Matusow and Ford for use in their cross-examination. The Court condemned the then-current practice of allowing the trial judge to inspect certain classes of notes and memoranda *in camera* to determine their materiality before allow-

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\(^{35}\) United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), cert. den., 345 U.S. 925 (1953).
\(^{39}\) 341 U.S. 214 (1951). See the discussion of this case at Notes 59–60, infra, and accompanying text.
ing defense counsel to inspect. If the trial judge determined that they were not material, he had discretion to deny the inspection. The Court stated:

"We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

In addition, the Supreme Court said that a preliminary foundation of inconsistency between the contents of the report and the testimony of the witnesses was not required to obtain an order for the government to produce the Federal Bureau of Investigation's report.

Congress reacted to this decision by enlarging the scope of discovery with the Jencks Act. This statute now prohibits pre-trial disclosures of any statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the government. The Act provides further for the production of some statements, but only after in camera inspection and the exclusion of non-relevant portions by the court. The statements which may be inspected at the trial are narrowly defined by the Act. A subsequent case, Palermo v. United States, made it clear that since the statute was apparently intended to be the sole means of obtaining inspection of materials falling within the discovery prohibition, certain documents such as a government agent's summary of a witness interview are no longer eligible for inspection.

Proposed Rule 16(b) would permit the inspection of documents containing witness statements in the possession of the government, but subject to the limitations imposed by the procedures of the Jencks Act.

D. Books, Documents, or Tangible Objects

Motions for access to books, documents, or tangible objects, may be made under present Rules 7(f), 16, and 17(c). Such requests have generally been denied under Rule 7(f) as constituting disclosure of evidence not necessarily needed for clarification to prevent surprise. However, there have been significant exceptions. In United States v.

42. 353 U.S. at 668.
43. Supra, note 40.
44. 18 U.S.C. 3500(e) (1957).
45. "Jencks does not require the government to open its investigative files in a criminal case and permit their inspection by persons charged with crime to assist them in the preparation for their defense. Nor does Jencks require the defendants to turn over to the prosecution their files of investigative material which they have secured for their own defense." United States v. West, 170 F. Supp. 200, 209 (N.D. Ohio 1959), aff'd, 274 F.2d 885 (6th Cir. 1960).
47. "The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of [section] (e), or do not relate to the subject matter of the witness' testimony. . . ." 360 U.S. at 354.
documents on which the government intended to rely as proof of crime were given to the defense for discovery purposes after they had moved for them under Rule 7(f).

Present Rule 16, under which a majority of these requests are made, authorizes the district judge to order the U.S. Attorney to permit the defendant to inspect and copy books, papers, documents, and other tangible evidence obtained from or belonging to the defendant or obtained from others, by seizure or process, subject to materiality and reasonableness. Despite the obvious limitation in the Rule — the items to be inspected had to be obtained by seizure or process — there is a wide area of granted requests. Birth certificates, non-communist affidavits, income tax returns, stolen television tubes, diaries, and company books containing information on allegedly unreported car sales have been considered proper for pre-trial discovery. Subsection (b) of the proposed Rule 16 eliminates the "seizure or process" test and permits inspection by the defendant of documents or other tangible objects in possession or control of the government subject to a showing that the items sought may be material to the preparation of the defense and that the request is reasonable.

Rule 16 has also been construed to permit inspection of drugs, but not of the scientific examinations relevant to them or of other scientific reports generally. However, a judge may allow a defendant's own expert to make such analysis. Subsection (a) of the proposed amended Rule 16 would extend discovery to the reports of physical or mental examinations and scientific tests or experiments. The court would have discretion to permit such discovery; no standard is stated which the defendant must satisfy.

Present Rule 17(c) in general terms allows either party to serve subpoenas duces tecum. It also provides that material designated in such a subpoena is to be made available for inspection by the other party. Before 1951, however, it was not clear that the defense could use a subpoena duces tecum to obtain access to material in the hands of the government. In *Bowman Dairy Co. v. United States*, this doubt was resolved, the Court holding that the defense was entitled to subpoena documents on which the government intended to rely as proof of crime.
to examine material obtained by the government without the use of seizure or process. The Court said that Rule 17(c) can be utilized by the defense for pre-trial inspection of such material unavailable under Rule 16 if the material sought "is in a good faith effort to obtain evidence," whether or not such material might have been obtained under Rule 16.

Judge Weinfeld, in United States v. Iozia, 60 states that the defendant must show the following before a motion should be granted under Rule 17(c):

"(1) That the documents are evidentiary and relevant;

"(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;

"(3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;

"(4) That the application is made in good faith and is not intended as a general fishing expedition."

Inspection of forged documents, 62 contracts and checks and other bank records referred to in the indictment, 63 company books involving the charge, 64 and installment contracts in fraud cases 65 has been permitted.

The proposed changes in Rule 16 will make the use of Rule 17(c) sanctioned in the Bowman Dairy Co. case unnecessary. The proposed standard, that the desired evidence "may be material to the preparation of his defense and that the request is reasonable," is probably more liberal in allowing discovery than the existing law.

E. Pre-Trial Conference

In ordinary criminal cases, pre-trial conferences are probably neither necessary or desirable. Trial time is generally short, and the burden, of course, is on the government to establish guilt. 66 However, in cases involving multiple defendants, complex issues, and a copious amount of evidence, pre-trial procedures would frequently be useful. 67 In such cases, the saving in time and expense would be considerable. The defendant would then be apprised more clearly of what evidence he had to meet and could avoid gathering many witnesses who might prove not only unnecessary but incompetent. 68

60. 13 F.R.D. 335 (S.D.N.Y. 1952).
61. Id. at 338.
While a court may have the power to order a pre-trial conference in a criminal case, it cannot compel either the government or the defense to make disclosure of their cases (as it can in civil cases); it can only promote agreements and stipulations. In order to complete the liberalization of discovery in criminal cases and remove the element of surprise from this litigation, pre-trial procedure, which has proved so successful in civil cases, should be imported into the criminal court. The Advisory Committee proposes such a rule.

Objectives of criminal pre-trial conferences are the same as in civil pre-trial conferences. However, the constitutional protections afforded the defendant are different in criminal cases. The defendant must be present at every phase of a criminal case, and the court cannot impose sanctions for defendant's refusal to testify or to admit facts, as can be done in civil cases. Thus, in criminal cases emphasis in the pre-trial conference often may have to be on procedures for handling voluminous evidence rather than on the refining and simplification of issues. However, as suggested earlier, some gathering of unnecessary evidence and witnesses by the defendant may be avoided. Proposed Rule 17.1 will clarify the power of the court to require a pre-trial conference "to consider such matters as will promote a fair and expeditious trial," subject to the constitutional safeguards afforded the defendants.

F. Discovery of Grand Jury Proceedings

Rule 6(e) is not being amended except to add operators of recording devices and transcribing typists to those who may be directed to disclose. This rule allows for disclosure of matters before the grand jury preliminary to trial. Despite this, grand jury transcripts of witnesses' testimony have been virtually unavailable prior to trial. Once the grand jury has the case, secrecy surrounds its deliberations, and there are strong policy reasons supporting this non-disclosure of its minutes.

70. See generally Nims, Pre-Trial (1950); Murrah, Pre-Trial Procedure — A Statement of Its Essentials, 14 F.R.D. 417, 420 (1954).
75. This issue is discussed in United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954) and Travis v. United States, 269 F.2d 928, 945 (10th Cir. 1959), where it was stated that, "[I]nstances when the need for disclosure of grand jury proceedings outweighs countervailing policy maintaining the secrecy of such proceedings must be shown with particularity. . . . [a]nd the burden is on the defense to show that a 'particularized need' exists for the minutes which outweighs the policy of secrecy. . . ." See also United States v. Schneiderman, 104 F. Supp. 405 (S.D. Calif. 1952). See generally Orfield, The Federal Grand Jury, 22 F.R.D. 343 (1959).
Non-disclosure of the minutes before the trial prevents the accused from tampering with the witnesses against him; prevents publication of derogatory information presented to the grand jury against an accused who has not been indicted; encourages complainants and witnesses to come before the grand jury and speak fully without fear that their testimony will be made public (thereby subjecting them to possible repercussions); and encourages the grand jurors to engage in uninhibited investigation and deliberation by barring, before trial, disclosures of their votes and comments. 76

There are instances, nevertheless, where the courts have made grand jury minutes available to the defense. The minutes have been made available in refreshing recollection of government witnesses at trial, 77 in impeaching witnesses at trial, 78 and in allowing the defendant to prepare his defense in a case where he is accused of committing perjury before the grand jury. 79 The government has recognized the fairness of permitting the defense access to the grand jury testimony of government witnesses, even though it considered that it was not bound to do so. 80 Should the government use grand jury minutes at trial, the defense is ordinarily entitled to inspect the relevant testimony in those minutes. 81 The decision to release grand jury minutes results from weighing the maintenance of secrecy against the defendant’s need for such information to adequately prepare his defense. When the latter is necessary, discovery of the relevant portions of the minutes should be allowed. 82

Certainly, most defense counsel requests for the production of grand jury minutes are denied under Rule 6(e). Ready granting of such requests would dangerously impair our system of grand jury procedure, since it would open the way for an exploratory expedition into the government’s evidence, as well as encourage dilatory tactics. Yet, the court should carefully screen such requests in line with the trend toward allowing liberal discovery for the defendant. 83 Under proposed Rule 16(a), however, the recorded testimony of a defendant before a grand jury will be made available for discovery purposes. The same policy which favors pre-trial disclosures of his written confessions and statements to the police also supports disclosure of his statements in this instance.

76. See Goldstein, supra note 16, at 1184-85.
77. Burton v. United States, 175 F.2d 960 (5th Cir. 1949); United States v. Alper, 156 F.2d 222 (2d Cir. 1946); United States v. Colter, 60 F.2d 689 (2d Cir. 1932).
78. United States v. Rose, 215 F.2d 617 (10th Cir. 1954); United States v. Remington, 191 F.2d 246 (2d Cir. 1951).
III.

SUMMARY AND CONCLUSION

Liberal discovery techniques, together with the use of pre-trial conferences properly administered, will further the aim of criminal litigation to arrive at the truth. For too long, the emphasis has been on the "sporting theory" of justice, a theory that stresses, unfortunately, that the lawsuit is a game with the judge as the umpire awarding the prize to the more skillful. This principle is outmoded; it has no place in a criminal trial, and it is directly contrary to our concept of justice. No one should contest the fact that beneficial results are achieved by eliminating surprise and confining the trial to the issues, legal and factual.

Circuit Judge Kaufman, in speaking of the trial lawyer, recently said:

"The trial lawyer presents one version or interpretation of the facts, the one most favorable to his client, and his opposing advocate does the same. Perhaps some place between the two versions is what actually happened. The system of adversary proceedings is based on the premise that the best presentation of both versions of the facts will result in a close enough approximation of truth so as to be classifiable as justice."

For the defense to offer the best presentation of the facts, it must be allowed a decent opportunity to prepare in advance of trial by obtaining, through discovery, the facts of the alleged crime. It is no answer to say that the defendant must remember what he said or did. Although legal history does not support a broad claim for discovery in a criminal case, the virtue of our adversary system in criminal trials lies precisely in the opportunity for a full and fair presentation of the facts.


(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, [or] stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Rule 7. The Indictment and the Information.

(f) Bill of Particulars. The court [for cause] may direct the filing of a bill of particulars. A motion for a bill of particulars may be made [only] before arraignment or within ten days after arraignment or at such [other] later time [before or after arraignment as may be prescribed by rule or orders] as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 16. Discovery and Inspection.

[Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.]

(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, which are known by the attorney for the government to be within the possession, custody or control of 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, which are known by the attorney for the government to be within the possession, custody or control of the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents or Tangible Objects. 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 or tangible objects, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subdivision 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 this rule, it may condition its order by requiring that the defendant permit the government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control.

(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 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.

**Rule 17.1. Pretrial Procedure.**

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order counsel for all parties to appear before it for one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. This rule shall not be invoked in the case of a defendant who is not represented by counsel.