PREPLEA DISCOVERY: GUILTY PLEAS AND THE LIKELIHOOD OF CONVICTION AT TRIAL

The majority of convictions for federal and state crimes result from guilty pleas. Few jurisdictions have plea rates lower than sixty percent and some have rates estimated as high as ninety-five percent.[1] Such figures reflect a pervasive plea bargaining process in which prosecutorial concessions and judicial sentencing practices encourage pleas of guilty.[2]

The constitutional requirement of a "knowing and voluntary" waiver of the right to a trial protects a defendant against coercion by the prosecutor or judge[3] and against guilty pleas entered in ignorance

[1] *See* A. BLUMBERG, CRIMINAL JUSTICE 28-29 (1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. PA. L. REV. 865 (1964).

[2] *See* D. NEWMAN, *supra* note 1, at 66; Note, *supra* note 1, at 865-66; notes 11-12 *infra* & accompanying text. Courts have generally accepted plea bargaining. *See, e.g.,* Brown v. Beto, 377 F.2d 950, 956 (5th Cir. 1967); People *ex rel.* Valle v. Bannan, 364 Mich. 471, 475-76, 110 N.W.2d 673, 675-76 (1961); Note, *Official Inducements to Plead Guilty: Suggested Morals for the Market Place,* 32 U. CHI. L. REV. 167, 174-78 (1964).

In Brady v. United States, 397 U.S. 742 (1970), the Supreme Court upheld a guilty plea made to secure a more lenient sentence. The defendant plead guilty after his indictment under a statute which provided that the death penalty could be imposed only by a jury. In assessing the voluntariness of his plea, the Court noted that

> the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

Id. at 751.

[3] The prosecutor is permitted to bargain quite freely as long as he does not bypass defense counsel. *See, e.g.,* Martin v. United States, 256 F.2d 345 (5th Cir. 1958) (guilty plea voluntary where prosecutor agreed to drop capital charge in return); Barber v. Gladden, 220 F. Supp. 308 (D. Ore. 1963), *aff'd,* 327 F.2d 101 (9th Cir.), *cert. denied,* 377 U.S. 971 (1964) (guilty plea may be voluntary though prosecutor threatens to invoke habitual criminal statute at trial); Anderson v. North Carolina, 221 F. Supp. 930, 934-35 (W.D.N.C. 1963) (constitutionally guaranteed right to counsel extends to plea bargaining stage).

The judge, however, is generally prohibited from participating in the plea bargaining process. *See, e.g.,* Euziere v. United States, 249 F.2d 293 (10th Cir. 1957) (guilty plea involuntary when judge said that if defendants were found guilty at trial he "would feel that they should have the maximum sentence provided by law"); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) ("A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act."). *But see* Brown v. Peyton, 39 U.S.L.W. 2386 (4th Cir., Dec. 29, 1970) (guilty plea voluntary where trial judge told defense counsel that defendant would receive only a life sentence if he plead guilty); United States *ex rel.* McGrath v. LaVallee, 348 F.2d 373 (2d Cir. 1965) (judge's opinion that a defendant's chances of acquittal were slim and that a long sentence would be imposed at trial did not invalidate a guilty plea when no promises were made). The Supreme Court has recently granted certiorari in a case involving judicial participation in the plea bargaining process. Green v. Kentucky, 39 U.S.L.W. 3297 (U.S., Jan. 11, 1971).

of the offenses charged and the potential penalties.[4] A defendant is thus guaranteed an opportunity to balance the possible consequences of a trial against the certain consequences of a guilty plea. But to make a fully informed decision to plead guilty or stand trial, he must also be able to assess knowledgeably the likelihood of conviction at trial.[5]

Both federal and state courts permit defendants preparing for trial to discover certain evidence in the possession of the prosecutor.[6] This Comment contends that defendants should be afforded similar opportunities for discovery prior to entry of a plea:[7] a defendant can assess the likelihood of conviction at trial only if he first secures and evaluates relevant evidence held by the prosecutor. The Comment will discuss the rationale for preplea discovery and propose specific changes in the Federal Rules of Criminal Procedure.

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[4] *See, e.g.*, Smith v. O'Grady, 312 U.S. 329, 334 (1941); DeLeon v. United States, 355 F.2d 286 (5th Cir. 1966); Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963).

[5] The Supreme Court has recognized the importance of assessing the likelihood of conviction:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of *unavoidable uncertainty*, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a Court.

McMann v. Richardson, 397 U.S. 759, 769 (1970) (emphasis added). This Comment, however, contends that the uncertainty is not entirely "unavoidable" but can be substantially reduced through discovery prior to pleading.

[6] *See* FED. R. CRIM. P. 16. *See also id.* 7(f), 15, 17. About a third of the states accept the view that trial courts lack power to allow discovery in the absence of legislation. Most others permit discovery at the discretion of the trial judge. *See* Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 867-68 (1968).

Many commentators have argued for broader discovery. *See, e.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279; Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-99 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961); Margolin, *Toward Effective Criminal Discovery in California—A Practitioner's View*, 56 CALIF. L. REV. 1040 (1968); Moore, *supra;* Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 228 (1964).

[7] No jurisdiction currently appears to authorize defense discovery prior to entry of a plea, either as a statutory right or as a matter of judicial discretion. *Cf.* sources cited note 6 *supra*. Rule 16(f) of the Federal Rules of Criminal Procedure authorizes pretrial discovery "only within 10 days after arraignment or at such reasonable later time as the court may permit." FED. R. CRIM. P. 16(f). The defendant must enter his plea at the arraignment, *id.* 10. While rule 16(f) sets no initial time prior to which discovery may not be had, the words "only within 10 days after arraignment" at least suggest that prearraignment discovery was not contemplated and the words "only within" are susceptible of a construction limiting disclosure to the period after arraignment.

Rule 16 further limits discovery of some kinds of evidence to cases where there has been a showing of "materiality to the preparation of [defendant's] defense and that the request is reasonable." *Id.* 16(b); *see, e.g.*, United States v. Hrubik, 280 F. Supp. 481 (D.C. Alas. 1968); United States v. Crisona, 271 F. Supp. 150 (S.D. N.Y. 1967).

I. A Rationale for Preplea Discovery

The legitimacy of the state's power to punish an individual for alleged criminal conduct rests on probabilities rather than certainties. As Professor Bator has observed:

> The task of assuring [the] legality [of an incarceration] is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be "true" and the law applied "correct." [8]

Developed to realize this goal, the trial process seeks to maximize the probability that guilty individuals are adjudged "guilty" and innocent individuals "not guilty." Although scarcity of resources precludes a trial in every case, elementary fairness suggests that any alternative procedure for determining guilt should yield results consistent with the probable outcome at trial: a defendant should not be induced to plead guilty if conviction at trial is unlikely. In *Brady v. United States*,[9] the Supreme Court implicitly accepted this proposition when it observed that through conviction by guilty plea "scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the state can sustain its burden of proof." [10]

The plea bargaining process, however, may encourage a defendant to plead guilty without regard to whether he could be convicted at trial. Prosecutors offer to recommend a light sentence or to reduce charges or counts in exchange for a guilty plea,[11] and judges commonly impose lighter sentences on defendants pleading guilty than on those convicted at trial.[12] The defendant must in turn determine whether to plead guilty and receive a certain, reduced penalty or face the uncertainties of a trial and the risk of a severe sentence.

The parties assess the uncertainties of trial and bargain with each other from unequal positions. During the period immediately following arrest, the prosecutor can secure the police investigation report which summarizes the observations of witnesses, describes the physical evidence, and contains the results of scientific and medical tests. He may

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[8] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 448 (1963).

[9] 397 U.S. 742 (1970).

[10] *Id.* at 752.

[11] *See generally* D. NEWMAN, *supra* note 1, at 78-90. For a description of the plea bargaining process in Philadelphia and New York, see White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

[12] Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination*, 6 AM. CRIM. L.Q. 187, 188 (1968); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206-09 (1956). Differential sentencing based solely upon the defendant's choice to exercise his right to trial has been argued to be an unconstitutional denial of equal protection. Chalker, *supra* at 197.

also be able to obtain information from the defendant himself, despite judicially imposed restrictions on interrogation.[13] Finally, he can question witnesses before the grand jury in the absence of defendant or his counsel.[14]

In contrast, because he usually lacks resources for conducting an independent investigation, defense counsel's primary source of information is the defendant. Even if an independent investigation can be made, the prosecutor may possess medical or scientific reports which cannot be duplicated or statements of unavailable witnesses. Although defense counsel may request from the prosecutor the names of witnesses, the police investigation report, or similar evidence, satisfaction of his request depends upon his working relationship with the prosecutor and upon the number of prosecutors involved in the case. If the prosecutor and the defense counsel are unfriendly or if a different prosecutor controls each phase of the prosecution, information may be impossible to obtain.[15] Or the prosecutor may permit examination of its files or the police investigation report when its case is strong, but deny it in a close case.

Nor do more formal discovery procedures assist the defendant in assessing the prosecutor's case.[16] Although the preliminary hearing affords the defendant access to some adverse evidence, the prosecutor need disclose only enough evidence to establish probable cause or a prima facie case of guilt,[17] and may withhold other evidence for use at trial.[18] Even this limited discovery can be nullified if the prosecutor

[13] A detailed study of the effect of Miranda v. Arizona, 384 U.S. 436 (1966) on police interrogations in New Haven, Connecticut concluded that the required warnings did not significantly reduce the number of statements or confessions given by defendants in custody. Note, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

[14] Margolin, *supra* note 6, at 1041; Traynor, *supra* note 6, at 231.

[15] Margolin, *supra* note 6, at 1047.

[16] One defense counsel has been quoted as stating:

> When we demand to see the police reports and copies of any confessions, we are told that perhaps an appellate court will let us see them. When we file a formal motion to produce, the prosecutor responds that he does not have what we're asking for. What he means is that he turned the evidence over to the arresting officer as soon as he received our motion. When we then file a strong motion to divulge or quash, we can't get a proper hearing. The judge treats the motion lightly and remarks that we can take the matter up again at trial. The result is that we are always negotiating in the dark. The atmosphere is one of chance-taking, and the tendency is always to plead people who are effectively unconvictable.

Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 66 (1968).

[17] Goldstein, *supra* note 6, at 1183; Comment, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change,* 116 U. PA. L. REV. 1416, 1418 (1968).

[18] *See* Goldstein, *supra* note 6, at 1183; *cf.* Comment, *Preliminary Hearings in Pennsylvania: A Closer Look,* 30 U. PITT. L. REV. 481, 488-90 (1969). In England, the preliminary hearing is an effective discovery device for the defendant because the prosecutor is required to present all the evidence he intends to use at trial and because any evidence discovered after the hearing must be disclosed to the defendant if it is to be used at trial. P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 112 (1958). Yet the defendant still cannot discover evidence inadmissible at trial, there may be

can secure continuances until the grand jury returns an indictment.[19]

Thus plea bargaining is nonadversary. Whether a guilty plea reflects the likelihood of conviction at trial depends largely upon the prosecutor's good faith and accuracy in evaluating the evidence. In view of his inability to assess the strength of the case against him, a defendant—regardless of his actual guilt or innocence or whether he could be convicted at trial—might readily decide to accept a certain, reduced penalty rather than risk the uncertainties of a trial and a possible heavy sentence. Plea bargaining conducted after a defendant has been afforded the opportunity to discover evidence held by the prosecutor would equalize the parties' respective bargaining positions and minimize the risk that a defendant would plead guilty because he was erroneously convinced that the prosecution had a strong case against him.

Preplea discovery might also help to maximize the efficient utilization of judicial and prosecutorial resources. Because a prosecutor may wish to improve his trial conviction record,[20] he may allow strong as well as weak cases to go to trial. Preplea discovery would deter this practice by encouraging defendants unlikely to prevail at trial to plead guilty, thereby conserving scarce judicial and prosecutorial resources for trying cases in which the defendant's guilt is uncertain.

Despite its potential benefits, preplea discovery is likely to provoke much criticism. First, critics may contend that it will be difficult and costly to administer. But much of the material requested will be documents, such as confessions, statements of witnesses, ballistics reports, and evidentiary analyses, which the prosecutor can easily show or give to defense counsel. Even if a document contains both discoverable and nondiscoverable information, requiring the prosecutor to separate the two is not an unwarranted burden. In addition, although receiving and deciding preplea discovery requests obviously increases the judicial workload, the number of collateral attacks on guilty pleas might simultaneously be reduced. Because courts might readily consider a defendant's opportunity to evaluate the case against him prior to entering a plea as evidence of the plea's voluntariness, they would tend to find such pleas to be uncoerced, thus deterring collateral attacks upon their validity. Further, a defendant pleading guilty after examining all the evidence might be less disposed to contest his plea than a defendant denied access to such information. Finally, should a de-

admissible evidence favorable to the defendant which the prosecutor does not intend to use at trial, and the prosecution can introduce previously undisclosed evidence at the trial to impeach defense witnesses. Traynor, *supra* note 6, at 755-58.

[19] Comment, *supra* note 17, at 1420-26. *See also* Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361 (1969). In United States v Amabile, 395 F.2d 47 (7th Cir. 1968), the court specifically stated that neither the language of rule 5 of the Federal Rules of Criminal Procedure nor its history indicated that the preliminary hearing was intended to provide defendants with pretrial discovery. *Id.* at 54.

[20] White, *supra* note 11, at 445-46.

fendant decide to stand trial, preplea discovery will only be an earlier expenditure of judicial and prosecutorial resources which would have been expended later under the present pretrial discovery procedures.

Second, critics may assert that broad preplea discovery would place an undue burden on courts by encouraging too many defendants to stand trial. That is, the number of defendants encouraged to stand trial by discovery of weaknesses in the prosecutor's case or of evidence favorable to their own case would be greater than the number of defendants induced to plead guilty by discovery of a strong case against them. But even if this prediction should prove correct, the reduced risk of securing guilty pleas from innocent defendants or from defendants unlikely to be convicted at trial would seem to justify placing this additional burden upon the courts. Moreover, increased prosecutorial concessions might well maintain the current guilty plea rate. Although preplea discovery deprives the prosecutor of his superior ability to assess the likelihood of conviction at trial, it does not reduce the uncertainty inherent in the trial process.

II. Evidence Discoverable Prior to Plea

Evidence discoverable prior to plea should include defendant's written statements and confessions, reports of medical examinations and scientific tests, names and statements of government witnesses, and reports by investigating agencies.[21] Discovery of such evidence is necessary for assessing the probability of conviction at trial, but is unlikely to encourage perjury or intimidation of witnesses—two evils often alleged to result from allowing pretrial discovery.[22]

To assess the likelihood of conviction at trial, defense counsel must obviously be able to evaluate both the evidentiary value and the admissibility of a confession[23] or other incriminating statement by the defendant. Although rule 16 of the Federal Rules of Criminal Procedure permits pretrial discovery of statements or confessions[24] without a showing of materiality to the preparation of the defense,[25] a

[21] The following proposals for discovery of specific kinds of evidence are limited to the federal system, in which the timing of pretrial procedure most readily accommodates preplea discovery. The defendant is expected to enter a plea of guilty or not guilty at the arraignment, which occurs from one to four weeks after arrest, 2 L. Orfield, Criminal Procedure Under the Federal Rules § 10:22 (1966), thus allowing sufficient time for discovery.

[22] Moore, *supra* note 6, at 872-76.

[23] In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court held that defense counsel's failure to predict the inadmissibility of a confession, subsequently ruled inadmissible on collateral attack, was not grounds for vacating a guilty plea or even holding a hearing on a petition for habeas. The Court reasoned that "[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *Id.* at 770. *See also* note 5 *supra*. To conclude, however, that a perfectly accurate assessment of the admissibility of a confession is not constitutionally compelled should not preclude development of procedures enabling defense counsel to make a more accurate assessment.

[24] Fed. R. Crim. P. 16(a); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1277 (1966).

[25] *Compare* Fed. R. Crim. P. 16(a), *with id.* 16(b).

request may be made under the rule only after the arraignment at which a plea is entered.[26] Yet preplea discovery of such information would not encourage intimidation of witnesses, because none are involved, nor would it significantly increase the danger of perjury, since the defendant can already secure such information if he decides to go to trial. Moreover, the police and the prosecutor would incur little expense in making available to the defendant copies of his statements. Thus rule 16(a) should be amended to grant defendants the right to preplea discovery of their statements or confessions.

Discovery of the results of medical and scientific tests [27] is essential to redress the critical imbalance in resources available to defendant and prosecutor. Although ballistics test results, fingerprints, blood samples, or handwriting analyses may be the primary, or even the only, inculpating or exculpating evidence, the defendant will almost certainly be unable to secure such data independently. Because discovery of this evidence encourages neither perjury nor intimidation of witnesses and because it can be easily made available, rule 16 should be amended to afford defendants access to it.

Preplea discovery of the identity of government witnesses [28] may be less productive than discovery of other kinds of informataion. First, defense counsel has no guarantee that a government witness will agree to an interview, nor any way of compelling him to talk.[29] In fact, the prosecutor may have instructed the witness to remain silent.[30] Second, voluntary defenders and court-appointed counsel usually lack the time and resources to locate and interview these witnesses.

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[26] *See id.* 16(f); note 7 *supra.*

[27] FED. R. CRIM. P. 16(a) provides for pretrial discovery of "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the partciular case, or copies thereof." *See* United States v. Bel-Mar Laboratories, 284 F. Supp. 875, 887 (E.D.N.Y. 1968); United States v. Turner, 274 F. Supp. 412, 418 (E.D. Tenn. 1967). *But see* Hemphill v. United States, 392 F.2d 45, 48 (8th Cir.), *cert. denied,* 393 U.S. 877 (1968), in which the court held that the denial of defendant's request to inspect reports of scientific experiments conducted in connection with the case and the criminal records of the government's witnesses, did not constitute reversible error. If the prosecutor permits inspection of his reports, he may be required to allow the defendant to copy them. United States v. Cobb, 271 F. Supp. 159, 162 (S.D.N.Y. 1967), *aff'd per curiam,* 396 F.2d 158 (2d Cir. 1968).

[28] Although the federal rulemakers may have contemplated discovery of the names and addresses of prospective government witnesses, Rezneck, *supra* note 24, at 1286, the courts have commonly denied such requests in noncapital cases. *See, e.g.,* Cullen v. United States, 408 F.2d 1178 (8th Cir. 1969); United States v. Jordan, 399 F.2d 610 (2d Cir.), *cert. denied,* 393 U.S. 1005 (1968); Archer v. United States, 393 F.2d 124 (5th Cir. 1968); United States v. Chase, 372 F.2d 453 (4th Cir.), *cert. denied,* 387 U.S. 907 (1967); United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968); United States v. Westmoreland, 41 F.R.D. 419 (S.D. Ind. 1967). Nor is the Government required to give defendants the criminal records of its witnesses for impeachment purposes. Hemphill v. United States, 392 F.2d 45, 48 (8th Cir.), *cert. denied,* 393 U.S. 877 (1968).

[29] FED. R. CRIM. P. 15(a) provides for depositions only when "it appears that a prospective witness may be unable to attend or prevented from attending" the trial or hearing and his testimony is "material" and "necessary . . . to prevent a failure of justice."

[30] Katz, *Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform,* 5 CRIM. L. BULL. 441, 454 (1969).

But written statements by government witnesses may be highly valuable to the defendant. Eyewitness reports may be the primary incriminating evidence, and knowledge of the circumstances surrounding the witnesses' observations is essential to assess their probative value. In accord with the Jencks Act,[31] however, rule 16 prohibits discovery of the names or statements of government witnesses. This prohibition rests upon legitimate fears that defendants might threaten or bribe witnesses and that disclosure of the identity of undercover agents and informers would imperil their safety. Yet these dangers do not compel denying the defense all access to statements of government witnesses. Rule 16 might be amended to permit such discovery at the discretion of the trial judge and with such protective orders as he deems appropriate.[32] Although the potential for abuse is great, the defendant has a strong interest in securing the fullest possible access to information relevant in assessing the likelihood of conviction at trial. Allowing the trial judge to issue protective orders or deny discovery when he believes the risks of abuse are substantial would adequately safeguard the Government's interest in protecting its witnesses without foreclosing discovery in all cases.

Examination of the investigation report[33] containing the names and observations of witnesses and other data gathered at the time of the crime or shortly thereafter is probably the most adequate basis for assessing the strength of the prosecutor's case.[34] Both federal and state courts, however, have condemned pretrial discovery of such reports, either characterizing it as a "fishing expedition"[35] or holding the report to be a privileged "work product" of the prosecutor.[36] But

[31] 18 U.S.C. § 3500 (1964). The Act prohibits discovery of a "statement or report . . . made by a Government witness or prospective Government witness . . . until said witness has testified on direct examination in the trial of the case." It was passed in response to the Supreme Court's decision in Jencks v. United States, 353 U.S. 657 (1957), which involved the prosecution of a labor union official for filing an affidavit falsely stating that he was not a communist. The defendant's request that the trial judge inspect the pretrial statements of government witnesses and deliver admissible portions to him for impeachment purposes was denied. The Supreme Court reversed, holding that such statements should be available to the accused without a preliminary judicial determination of their relevancy. *Id.* at 668-69. Congress, fearful that the "decision would compel the Government to reveal confidential information about anti-communist operations," legislatively overruled the decision by passing the Act. Traynor, *supra* note 6, at 240. *See generally* Wexler, *The Constitutional Disclosure Duty and the Jencks Act,* 40 ST. JOHN'S L. REV. 206 (1966).

[32] This amendment would require the repeal of the Jencks Act. *See* note 31 *supra.*

[33] Rule 16 "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." FED. R. CRIM. P. 16(b).

[34] The United States Attorney for the Southern District of California has estimated that for his district the report of the investigating agency will "normally reflect" 95% of the evidence that the Government will use at trial. Miller, *The Omnibus Hearing—An Experiment in Federal Criminal Discovery,* 5 SAN DIEGO L. REV. 293 (1968).

[35] *See, e.g.,* United States v. Cobb, 271 F. Supp. 159, 161 (S.D.N.Y. 1967); People v. Johnston, 55 Misc. 2d 185, 186, 285 N.Y.S.2d 243, 245 (Tioga County Ct. 1967).

[36] *See, e.g.,* Doakes v. District Ct., 447 P.2d 461, 464 (Okla. Crim. App. 1968). For a discussion of the work product doctrine in federal and state jurisdictions, see Comment, *Basic Survey of Work Product in Federal and State Jurisdictions in Civil and Criminal Proceedings,* 35 TENN. L. REV. 474 (1968).

these concepts, imported from civil procedure, should not control in criminal cases. A defendant unable to conduct his own investigation must necessarily rely upon police investigation reports; access to them is essential if he is to bargain as an equal with the prosecutor. Thus the charge of "fishing expedition" is unjustified. Further, the prosecutor's work product can be protected by appropriate judicial limitations on the kinds of reports discoverable.

CONCLUSION

The "Omnibus Hearing Project," a recent experiment in the Southern District of California,[37] indicates that preplea discovery is indeed feasible. Designed to facilitate handling of the district's heavy caseload,[38] the procedure permits broad discovery by defendants between arraignment and the omnibus hearing held three weeks later.[39] To the extent that the hearing realizes its purpose "[t]o allow the defendant discovery so that he may make an informed decision as to a plea of guilty," [40] it is the functional equivalent of preplea discovery. Although the full impact of the hearing remains unclear, permitting at least a form of preplea discovery apparently does not hinder the efficient disposition of cases.[41]

Preplea discovery will of course not eliminate the injustices and inaccurate results produced by present plea bargaining practices. The often unsatisfactory performance of plea bargaining results not only from defendants deciding to plead guilty in ignorance of the likelihood of conviction at trial, but also from the inconsistent bargaining practices of prosecutors.[42] But combined with the adoption of reforms urged elsewhere in this issue [43] to encourage more consistent bargaining by prosecutors, preplea discovery would significantly increase the fairness of the guilty plea process and insure an efficient allocation of trial resources.

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[37] For a description of the project, see Miller, *supra* note 34.

[38] In 1967, the district had the heaviest caseload in the country. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS, pt. 3, Appendix, Table D 3 (1967).

[39] Omnibus Hearing Project, Form OH-1 (revised Jan. 2, 1968) (description of the project); Omnibus Hearing Project, Form OH-3 (revised Jan. 2, 1968) (describing discovery procedures and kinds of materials discoverable).

[40] Form OH-1, *supra* note 39.

[41] The omnibus hearing was established on April 1, 1967. *Id.* From June 1966 to June 1967, of all defendants convicted in the Southern District, 6.9% were convicted at trial. The figures for 1968 and 1969 were 12.2% and 8.6% respectively. Letter from James A. McCafferty, Assistant Chief, Division of Procedural Studies and Statistics, Administrative Office of the U.S. Courts, to the *University of Pennsylvania Law Review*, Feb. 25, 1970, on file in Biddle Law Library, University of Pennsylvania. Thus it does not appear that the omnibus hearing significantly increases the percentage of defendants who choose to stand trial rather than plead guilty.

[42] *See* White, *supra* note 11, at 449-52.

[43] *Id.* 453-62.