Discovery in the Federal Criminal System

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INTRODUCTION

Defense lawyers practicing law in the State of Montana are indeed fortunate. They work with the Montana Code of Criminal Procedure1—one of the most advanced and far reaching codes available to the defendant in the United States. The Montana Code provides the defendant with broad powers which allow him to have virtually complete pre-trial discovery and inspection of all evidence which may or may not be used against him. Thus, it could be stated that the defendant charged with a crime in the State of Montana has discovery powers which parallel the broad powers afforded both the plaintiff and defendant in civil actions in the State of Montana and under the Federal Rules of Civil Procedure. A defense attorney handling a criminal case in the Federal system, however, will find considerable limitations on the availability of pretrial discovery by the defendant, and, in some cases, virtually no availability of pretrial discovery.

The general procedure in federal courts is for the defense counsel to file a motion for a bill of particulars or for pre-trial discovery and inspection. Rule 7(f) and Rule 16 of the Federal Rules of Criminal Procedure provide such an avenue. The motion for discovery is based upon the following constitutional requirements:

1. The defendant must be adequately apprised of the nature and scope of the accusations against him as guaranteed by the Sixth Amendment;2
2. The defendant must have an opportunity to adequately prepare his defense;3
3. Prejudicial surprise must be avoided at the time of trial;4
4. The issues must be clarified so that confusion and delay will be avoided at the time of trial;5
5. The defendant must be protected against a second prosecution for the same offense as guaranteed by the Fifth Amendment;6
6. Materials believed to be in the exclusive control and posses-

1. **Revised Codes of Montana, §§ 95-1801 to 95—1806 (1947).**
2. **U.S. Const. amend. VI.**
4. **United States v. Glaze, 313 F. 2d 757, 759 (2d Cir. 1963).**
5. **United States v. Ketchum, 320 F. 2d 3, 8 (2d Cir. 1963).**
6. **U.S. Const. amend. V.**
sion of prosecuting authorities and, thus, unavailable to the defendant, must be made available to said defendant; 7

7. The defendant must be afforded due process as guaranteed to him by the Fifth and Fourteenth Amendments; 8

8. The defendant must be afforded the right of effective confrontation against his accusers as guaranteed by the Fifth, Sixth, and Fourteenth Amendments; 9 and

9. The defendant must be afforded his right to effective aid and assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. 10

This article discusses first some general legal principles concerning the defendant's discovery rights based on the constitutional guarantees listed above and the United States Supreme Court's interpretation of these guarantees. It looks especially closely at the Court's interpretation of the due process clause, from which the Court has found a basis for many of the defendant's discovery rights. The article also sets out the American Bar Association's standards on the prosecution's obligation to disclose information to the defendant. Next, the article examines the legal authority for specific information which the defendant's counsel may discover from the prosecution, based on the Federal Rules of Criminal Procedure and court decisions interpreting discovery rights under those rules. Finally, an appendix is included to provide a model set of inquiries that may be used by defense counsel to obtain information from the prosecution.

GENERAL LEGAL PRINCIPLES

A. Constitutional Guarantee

The fundamental principles of criminal law in the American system are set out in the United States Constitution in the Fifth and Sixth Amendments. The first principle is stated in the Sixth Amendment:

In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation . . . (Emphasis supplied.) 11

This Constitutional principle is deeply rooted in the history of criminal law, based upon the reasoning that in order for a person to be able to defend himself against any charge, he must first know the

11. U.S. Const. amend. VI.
nature and the cause of the accusation. If the defendant is unaware of what is said against him, is unaware of the time and place that the accusation is made, and is unaware of the material facts upon which the prosecution intends to rely, how, then, can he adequately prepare his defense or even have knowledge of what defenses may be available on his behalf?

The remaining tenants of the Sixth Amendment are more sophisticated principles:

In all criminal prosecutions the accused shall . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.12

The courts have construed these tenants to require “effective” confrontation of witnesses,13 “effective” compulsory process for obtaining witnesses,14 and “effective” assistance of counsel for his defense.15 A defendant may rely on these principles in his discovery in federal criminal cases. If the prosecution refuses to disclose information requested in a motion for a bill of particulars, it is obvious that the defendant would be denied “effective” confrontation of witnesses and “effective” assistance of counsel.

Although the Sixth Amendment refers directly to criminal prosecutions, much of the case law that applies to criminal discovery rights has appeared under the Fifth Amendment. This trend has occurred because the Bill of Rights has been held generally not to be incorporated into the due process clause of the Fourteenth Amendment and thus not applicable directly to the states.16 It should be noted however, that a denial of the rights embodied in the Sixth Amendment, may, in specific instances, operate to deprive a defendant of due process of law.17 In contrast, the due process clause of the Fifth Amendment is embodied in the Fourteenth Amendment and is binding upon the states and state law. The fifth Amendment, in part, states: “No person shall. . . be deprived of life, liberty, or property, without due process of law.”

B. Supreme Court Interpretations

Under the due process clause of the Fifth and Fourteenth Amendments, the United States Supreme Court has developed two
principle rules concerning discovery rights of the defendant in criminal cases. The landmark decision of *Brady v. State of Maryland* \(^{18}\) established that the prosecution may not hide or fail to disclose favorable information to a defendant charged with a crime.\(^{19}\) The corollary to this rule was established earlier in *Napue v. Illinois*\(^{20}\) which stated that if the state allows false evidence to go uncorrected, there is a denial of due process for the defendant.\(^{21}\)

A prelude to the *Brady* case appeared in two Pennsylvania cases in which the United States Court of Appeals for the Third Circuit ruled that the prosecutor's failure to disclose exculpatory materials can be, under certain circumstances, a denial of due process.\(^{22}\) In *United States v. Baldi*,\(^{23}\) the petitioner sought habeas corpus on the grounds that he was denied due process of law where, in a prosecution for murder of a policeman, the state suppressed evidence tending to show that the petitioner did not fire the fatal shot and evidence that the shot was, in fact, fired by a policeman. The suppression of this evidence, although not relevant on the question of guilt, was relevant to the penalty to be imposed. The Court stated:

> We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process.\(^{24}\)

In another Third Circuit case, *United States v. Dye*\(^{25}\) also a petition of habeas corpus, the petitioner has been convicted of first degree murder. The petitioner contended that the prosecution had improperly suppressed testimony of the police officers to the effect that the petitioner was under the influence of alcohol at the time of his arrest. The court concluded that this was, in fact, a denial of due process since intoxication has a bearing upon the degree of guilt.\(^{26}\)

In *Brady*, the Supreme Court specifically stated that the *Baldi* and *Dye* cases "state the correct constitutional rule."\(^{27}\) The Court, relying on the due process clause, ruled as follows:

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19. *Id.* at 87.
21. *Id.* at 269.
24. *Id.* at 820.
26. *Id.* at 767.
We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. . . . A prosecution that withholds evidence on demand of the accused which, if made available, would tend to exculpate or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 28

It must be understood that Brady acknowledged the prosecution's advantage in a search for evidence by reason of the special powers it possesses. 29 For instance, there are many occasions when witnesses feel obliged to talk to the Federal Bureau of Investigation or the police, but will not talk to defense counsel. Furthermore, witnesses who are not inclined to speak to either side can be forced by the state to testify before a grand jury under the compulsion of subpoena. These discovery devices, of course, are not available to the defense. The imbalance of these investigatory facilities inevitably harms the defendant and can lead to an ill-prepared defense, and, therefore, an unfair trial. It was this obvious inequity that led to the decision in Brady.

Another prelude to Brady and the corollary to the Brady principle, came in Napue 30 where the Supreme Court decided that a lie told by a governmental witness which did not concern any of the facts of the case, but involved his credibility, tainted the conviction and necessitated a new trial. The government witness in Napue testified that no one had promised him consideration for his testimony, when in fact an assistant district attorney had made such a promise. The Court, in scalding language, denounced the government for this failure of disclosure and reversed Napue's conviction. 31

Recently, the Supreme Court reinforced the Napue holding in Giglio v. United States. 32 In a situation almost identical to Napue the Court reprimanded prosecutors for not divulging a witness's known false testimony. The prosecution acknowledged that an assistant United States Attorney had promised the witness he would not be prosecuted if he cooperated, but the assistant who tried the case pleaded that he was unaware of that promise. The Court, in rejecting this excuse, emphasized:

28. Id. at 87.
29. Id. at 88.
31. Id. at 270-272.
The prosecutor's office is an entity and, as such, it is the spokes-
man for the government. A promise made by one attorney must be
attributed, for these purposes, to the government. Thus, *Giglio*
expanded the frontiers of *Brady* and *Napue* by bringing within its scope the principle that the state cannot stand by and allow false testimony to go uncorrected, even though unsoli-
cited, and cannot escape the responsibility of the action of one attor-
ney in the United States Attorney's office, even though disavowed
by another.

The *Brady* and *Napue* doctrines have been further explained in
*Moore v. Illinois*. In this leading decision the Supreme Court re-
viewed a murder case arising in Illinois. The petitioner, convicted
of the shotgun slaying of a bartender, contended he was denied due
process because the state failed to disclose a favorable pre-trial
statement and a diagram demonstrating that a key government
witness could not have seen the shooting. The Court, dramatically
divided, rejected the petitioner's *Brady* claim, holding that in light
of all the evidence, the misidentification of the petitioner by only
one witness was not material to the issue of guilt. Significantly, the
prosecution had "presented its entire file to the defense, and no
further request for disclosure was made." The Court made clear its
intention to adhere to the principles of *Brady* and *Napue*, but felt
"that the present record embraces no violation of those princi-

ples." However, the Court did reshape the *Brady* rule somewhat
by stating:

The heart of the holding in *Brady* is the prosecution's suppression
of evidence, in the face of a defense production request, where the
evidence is favorable to the accused and is material either to guilt
or to punishment. Important, then, are (a) suppression by the
prosecution after a request by the defense, (b) the evidence is of a
favorable character for the defense, and (c) the materiality of the
evidence.

It becomes apparent that the evidence suppressed must be re-
quested by defense counsel. Thus, it is imperative that the defense
counsel be very thorough in asking for all information that may have
any effect on the outcome of his case.

Some prosecutors and courts have formed the habit of using the
word "exculpatory" in defining *Brady* material. Although that word

33. *Id.* at 154.
35. *Id.* at 798.
36. *Id.* at 794.
37. *Id.* at 798.
38. *Id.* at 794.
was used in the *Brady* opinion, the restatement of the rule in *Moore* clearly relates to "favorable" evidence. Obviously, there is a vast difference between favorable evidence and that which is exculpatory.

A last comment should be made on the *Moore* decision. The majority opinion drew an infuriated dissent from Justice Marshall, joined by Justices Douglas, Stewart, and Powell. Marshall exclaimed:

There can be no doubt that there was suppression of evidence by the state and that the evidence the state relied on was "false" in the sense that it was incomplete and misleading.39

Later in the dissent, Justice Marshall elaborated:

My reading of the case leads me to conclude that the prosecutor knew that evidence existed that might help the defense, that the defense had asked to see it, and that it was never disclosed.40

C. American Bar Association Standards

The prosecution's obligation to disclose has been further defined by the American Bar Association, which has followed the *Brady* principle, both in its project on Standards for Criminal Justice41 and in its Code of Professional Responsibility.42 The Standards for Criminal Justice relating to discovery and procedure before trial state as follows:

2.1 Prosecutor's obligation.

... (c) Except as is otherwise provided as to protective orders (Section 4.4), the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.43

The American Bar Association Code of Professional Responsibility speaks to the prosecutor's obligation to disclose information in both

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39. *Id.* at 808.
40. *Id.* at 810.
41. [American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial (1969)].
42. [American Bar Association Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility (1969)].
43. [American Bar Association, *supra* note 41 at 53].
its ethical considerations and disciplinary rules under Canon 7. The ethical consideration states:

EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor’s case or aid the accused.44 [Emphasis supplied.]

Finally, the disciplinary rules state:

DR 7-103(B). A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, or the existence of evidence, known to the prosecutor or other governmental lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.45

In conclusion, under the legal principles that have been enacted into the Federal Constitution, established by the Supreme Court of the United States, and have been adopted by the American Bar Association, it can be seen that a defendant’s motion for a bill of particulars should be granted for almost any information that will be helpful to the defendant.

LEGAL AUTHORITY FOR DISCOVERY

A. Federal Rules

Rule 7(f) and Rule 16 of the Federal Rules of Criminal Procedure provide the avenues for discovery by the defendant’s attorney in federal criminal cases. Rule 16, on discovery and inspection, is fairly specific. Subsection (a) provides that the court may order the government’s attorney to permit the defendant to inspect and copy:

44. AMERICAN BAR ASSOCIATION, supra note 42 at 79.
45. AMERICAN BAR ASSOCIATION [, supra note 42 at 87.
(1) written or recorded statements made by the defendant; (2) reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case; and (3) recorded testimony of the defendant before a grand jury. Subsection (b) of Rule 16 provides for discovery by the defense attorney of books, papers, documents, tangible objects, buildings or places, which are in the control of the government, upon a showing of materiality to the defense.

In contrast to Rule 16's specificity is Rule 7(f)'s generality. Rule 7(f) merely states that a court may direct the filing of a bill of particulars. It gives no description or limitation of any type of the areas of inquiry a bill of particulars may cover. Exactly what a bill of particulars is and its scope of inquiry have been defined by case law. Because its scope is apparently unlimited under the Federal Code, a vast area of inquiry may be achieved with a motion for a bill of particulars in federal criminal cases.

A bill of particulars is a procedural document complementary to the pleading. It is a statement containing a more specific allegation of the facts than is recited in the pleading. Its purpose is to amplify or limit a pleading, to specify more minutely a claim or defense, to give information not contained in the pleading to the opposite party, or to apprise the opposite party of the case he must meet. To these ends, the trial may be limited to the matters specified in the bill of particulars. The scope of the bill should ordinarily be limited to such matters as are required to enable the moving party to properly prepare his responsive pleadings and to generally prepare for trial. The granting or refusal of a motion for a bill of particulars rests in the sound discretion of the court.

Federal courts are excercising their discretion to grant bills of particulars more freely, and many have enlarged the scope of information available through this device. This trend has been especially marked in conspiracy cases and other complex cases such as income tax evasion and fraud prosecutions. Although even courts generously disposed to grant a bill will not "force the government to reveal its entire case, or all of the evidence it hopes to adduce at trial," there is increasing recognition that "any information which elaborates on the nature of the offenses charged is likely to itself constitute evidence" and a bill should not be denied for that reason alone.

The remainder of this article deals with specific areas of inquiry.

to which courts have held that a motion for a bill of particulars should be granted. These areas of precedent are intended to complement the model set of inquiries, which is included in the appendix to this article. The inquiries contained in the model set are of the following character:

A. Co-conspirators  
B. Prospective Witnesses  
C. Interviewers, not Witnesses  
D. Interviewers  
E. Statements or Evidence of the Defendant  
F. Books, Papers, Documents, Tests and Tangible Objects  
G. Impeachment  
H. Conviction Records  
I. Deals Made  
J. Knowledge of Relevant Facts  
K. Search and Seizure  
L. Miscellaneous  

B. Court Decisions

Basic Information

It has been held that a motion for a bill of particulars should be granted to disclose the time and place of the alleged offense.\(^5^0\) Also, the means employed to commit the alleged offense is discoverable through particulars.\(^5^1\) In a multi-defendant case, a specification of whether a defendant is charged as an aider and abetter, and, if so, how he aided and abetted the alleged offense must be given.\(^5^2\) It would seem that these motions obviously should be granted because they follow so closely from the Sixth Amendment command that a defendant shall be informed of the nature and cause of the charge against him.

Co-Conspirators

A long line of cases have dealt with the problem of bill of particulars concerning conspiracy charges. It has been held that particulars of the following character should be granted in conspiracy cases: (1) when, where, and in what manner each defendant became a

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52. United States v. Baker, supra note 51 at 674.
member of the alleged conspiracy; 53 (2) the names of all alleged co-conspirators not named in the indictment but known to the prosecution; 54 (3) all overt acts in furtherance of the conspiracy not specified in the indictment, on which the prosecution intends to rely; 55 (4) specification of the places at which overt acts were allegedly performed; 56 and (5) specification of the acts each defendant is alleged to have personally performed. 57 Again, it can be seen that these requests for information are not requests for evidence in the hands of the government, but more basically, they are requests for the specific acts done which comprise the crime.

**Prospective Witnesses**

As to prospective government witnesses, some courts have been hesitant in allowing discovery. The *Brady* decision requires only that information helpful to the defense must be produced at the appropriate time requested. This is in contrast to the disclosure timetable of the Jencks Act, 58 by which statements of witnesses to be called by the government need not be disclosed until trial.

One rule has been definitely established in rationalizing this dichotomy. The defendant has the right to know the names and addresses of persons, known to the government, who directly took part in the alleged illegal act, and whether such persons were agents of the government before trial. 59 In this regard, it has been stated that without definite specification of time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may be some difficulty in preparing a defense to the charges, and some danger of surprise. 60 Some courts, however, have held that the prosecution is not required to disclose the names and addresses of nonparticipating witnesses. 61

It may be argued that discovery should exist even as to witnesses who did not participate in the crime itself. In *Gregory v.*

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Witnesses, particularly eye-witnesses to a crime, are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them.\textsuperscript{63}

The defendant cannot compel a witness to submit to an interview to which that witness objects. However, the defendant’s attorney has not only the right,\textsuperscript{64} but the duty to talk to the state’s witnesses before trial.\textsuperscript{65} Thus, the defense attorney may find himself at a crossroads where, on one hand, he has the professional and legal duty to interview the state’s witnesses before trial, and on the other hand, he is unaware of the names, addresses, or telephone numbers of those witnesses. In the decision of United States v. Hardy,\textsuperscript{66} the district court allowed discovery of all persons having knowledge pertaining to the case or who were interviewed by the prosecution in connection with the case. The court explained its reasoning as follows:

Absent a showing . . . abuses and the considerations noted by the Advisory Committee, such as danger to witnesses, names and addresses of persons who have any knowledge pertaining to the case, both those who will be called as witnesses and those who will not are properly discoverable. . . . The necessity for discovery of names and addresses of persons with knowledge of the case whom the Government does not intend to call as witnesses may be even greater than the discovery of the names of witnesses who will be called. The former may have information favorable to the accused and that information would not be discoverable under the Jencks Act. Indeed, if discovery of names of non-witnesses with knowledge of the cases were denied, an innocent defendant might never even know of the existence of people who could save him from punishment for a crime he did not commit.

Two areas of discovery in which much favorable information may be made available to the defendant are interviewees who might not be called as witnesses and their interviewers. Individuals who

\begin{itemize}
  \item \textsuperscript{62} Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966).
  \item \textsuperscript{63} \textit{id}. at 188.
  \item \textsuperscript{64} American Bar Association, Canons of Professional and Judicial Ethics, Canon 39 (1957).
  \item \textsuperscript{65} Walker v. Superior Court, 155 Cal.App.2d 134, 317 P.2d 130, 134 (1957).
  \item \textsuperscript{66} United States v. Hardy, (D. D.C., Cr. No. 869069, 1968).
\end{itemize}
have been interviewed by the prosecution, but who will not be called in the prosecution case can only be reasonably excused from testifying at the trial on two grounds: (1) that they have no knowledge of relevant facts; or (2) that their knowledge is in some manner favorable to the defendant. If the second reason is true, then under the Brady doctrine that information should be made available to the defense.

Contrary to what might be expected, courts have not generally made information, which is not intended to be used at trial, discoverable to the defense. In *Giles v. Maryland*, the United States Supreme Court addressed the state's duty to disclose material facts known to the state prior to trial, even if such facts might not be admissible at trial. Four separate opinions were written in this case, each rendering the same judgment, but giving different reasons. Justice Abe Fortas considered this problem most closely. In his opinion, Justice Fortas held that the state may not be excused from its duty to disclose material facts known to it prior to trial solely because these facts would not be admissible at trial. The ultimate responsibility of the state under the Due Process Clause of the Fourteenth Amendment, he held, is not to convict, but to see that truth emerges. While he held that the state had no obligation to communicate preliminary, challenged, or speculative information, Justice Fortas, in concluding his position, stated:

My point relates, not to the defendant's discovery of the prosecution's case for purposes of preparation or avoidance of surprise, which is dealt with in Rule 16, but the State's constitutional duty, as I see it, voluntarily to disclose material in its exclusive possession which is exonerative or helpful to the defense — which the State will not affirmatively use to prove guilt — and which it should not conceal. . .

The reasoning of this opinion is most applicable to requests made by the defendant for discovery of information which clearly would be favorable to the defendant, but which would not be utilized by the prosecution in their case in chief.

*Simos v. Gray* may also be used to support discovery of materials not to be used at trial. Here, the court held that where witnesses identified the defendant from police photos six weeks after the offense, the state had the duty to disclose police reports which indicated that on the night of the offense witnesses declined to view such photographs because they were sure they could not identify the

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68. *Id.* at 96 to 102.
69. *Id.* at 101, 102.
burglar. Also, the police reports which showed that the witness made a misidentification several days later, and that a witness gave a physical description that varied from the description of the defendant were held to be discoverable. The court stated that the fact that the suppressed evidence tends only to rebut the state's case rather than exculpate the accused directly still raises the degree of prejudice necessary for reversal.\footnote{Id. at 270.}

In \textit{United States v. Ladd},\footnote{United States v. Ladd, 48 F.R.D. 266, 268 (D. Ala. 1969).} the court allowed the motion calling for statements of witnesses not proposed to be called by the government which tend to exculpate the defendant, based on the reason that there is no conflict with the Jencks Act and such statements are clearly favorable to the defendant.

\textbf{Statements or Evidence of Defendant}

With respect to matters constituting a discoverable statement of the defendant, a number of general principles have emerged. The contents of the statement may be either inculpatory or exculpatory; it need not be a confession or an admission of elements of the offense. It is sufficient that the statement is relevant to the crime charged.\footnote{United States v. Federman, 41 F.R.D. 339, 340 (S.D. N.Y. 1967).} The statement need not be made to an agent of the government. Any statement, to whomever made, is discoverable.\footnote{United States v. Lubomski, \textit{supra} note 50 at 720; United States v. Baker, \textit{supra} note 51 at 671-672.} The statement need not be made after the arrest of the defendant.\footnote{United States v. Leighton, 365 F.Supp. 27,34 (S.D. N.Y. 1967).} The statement need not be written out by the defendant or be a written document signed by him. An oral statement recorded by mechanical, electrical, or other means is discoverable.\footnote{United States v. Lubomski, \textit{supra} note 50 at 720.} The statement need not be a recital of past occurrences. It may, itself, constitute part of the alleged offense or be made in the course of the commission of the offense.\footnote{United States v. Isa, 413 F.2d 244, 248-249 (7th Cir. 1969).}

An oral statement of a defendant, recited or summarized in an investigative report or the notes of a government investigator, appears to be discoverable without regard to whether it is verbatim, only substantially verbatim, or when the report or notes were made.\footnote{United States v. Morrison, 43 F.R.D. 516, 519 (N.D. Ill. 1967).} Statements by the defendant to be used by the prosecution are discoverable under Rule 16(a) of the Federal Rules of Criminal Procedure, and thus one need not use a bill of particulars to request such information. The rationale of allowing discovery of the defen-
dant's statements is that these statements may be very damaging to the defendant and generally form the core of the prosecution's case. Thus, it is necessary to supply the defendant with this information.

**Books, Papers, Documents, Tests and Tangible Objects**

Rule 16(b) of the Federal Rules provides for discovery by the defense attorney of books, papers, documents, tangible objects, and even buildings or places in control of the government, upon a showing of materiality to the defense. It is plainly material and reasonable for the defense to discover all documentary and other tangible items referred to in the indictment or which form the subject matter of the alleged offense, or which constitute its fruits or the means of perpetrating said crime. Items such as an instrument a defendant is alleged to have used in perpetrating a crime should clearly be discoverable without question. As was stated in *United States v. Reed*:

> We think the defendant should be afforded access to the documents, papers, and tangible objects which the Government intends to introduce into evidence at trial. In an appropriate case, this procedure could be not only beneficial to the defendant, but also the court by streamlining the litigation in producing time saving stipulations of fact between the parties, and indeed perhaps making a trial unnecessary by pointing out to the defendant the enormity of the Government's case against him.

In this case, the court held that the government must disclose a memorandum of a federal agent based on his recollection and notes taken at an interview of the defendant. This document was ruled to be included under Rule 16.

In *United States v. Tanner*, the court directed the government to permit copying of all documents turned over by the defendants to the government. Even though the defendants made no showing of "materiality" or "reasonableness," the court reasoning that these items very likely would be material to the charges and fundamental fairness required that the defendant have access to them. It must also be noted that items discoverable under Rule 16 are not properly requested through a motion for a bill of particulars, but only by a motion for production of evidence favorable to defendant.

Rule 16(a) also provides for discovery of the results of any scien-

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80. *Id.* at 65.
tific tests or experiments conducted by the government. The basis for making this information available to the defendant is that it is generally impossible for the defense to conduct such tests either because the object of the test is not in his control or the defense does not have recourse to the same testing facilities as the government. Also, if the information was not provided, due to the technical nature of the tests, the defense would be in no position to cross-examine or confront the scientific tests or expert witnesses connected with the tests. If the tests have been taken, but are not planned to be introduced at trial by the prosecution, then it is very likely that the tests would be favorable or exculpatory to the defendant.

Impeachment, Conviction Records, and Deals Made

These three areas of inquiry are placed together because they all are directed toward the credibility of witnesses who may be called to testify against the defendant. The law is clear that all such information should be made available to the defendant prior to the time of trial.

In Giglio v. United States,83 the Supreme Court reversed a conviction and remanded for new trial a case in which a “deal” had been made with one of the key witnesses against the defendant, because the “deal” had not been brought to the attention of the defense prior to the time of trial. The opinion of Chief Justice Burger, which expressed the unanimous view of the Court, held that the assistant U.S. Attorney’s promise was attributable to the government, the agreement was relevant to the co-conspirator’s credibility and the non-disclosure of this evidence affecting the witness’s credibility violated due process.84 This same proposition was earlier set forth in the Napue85 case, where the Court ruled that the defense counsel should be advised of “deals” made which might affect the credibility of the prosecution witnesses.

From these decisions, it is clear that any material which affects the credibility of governmental witnesses is discoverable by the defense and must be produced prior to trial. The information requests in the areas of impeachment, conviction records, and “deals” will affect the credibility of the prosecution’s witnesses and, therefore, should be made available to the defense.

83. Giglio v. United States, supra note 32.
84. Id. at 153-155.
Conclusion

Courts must hold prosecutors to their duty to conduct themselves as "the architects of a fair trial," rather than as advocates privileged to win their cases by any means available. Civilized standards of justice should require the prosecution to reveal all evidence which may be the least bit useful to the defense. Allowing prosecutors and judges to decide what evidence will be helpful to the defense significantly interferes with the determination of justice. In most instances, the delivery of the requested evidence is not harmful to the government; however, it is usually most helpful to the accused. Any withholding of favorable evidence from the defense is unexcusable.

Today, the prosecution's monopoly of investigative agencies in criminal cases means that a defendant faces a far more efficient fact gathering adversary than he did a decade ago. The legal tools available to the prosecution far exceed those available to defense counsel. Under these circumstances, the Brady doctrine, its corrolary in Napue, and subsequent decisions have assumed great importance in achieving a system of equivalent knowledge of the facts concerning the criminal charges in criminal prosecutions. From the history of the due process clause concerning criminal cases, it appears that the scope of discovery available to the defendant will be extended even further. Because of this, the bill of particulars is a valuable tool in the hands of the defense, and its extreme usefulness should not be overlooked.
APPENDIX

MODEL SET OF INQUIRIES

A. CO-CONSPIRATORS

1. All statements made by the co-conspirators to prosecutorial authorities regarding their involvement in the alleged conspiracy and material facts relating thereto.

2. All statements made by the co-conspirators to prosecutorial authorities regarding their lack of involvement in the alleged conspiracy and material facts relating thereto.

3. All statements made by the co-conspirators to prosecutorial authorities regarding the involvement of defendant in the alleged conspiracy and material facts relating thereto.

4. All statements made by the co-conspirators to prosecutorial authorities regarding lack of involvement of defendant in the alleged conspiracy and material facts relating thereto.

5. All recorded testimony of the co-conspirators taken at any time or at any place before a jury and in a court of law.

6. All recorded testimony of the co-conspirators taken at any time or at any place before a presiding judge in any jurisdiction, including any admissions made by any co-conspirators in connection with a "guilty plea."

7. All statements made before a grand jury in any state court relating to the alleged conspiracy.

8. All statements made to a grand jury in any Federal prosecution relating to the alleged conspiracy.

9. A list of any and all alleged agreements made by any co-conspirators, including the defendant in furtherance of a common plan to conspire to commit the crime.

   (a) The names of all witnesses present at the time of any alleged agreements;
   (b) The addresses of all witnesses present at the time of any alleged agreements;
   (c) The exact time of any alleged agreements;
   (d) The exact place of any alleged agreements;
   (e) The exact date of any alleged agreements; and
   (f) any and all statements taken in connection with any and all alleged agreements.

10. A list of any and all overt acts which occurred after the alleged agreements were made to conspire to commit the crime.

   (a) The names of all witnesses present at the time of any alleged overt acts; 
   (b) The addresses of all witnesses present at the time of any alleged overt acts;
(c) The exact time of any alleged overt acts;
(d) The exact place of any alleged overt acts;
(e) The exact date of any alleged overt acts; and
(f) Any and all statements taken in connection with any and all alleged overt acts.

11. A list of all statements regarding additional agreements or follow-up agreements subsequent to the original agreement in regard to the conspiracy to commit the crime.

   (a) The names of all witnesses present at the time of any alleged additional or follow-up agreements;
   (b) The addresses of all witnesses present at the time of any alleged additional or follow-up agreements;
   (c) The exact time of any alleged additional or follow-up agreements;
   (d) The exact place of any alleged additional or follow-up agreements;
   (e) The exact place of any alleged additional or follow-up agreements; and
   (f) Any and all statements taken in connection with any and all alleged additional or follow-up agreements.

B. PROSPECTIVE WITNESSES

1. A list of all witnesses which the prosecution intends to call against the defendant at the time of trial.

   (a) The addresses of all such witnesses; and
   (b) The telephone numbers of all such witnesses.

2. A copy of all statements given by the prosecution's witnesses which statements connect or tend to connect the defendant with the alleged conspiracy to commit murder.

3. All exculpatory or favorable materials found in any statement which might be favorable to the defendant in connection with the charges filed against him.

4. All exculpatory or favorable materials secured by any prosecutorial authority which could be favorable to the defendant in connection with the charges filed against him.

5. A list of all exhibits which the prosecution intends to introduce at the time of trial.

   (a) The name of the witness through which each exhibit will be introduced by the prosecution at the time of trial.

C. INTERVIEWEES WHO MAY NOT BE CALLED AS WITNESSES

1. A list of all individuals interviewed by any prosecutorial
authority, even though they might not be called as witnesses against the defendant.

(a) The addresses of all such individuals; and
(b) The telephone numbers of all such individuals.

2. A copy of all statements taken as a result of said interviews by prosecutorial authorities.

3. A copy of all exculpatory or favorable statements which have resulted from the interviews of said individuals, even though the interviewees may not be called as witnesses against the defendant.

4. A copy of all exculpatory or favorable materials in the possession of prosecutorial authorities which may have resulted from said interviews, even though the interviewees may not be called as witnesses against the defendant.

**D. INTERVIEWERS**

1. A list of all individuals who have participated in the investigation of the crime.

(a) The addresses of all said interviewers; and
(b) The telephone numbers of all said interviewers.

2. A copy of all notes or statements secured by said interviewers which may be favorable or exculpatory to the defendant.

3. A complete statement of all material facts which were secured by any and all such interviewers.

**E. STATEMENTS OR EVIDENCE OF THE DEFENDANT**

1. A complete copy of all statements given by the defendant to any or all prosecutorial authorities.

2. All recorded statements made by the defendant which may be used against him.

3. A copy of all alleged verbal statements made by the defendant to any person or persons which may be used against the defendant at the time of trial.

4. A copy of all documents prepared by the defendant which the prosecution intends to introduce at the time of trial.

5. A copy of all documents caused to be prepared by the defendant or which were prepared under defendant’s authority which the prosecution intends to introduce at the time of trial.

6. The exact time, the exact place, the exact date and the names of all witnesses present when any and all of the statements or documents requested in Items 1 through 5 above were allegedly made or given by the defendant.
F. BOOKS, PAPERS, DOCUMENTS, TESTS AND TANGIBLE OBJECTS

1. A list of all books, papers, documents, test results and tangible objects which the prosecution intends to introduce into evidence against the defendant at the time of trial.

2. A copy of all books, papers, documents, test results and tangible objects which the prosecution intends to introduce into evidence against the defendant at the time of trial.

3. A list of all books, papers, documents, test results and tangible objects which the prosecution does not intend to introduce into evidence at the time of trial but which may be favorable or exculpatory to the defendant and within the control of the prosecutorial authorities.

4. A copy of all books, papers, documents, test results and tangible objects which the prosecution does not intend to introduce into evidence at the time of trial but which may be favorable or exculpatory to the defendant and within the control of the prosecutorial authorities.

5. A list of all scientific tests conducted by the prosecutorial authorities in the investigation of the crime.
   (a) A copy of all such scientific tests;
   (b) The name of the individual who performed each such scientific test;
   (c) The address of the individual who performed each such scientific test;
   (d) The telephone number of the individual who performed each such scientific test;
   (e) A copy of the results of each such scientific test; and
   (f) A statement of whether or not the results of each such scientific test will be introduced into evidence against the defendant at the time of trial.

6. The names and addresses of any expert witnesses which the prosecution intends to call against the defendant at the time of trial.
   (a) A copy of the results of each such expert witness’ tests, investigations or opinions.

7. The names and addresses of any expert witness or expert witnesses employed by the prosecutorial authorities but which the prosecution does not intend to call against the defendant at the time of trial.
   (a) The results of each such expert witness’ tests, investigations or opinions.
G. IMPEACHMENT

1. A list of all witnesses who were interviewed by the prosecutorial authorities whose statements or testimony may tend to impeach or be inconsistent with the testimony of other witnesses who may be called against the defendant at the time of trial.
   
   (a) The address of each such witness;
   (b) The telephone number of each such witness;
   (c) The exact date and place that each such statement was given by each such witness;
   (d) The names of all individuals present when each such statement by each such witness was given; and
   (e) A copy of all statements of all witnesses interviewed by prosecutorial authorities, which statements may tend to impeach or be inconsistent with the testimony of other witnesses which the prosecution may call against the defendant at the time of trial.

2. A list of all statements given at any time and at any place before any court or any jury by any or all alleged co-defendants which may be inconsistent with other statements given by any individual co-defendant.

3. A copy of all statements given at any time and at any place before any court or any jury by any or all alleged co-defendants which may be inconsistent with other statements given by any individual co-defendant.

4. A list of all individuals known to the prosecutorial authorities who have committed perjury in connection with the crime.
   
   (a) The address of each such individual;
   (b) The telephone number of each such individual;
   (c) The exact place where each such individual committed said perjury; and
   (d) A copy of any and all statements tending to prove said perjury on the part of each such individual.

5. A copy of all inconsistent statements which may tend to exculpate or be favorable to the defendant.
   
   (a) The name of each person giving such a statement;
   (b) The address of each person giving such a statement;
   (c) The telephone number of each person giving such a statement;
   (d) The location where each such statement was given;
   (e) The date each such statement was given; and
   (f) The names of all individuals present when each such statement was given.
6. A list of all potential witnesses for the prosecution who have been charged with the crime of perjury.

7. A list of all potential witnesses for the prosecution who have been convicted of the crime of perjury.

   (a) The date of conviction of each such potential witness.

**H. CONVICTION RECORDS**

1. A list of all potential witnesses for the prosecution who have been convicted of one or more felonies.

2. A complete copy of the conviction records of all potential witnesses for the prosecution.

3. A complete copy of the conviction record of the defendant.

**I. DEALS MADE**

1. A statement regarding all plea-bargain deals offered by the prosecution to any alleged co-defendant or witness.

2. The time, date, place and persons present when each such plea-bargain deal was offered to any co-defendant or witness.

3. A list of the number of times that any plea-bargain deal was offered to any and all co-defendants or witnesses.

4. The results of any plea-bargain deals offered by the prosecution to any and/or all of the co-defendants or witnesses.

**J. KNOWLEDGE OF RELEVANT FACTS**

1. Provide a list of all individuals who have knowledge of relevant facts in connection with the alleged crime.

   (a) The address of each such individual;

   (b) The telephone number of each such individual; and

   (c) A copy of all statements given by each such individual.

**K. SEARCH AND SEIZURE**

1. Did the government utilize any wire-tapping, electronic eavesdropping or interceptive devices of any nature in conducting its investigation of this defendant or of any of the co-conspirators?

2. If the answer to Item 1 above is in the affirmative, please indicate the time, date and place that said surveillance was conducted and indicate the results thereof and in whose possession the original or copies might be.

3. Does the government intend to introduce any evidence which resulted from a search and seizure by any law enforcement officials?
4. If the answer to Item 3 above is in the affirmative, please state:
   
   (a) The time, date and place any and all such searches and seizures were conducted;
   
   (b) The circumstances under which any and all such searches and seizures were conducted;
   
   (c) If a search warrant was involved in each such search and seizure; and
   
   (d) A copy of each such search warrant involved in each such search and seizure.

L. MISCELLANEOUS

1. Has the prosecution conducted any pre-trial jury investigation?

2. If the answer to Item 1 above is in the affirmative, please provide a copy of all results of said pre-trial jury investigation.