Keller, Prosecutorial Discovery and the Privilege Against Self-Incrimination

On October 15, 1974, the Indiana Supreme Court decided *State ex rel. Keller v. Criminal Court.*[1] This case greatly enhanced the extent to which an Indiana trial court may order prosecutorial discovery. Apparently, the court accepted the American Bar Association's guiding maxim that criminal discovery should be "as full and free as possible."[2] However, the discovery rules promulgated in *Keller* go beyond the now approved ABA Standards. Likewise, the *Keller* rules are freer and fuller than the newly revised and recently enacted Federal Rules of Criminal Procedure.[3] This Note will survey the changes in Indiana law endorsed by *Keller*, analyze the arguments used by the majority in justifying the *Keller* decision, examine the traditional arguments for prosecutorial discovery, and, finally, discuss the relationship between the accused's privilege against self-incrimination and liberal prosecutorial discovery.

I. Significance and Impact of *Keller* on Prosecutorial Discovery

The importance of *Keller* is threefold. Primarily, *Keller* emphasized that the right to discovery shall be balanced between the parties.[4] This doctrine of balanced discovery is referred to in the opinion as "reciprocity." Chief Justice Arterburn, writing for the majority, stated that the accused will have the "ultimate choice of whether to risk self-incrimination."[5] Similarly, Justice DeBruler, dissenting, interpreted "reciprocity" to mean that the accused may have discovery only if he is willing to permit disclosure to the state.[6] For the purposes of this Note, Justices DeBruler's interpretation of reciprocity will be labelled "conditional discovery"

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[1]317 N.E.2d 433 (Ind. 1974).

[2]ABA Standards Relating To Discovery and Procedure Before Trial § 1.2 (Approved Draft, 1970) [hereinafter cited as ABA Standards]. The approved draft contains the tentative draft and the supplement to the tentative draft. Parentheticals will be used to refer to the language of the supplement when language contained therein differs from the language of the tentative draft.

[3]Fed. R. Crim. P. 16.

[4]317 N.E.2d at 438.

[5]*Id.*

[6]*Id.* at 443. Justice DeBruler feared that where the accused decides not to seek discovery, the case will be tried under procedural rules existing prior to Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967). In other words, the case would proceed without reliance upon discovery.

since the accused's rights to discovery are conditioned on his willingness to permit equal privileges to the state. Conditional discovery gives the impression of satisfying the requirements of the fifth amendment so as to preclude an attack on the ground that the accused's privilege against self-incrimination has been violated. The majority in *Keller* reasoned that the privilege is violated only when the accused is *compelled* to incriminate himself. Therefore, if the accused is held to waive his objection voluntarily by requesting discovery, the privilege is not contravened.[7]

However, when one recognizes that the Indiana judiciary in the past seven years has granted the criminal defendant rights to discover certain information within the possession of the state, independent of any right of the state to discovery, conditional discovery becomes restrictive and a deprivation of defense discovery. In upholding conditional discovery, the ground gained by an accused in Indiana has been effectively eliminated. If the accused chooses to assert his constitutional right not to incriminate himself, he will be forced to forfeit his right to request discovery from the state as was permitted him by *Bernard v. State,*[8] *Antrobus v. State,*[9] *Dillard v. State,*[10] *Sexton v. State,*[11] and other Indiana Supreme Court cases decided within the past seven years. The dilemma denies the accused formal pretrial discovery and exposes him to the extraordinary investigatory resources of the state. The ABA Advisory Committee on Pretrial Procedure acknowledged the innate deprivation of conditional discovery: "Indeed, there is considerable doubt whether, in practice, the imposition of a condition will accomplish anything but a denial of disclosures to the accused."[12]

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[7]317 N.E.2d at 438.

[8]248 Ind. 688, 230 N.E.2d 536 (1967). *Bernard* held that where a list of witnesses is requested by the defendant, it should be granted unless the state makes a showing of a paramount interest over that of the defendant.

[9]253 Ind. 420, 254 N.E.2d 873 (1970). A defendant can obtain production of a prosecution witness' pretrial statements to the police or grand jury when: (1) the witness whose statement is sought has testified on direct examination; (2) a substantially verbatim transcript of the statement is shown to probably be within control of the prosecution; and (3) the statement relates to matters covered in the witness' testimony.

[10]257 Ind. 282, 274 N.E.2d 387 (1971). A defendant can obtain pretrial discovery if he specifically designates the items sought, if he shows that the items are material to his defense, and if the state has not made a showing of a paramount interest in nondisclosure. The "materiality" and "specificity" requirements have been liberally construed.

[11]257 Ind. 556, 276 N.E.2d 836 (1972). Applying the same requirements as *Dillard,* the *Sexton* court held that it was error for the trial court to deny the defendant's motion for pretrial discovery of his written pretrial statement to the police and a diagram made by the police of the scene of the killing.

[12]ABA STANDARDS § 1.2, at 45.

On the other hand, "reciprocity" may mean something other than conditional discovery. *Keller* defined "reciprocity" as "the balancing of the *right* to discovery on both sides."[13] This suggests that both the state and the accused have an equal right to discovery. Yet, the right cannot be equal unless both parties are permitted to request discovery independent of any conditions. This system of the right to discovery will be referred to as "independent discovery." Independent discovery has been endorsed by the ABA Standards[14] and the Federal Rules of Criminal Procedure,[15] which were cited by the *Keller* majority as supportive of its stand on broad pretrial discovery.[16] Independent discovery has the effect of preserving the accused's right to request pretrial discovery as well as any objection he may later assert that certain information required to be disclosed to the state is violative of his fifth amendment privilege against self-incrimination. In short, the accused is not required to forfeit one right in order to exercise the other. Also, independent discovery allows the state to request pretrial disclosures without regard to whether the accused requests discovery.

"Reciprocity" as used in *Keller* is an ambiguous concept. Whether it was intended to mean "conditional" or "independent" discovery will be a matter for judicial interpretation. This Note will proceed on the assumption that the defendant chooses to seek discovery.

Keller is also significant because of the broad degree of prosecutorial discovery that is sanctioned, thus catapulting Indiana to the forefront in the area of prosecutorial discovery. Prior to *Keller*, the state possessed only a few means of securing formal pretrial discovery.[17] It remains to be seen whether, in the face of constitutional safeguards of the accused, the sudden and extreme change of doctrine can be justified.

The third significance of *Keller* concerns the discretion of the trial court when ordering pretrial discovery. Did the majority set out guidelines to be followed by the lower courts when confronted with the question of pretrial discovery? Or, did *Keller* simply affirm the discovery order in issue? *Keller* held that as a matter of law "a trial court has the inherent power to balance discovery privileges between parties."[18] To that end, the *Keller* opinion includes specific material which is approved as suitable for dis-

[13]317 N.E.2d at 438 (emphasis added).

[14]ABA STANDARDS § 1.2, at 45.

[15]FED. R. CRIM. P. 16 (notes of the Advisory Committee on Rules).

[16]317 N.E.2d at 436.

[17]Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972); Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972); IND. CODE § 35-5-1-1 (Burns 1975); *id.* § 35-5-2-1; *id.* § 35-1-38-8.

[18]317 N.E.2d at 438.

covery and will serve to guide the trial courts in Indiana.[19] The opinion not only sanctioned the reciprocity concept, but also the rules prescribing the scope of prosecutorial discovery which were ordered by the lower court. The rules were specifically enumerated and will undoubtedly influence the trial courts.

Now that the terrain of prosecutorial discovery has been mapped by the Indiana Supreme Court, how much actual discretion is left to the trial courts? The question of the accused's fifth amendment privilege against self-incrimination was summarily dismissed by the supreme court. As a result, objections based upon a violation of the privilege, except in cases where the state's request is flagrantly unconstitutional, would be to no avail. In effect, the trial courts are preempted from hearing and considering a defendant's contention of self-incrimination. Indeed, the rules prescribed in *Keller* suggest that when the motion for discovery has been made by the state and the motion is within the purview of the rule, the lower court *shall* order discovery.[20] Therefore, the only appreciable degree of discretion remaining with the trial courts when asked to order prosecutorial discovery is whether a defendant has been afforded the same scope of discovery. Although it is clear that the trial courts have the inherent power to order balanced discovery, it is questionable whether the trial courts now have, in a practical sense, the inherent power to refuse discovery to the state once a proper motion has been made.

II. Prosecutorial Discovery: Before and After *Keller*

Unlike defense discovery, extensive pretrial prosecutorial discovery did not exist prior to *Keller*. The state was afforded few formal means of discovery. A small number of state statutes and a handful of "parrot" cases following the examples set by the United States Supreme Court in the area of physical identification evidence[21] provided the state with formal discovery devices. These statutes require the defendant who intends to plead alibi[22] or insanity[23] at trial to inform the prosecution of the de-

[19] *Id.* at 435-36.

[20] *Id.* at 436.

[21] Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972); Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972).

[22] Ind. Code § 35-5-1-1 (Burns 1975). A defendant in a criminal case shall notify the prosecution in writing of his intention to offer into evidence his defense of alibi not less than 10 days prior to trial. The notice shall include specific information as to the exact place that the defendant claims to have been at the time of the offense.

[23] *Id.* § 35-5-2-1. When a defendant desires to plead insanity at the time of the offense, he must set out his defense specifically in writing.

fense within a reasonable time before trial. Another statute provides that if the defendant is permitted to take depositions, the state may also take them.[24] In two 1972 decisions, the Indiana courts held that the state could take samples of a defendant's handwriting[25] or his fingerprints.[26] The court reasoned that this evidence was not testimonial and, therefore, not violative of a defendant's privilege against self-incrimination. In 1973, the court held that the defendant can be required to appear in a lineup and give voice exemplars.[27]

In addition to the formal discovery rights previously allowed the state, the *Keller* decision permits the state to discover any physical or mental examinations or other reports of experts that the defense counsel has in his possession or control.[28] However, if the defense does not intend to use any portion of certain reports at trial, the defendant's statements included in such reports may be withheld from the prosecution's discovery.

Keller also allows the state to discover any defenses which the defense counsel intends to use at trial.[29] In conjunction with the defenses, the defendant must inform the state of the names and addresses of prospective witnesses, together with their relevant statements. Finally, the state can learn of any tangible evidence intended to be introduced at trial.[30]

III. A Comparison: Federal Rules and ABA Standards

Aside from any constitutional arguments that may exist, how do the *Keller* rules on prosecutorial discovery compare with other accepted standards of discovery? The *American Bar Association Standards Relating to Discovery and Procedure Before Trial* and the new Federal Rules of Criminal Procedure will serve as models for comparison.

Neither the ABA Standards nor the federal rules go so far in the area of medical and scientific reports as does *Keller*. *Keller*

[24]*Id.* § 35-1-31-8. When a defendant takes depositions of witnesses to be read at trial, the prosecution has the reciprocal right to depose witnesses, relevant to the same matter.

[25]Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972). In a forgery case, the defendant was compelled to undergo handwriting tests.

[26]Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972). In a first degree burglary case, the defendant was forced to submit to fingerprinting.

[27]Stephens v. State, 260 Ind. 326, 330, 295 N.E.2d 622, 624-25 (1973). The defendant was convicted of robbery and kidnapping. On appeal, he contended that he was prejudiced when he was forced to speak at a police lineup. The court held that requiring an accused to state his name and address is permissible.

[28]317 N.E.2d at 436.

[29]*Id.*

[30]*Id.*

suggests that, absent a strong interest in nondisclosure, the prosecution must be permitted to discover all reports in the possession of the defense and testimony relating to the reports.[31] The ABA Standards leave such a potentially harmful device in the sound discretion of the court.[32] Moreover, *Keller* permits state discovery of defense reports when the defense does not intend to introduce them into evidence. Both the ABA Standards[33] and the federal rules[34] restrict discovery to those reports intended to be introduced into evidence at trial.

Also, both the ABA Standards[35] and the federal rules[36] restrict state discovery of medical and scientific reports to reports or statements made in connection with the particular case. *Keller* includes no such limitation. Additionally, *Keller* permits discovery of any testimony relative to the medical reports. The ABA Standards do not directly address this problem. However, the federal rules do not permit the state to discover expert testimony, but rather permit the state to discover only the reports which relate to the expected testimony.[37]

As to defenses, the *Keller* rules require the defense counsel to divulge any defense he intends to make at trial.[38] In contrast, the ABA Standards leave the decision of whether discovery should be permitted to the discretion of the court.[39] The federal rules do not make defenses discoverable.

Keller and the ABA Standards[40] provide the disclosure to the state of the names and last known addresses of witnesses intended

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> Subject to constitutional limitations, the trial court *shall*, on written motion, require that the State be informed of . . . scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel has in his possession or control . . . .

Id. (emphasis added).

[32]Upon written motions, "the trial court *may* require disclosure." ABA STANDARDS § 3.2, at 2 (Oct. Supp.) (emphasis added).

[33]*Id.* at 2-3. The prefacing phrase, "Subject to constitutional limitations," encompasses the restriction that the only reports discoverable are those which defense counsel intends to use at trial.

[34]FED. R. CRIM. P. 16(b)(1)(B).

[35]ABA STANDARDS § 3.2, at 2 (Oct. Supp.).

[36]FED. R. CRIM. P. 16(b)(1)(B).

[37]*Id.*

[38]"Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel *shall* inform the State of any defenses which he intends to make at a hearing or trial." 317 N.E.2d at 436 (emphasis added).

[39]ABA STANDARDS § 3.3, at 3 (Oct. Supp.).

[40]*Id.*

to be called at trial. However, only *Keller* permits pretrial discovery of documented witness statements.[41]

Both *Keller* and the federal rules[42] provide for prosecutorial discovery of tangible evidence that the accused intends to use at trial. The ABA Standards do not provide for such discovery.

IV. Setting the Scene for *Keller*

In order to justify the catapulting effect of prosecutorial discovery in Indiana, the *Keller* majority relied substantially on two United States Supreme Court cases which only inferentially relate to broad prosecutorial discovery.

In *Williams v. Florida*,[43] the Court upheld, against a fifth amendment attack, Florida's notice-of-alibi statute,[44] which required the defendant to inform the state of the witnesses he intended to call prior to trial. The Court reasoned: "At most, the rule only compelled petitioner to accelerate the *timing* of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."[45] On this theory, the Court held that there was no legal compulsion, and therefore, no violation of the petitioner's privilege against self-incrimination.[46] The Court also said: "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense."[47]

Three years later, the Supreme Court decided *Oregon v. Wardius*.[48] This case is often quoted as holding that "discovery must be a two-way street."[49] More precisely, the majority stated, "We hold that the Due Process Clause of Fourteenth Amendment forbids enforcement of abili rules unless reciprocoal discovery rights are given to criminal defendants."[50]

With the mandate of *Williams* and *Wardius*, proponents of prosecutorial discovery have launched eagerly into broad discov-

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[41] 317 N.E.2d at 436.

[42] Fed. R. Crim. P. 16(b)(1)(A).

[43] 399 U.S. 78 (1970).

[44] Fla. R. Crim. P. 1.200. Defendant, who was charged with robbery, complied with the statutory notice of alibi.

[45] 399 U.S. at 85 (emphasis added).

[46] *Id.*

[47] *Id.*

[48] 412 U.S. 470 (1973). At the trial level, defendant was prevented from introducing any evidence to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi rule. However, the Court held that due process forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.

[49] *E.g.*, Keller v. Criminal Court, 317 N.E.2d 433, 438 (Ind. 1974).

[50] 412 U.S. at 472.

ery powers for the state. *Keller* suggests that if pretrial revelation of an alibi defense does not violate the accused's privilege against self-incrimination, then neither should the pretrial discovery of any other defense that the accused intends to make at trial.[51] *Wardius* is cited for the proposition that since defense discovery has already blossomed, to be a true "two-way street," prosecutorial discovery also should be expanded. Thus, *Keller's* "reciprocity" is justified, and with it, broad prosecutorial discovery rights are permitted in Indiana.

However, Justice Black's dissent in *Williams* warned of the snowballing effect that might result if the full implications of the *Williams* holding were carried to their logical extremes. Justice Black foresaw the possibility of an

> inch-by-inch, case-by-case process by which the rationale of today's decision can be used to transform radically our system of criminal justice into a process requiring the defendant to assist the State in convicting him, or be punished for failing to do so.[52]

Interestingly, a popularly suggested sanction for those who do not disclose information pursuant to a discovery order, due to constitutional considerations, is to exclude the evidence that the defendant may desire to introduce at trial.[53]

The question remains whether it is desirable to extend the *Williams* rationale for alibi defenses to *any* defense that the defendant may want to introduce at trial. Resigning itself to the holding in *Williams,* the ABA Advisory Committee stated, "[T]here is no apparent reason why a general requirement of disclosing the nature of any defense ought not be equally valid."[54]

Historically, the privilege against self-incrimination was engendered from an attempt to guard against the notorious tactics of England's courts of Star Chamber.[55] In the courts of the Star Chamber, "the accused could be made to participate in the proceedings, and this mandate could be enforced by torture."[56] Entertaining the possibility of a subtle recurrence of similar tactics and speaking critically of Illinois Rule of Criminal Discovery 413(d), which is identical to the pretrial relinquishing of defenses portion in *Keller,* one commentator stated: "The scope of rule 413(d)

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[51]317 N.E.2d at 436-37.

[52]399 U.S. at 115 (Black, J., dissenting).

[53]FED. R. CRIM. P. 16(d)(2); ILL. R. CRIM. DISCOVERY § 413(d).

[54]ABA STANDARDS § 3.3, at 5 (Oct. Supp.).

[55]399 U.S. at 115-16; Note, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery,* 7 JOHN MAR. J. PRAC. & PROC. 364, 369 (1974).

[56]Note, *supra* note 55, at 369. *See also* 399 U.S. at 115.

goes far beyond the reciprocal notice-of-alibi rule upheld in *Williams v. Florida* . . . . This kind of pretrial discovery was unknown to English law except in proceedings in the Star Chamber courts."[57]

The *Williams* rationale should not apply to all defenses. An alibi defense is unusually burdensome on the prosecution when revealed during trial for the first time because "of the relative ease with which the defense can be fabricated and the difficulty of rebuttal."[58] With a surprise alibi, a continuance is often fruitless for the state.[59]

Although the majority in *Keller* chose to follow the *Williams* example, it might well have learned from the California experience. *Jones v. Superior Court*[60] permitted prosecutorial discovery in California a full eight years before *Williams*. In *Jones*, a rape case, the defendant was granted a continuance to gather medical evidence to prove his impotency. The state filed a motion for discovery, which requested all of the reports, X-rays, and names and addresses of the physicians who treated or examined the defendant. Writing for the majority, Justice Traynor held that, although the motion was too broad, the state would be entitled to names and addresses of witnesses the defendant intended to call and any reports and X-rays the defendant intended to introduce into evidence in support of his affirmative defense of impotency.[61] Justice Traynor reasoned that the discovery order did not compel the defendant to relinquish any evidence "other than that which he would voluntarily and without compulsion give at trial."[62] However, the discovery of witnesses and reports that the defendant did not intend to introduce into evidence at trial would be a violation of his privilege against self-incrimination.[63] In contrast, *Keller* allows the state to discover *all* of the reports in the possession of the defendant, without regard to the defendant's intention to rely upon them at trial.

Prosecutorial discovery thrived in California until 1970, the same year that *Williams* was decided. In *Prudhomme v. Superior*

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[57]Doherty, *Total Pretrial Disclosure to the State: A Requiem to the Accusatorial System*, 60 ILL. B.J. 534, 536 (1972). Rule 413(d) deals with discovery of the accused's defenses, witnesses, and tangible evidence.

[58]Note, *supra* note 55, at 381.

[59]*But see id.* at 380.

[60]58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). *Jones*, a rape case, was the first major decision which granted prosecutorial discovery. The prosecution's discovery was limited to the items which the defendant intended to introduce at trial.

[61]*Id.* at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[62]*Id.*

[63]*Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

Court,[64] the California Supreme Court held a discovery order void because "it [did] not clearly appear from the face of the order or from the record below that the information demanded . . . [could not] possibly have a tendency to incriminate [the defendant]."[65] The nullified discovery order required the defendant to disclose the names, addresses, and the expected testimony of witnesses that he intended to call at trial. The *Prudhomme* test for granting prosecutorial discovery is that there must be reasonable demand for factual information pertaining to a particular defense which does not present a substantial hazard of self-incrimination.[66]

Bradshaw v. Superior Court[67] was a companion case to *Prudhomme*. *Bradshaw* reasserted the *Prudhomme* test to the extent that prosecutorial discovery is prohibited unless it clearly appears from the face of the order that the information sought could not possibly incriminate the defendant.[68] *Prudhomme* and *Bradshaw* established the rule in California that, if a disclosure could serve as a "link in the chain" of evidence tending to establish guilt, the information is not discoverable by the prosecution for discovery would violate the defendant's privilege against self-incrimination.[69]

After eight years of prosecutorial discovery in the wake of *Jones*, why did the California Supreme Court retrench its position in 1970 to the degree expressed in *Prudhomme* and *Bradshaw*? One writer believes that *Prudhomme* and *Bradshaw* were merely misdirected forecasts of the United States Supreme Court's opinion in *Williams*.[70] To give credence to his theory, the writer quotes from *Prudhomme* which states that "*Jones* relied heavily upon the *assumed constitutionality* of the state 'alibi' statutes."[71] The writer implies that the *Prudhomme* court fully expected alibi statutes to be invalidated by the Supreme Court.

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[64]2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). In a pending murder case, the defendant was ordered to disclose the names and addresses of all witnesses and any defense upon which he intended to rely at trial. The pretrial discovery order was held to be too broad, and thus it violated the accused's constitutional rights.

[65]*Id.* at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130.

[66]*Id.* at 327-28, 466 P.2d at 678, 85 Cal. Rptr. at 134.

[67]2 Cal. 3d 332, 466 P.2d 680, 85 Cal. Rptr. 136 (1970). The discovery order which required the accused to produce expected testimony of each witness intended to be called at trial was beyond the trial court's jurisdiction where it did not clearly appear that disclosure of such information could not possibly incriminate the accused.

[68]*Id.* at 333, 466 P.2d at 681, 85 Cal. Rptr. at 137.

[69]Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677-78, 85 Cal. Rptr. 129, 133 (1970). *See* Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U. SAN FRANCISCO L. REV. 203, 208 (1973).

[70]Kane, *supra* note 69, at 208-09.

[71]2 Cal. 3d at 324, 466 P.2d at 676, 85 Cal. Rptr. at 132 (emphasis added).

However, another authority interprets *Prudhomme* and *Bradshaw* in a different light—that *Prudhomme* was prompted by "increased emphasis placed upon the Fifth Amendment privilege against self-incrimination by the United States Supreme Court in a series of cases decided since *Jones*."[72] The writer summarized by stating the following:

> It is the view of the author that the restrictions imposed by the *Prudhomme* court, after several years' experience with broad rights of discovery in the prosecution, were wise and necessary to insure that criminal prosecutions remain accusatorial rather than inquisitorial in nature.[73]

The second of the major cases that *Keller* relied on for its decision, *Oregon v. Wardius*,[74] was cited by *Keller* as holding that discovery, to be valid, must be a two-way street,[75] that is, reciprocal. But, the thrust of *Wardius* was not to give the prosecution expanded powers of discovery. It simply held that, to enforce the existing prosecutorial discovery rights and the sanctions for noncompliance, similar rights of discovery must be afforded the defendant. *Wardius* was primarily a due process case affording protection to the accused. In *Wardius*, the Supreme Court indicated that, due to the state's inherent information-gathering advantages, any imbalance in discovery rights should work in the defendant's favor.[76]

In *Keller*, Chief Justice Arterburn's majority opinion misuses the "two-way street" concept to authorize overwhelming discovery privileges to the state. The opinion interprets *Wardius* to hold that "disclosure requirements must be fairly balanced between the parties."[77] However, the court ignored the factual context of *Wardius*. Justice Peters' concurring opinion in *Prudhomme* states a contrary view. Justice Peters stated: "Discovery is not a 'two-way street' because of the constitutional rights of the defendant not accorded the prosecution, and we should frankly and directly so hold."[78] The one-way street Justice Peters is promoting would be travelled primarily by the accused. Conversely, the one-way street that *Wardius* set out to abolish was dominated by the state.

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[72]Lapides, *Cross Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U. SAN FRANCISCO L. REV. 217 (1973). Lapides cites several cases as examples: Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[73]Lapides, *supra* note 72, at 218.

[74]412 U.S. 470 (1973).

[75]317 N.E.2d at 438.

[76]412 U.S. at 475 n.9.

[77]317 N.E.2d at 437.

[78]Prudhomme v. Superior Court, 2 Cal. 3d 320, 327-28, 466 P.2d 673, 678, 85 Cal. Rptr. 129, 134 (1970) (Peters, J., concurring).

V. Justifications for and Criticisms of Prosecutorial Discovery

"The lofty prime objective of the adversary system . . . is the ascertainment of truth."[79] This maxim makes a secure springboard for the proponents of liberal prosecutorial discovery. With broad discovery privileges afforded to the state, the prosecution will have a better grasp of the facts and thereby reduce the chance of surprise at trial. Also, both parties will be able to take a practical approach to plea negotiations.

However, Justice DeBruler, in his dissenting opinion, viewed prosecutorial discovery as a possible obstruction to the attainment of the truth, and, indeed, a threat to the very basis of the adversary system.[80] He suggested that, with broad discovery rules, the discrepancies in the perceptions of the opposing parties will "become resolvable by plea bargaining as both counsel become less and less interested in pressing their views to trial, and therefore getting at the truth."[81] Justice DeBruler also feared that the search for truth will become dulled when police and prosecutor cease investigative efforts and rely solely upon advantageous information gathered from discovery.[82]

One of the arguments for the aggrandizement of prosecutorial discovery rights is that the discovery advantages of the defendant are so overwhelming that a neutralizing factor needs to be introduced into the system. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States declared that "the two—prosecutorial and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution."[83] Yet, the most influential factor in the earlier trend toward more liberal defense discovery was the growing realization that the prosecution has a tremendous discovery advantage.[84]

Other writers suggest that "[d]iscovery by the prosecution tends to upset the balance by adding to the state's already superior investigative power, tactical advantages, and financial resources."[85] Numerous informal state discovery devices are inher-

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[79]Kane, *supra* note 69, at 203.

[80]317 N.E.2d at 443 (DeBruler, J., dissenting).

[81]*Id.*

[82]*Id.* at 444.

[83]*Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 553, 595 (1970) (Advisory Committee Notes).

[84]Note, *Criminal Discovery—Comparison of Federal Discovery and the ABA Standards with the New Statutory Provisions in Wisconsin*, 1971 Wis. L. Rev. 614, 617-18.

[85]Note, *supra* note 55, at 371.

ent in the criminal justice system. Among these are the right of the state to thoroughly search the accused,[86] access to electronic eavesdropping and wiretaps to gather evidence,[87] the right to compel, with reason, the accused to exhibit his body, assume poses, put on or take off clothes for identification, participate in a line-up, provide examples of his handwriting, provide fingerprints, or speak for voice identification.[88] The prosecution also may obtain samples of the defendant's blood, breath, or urine for scientific analysis when not unreasonable to do so.[89] In addition, the state has certain statutory advantages in Indiana.[90] Thus, the state's means to obtain pretrial information is quite substantial, even in the absence of the extensive formal discovery privileges bestowed upon the state by *Keller*.

The grand jury also provides the prosecution with discovery devices. "[T]he prosecution may call the 'accused' as a witness prior to his being formally charged with an offense."[91] The grand jury does not afford the defendant the procedural rights to notice, to be heard, to present witnesses, to confront or cross-examine witnesses, to counsel, and to a statement of reasons for any determination against him.[92]

Finally, and most significantly, "[t]he prosecution has the manpower of all police agencies in its jurisdiction at its disposal, along with state and federal laboratory facilities and expertise."[93] By comparison, the resources of the accused are usually extremely restricted. The argument for prosecutorial discovery which suggests that, as with defense discovery, the accused has every advantage cannot be supported. The primary reason for the introduction of defense discovery should not now be used to justify expanded prosecutorial discovery.

Another proposed justification for broad prosecutorial discovery is that it would prevent surprise at trial. Admittedly, the state's interest in preventing surprise is important. The danger of surprise is that an accused, who committed a criminal act, can escape punishment by presenting a defense for which the prosecution has been unable to prepare. For example, in a murder trial, the defense may introduce an unexpected witness who testifies to

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[86]Chimel v. California, 395 U.S. 752 (1969).

[87]Nakell, *The Effect of Due Process on Defense Discovery*, 62 KY. L.J. 58, 70 (1973).

[88]*Id.* at 70-71.

[89]Note, *supra* note 84, at 615.

[90]IND. CODE §§ 35-5-1-1, 35-5-2-1, 35-1-31-8 (Burns 1975). See notes 22-24 *supra*.

[91]Note, *supra* note 84, at 615.

[92]Nakell, *supra* note 87, at 81.

[93]Note, *supra* note 84, at 615.

self-defense. However, in many states, statutes afford the state advance notice of the defenses which lend themselves more readily to surprise—alibi, insanity, and impotency.[94] And, when the state is truly surprised at trial, an available remedy exists in the form of a continuance.[95] This remedy can be complemented by more effective use of the prosecution's vast investigative resources, so as to significantly mitigate the probability of surprise.[96] Because alternative means of curbing surprise at trial are available to the state, prosecutorial discovery need not be instituted for that purpose.

The threat of perjury also haunts the proponents of broad prosecutorial discovery. It is feared that, with some knowledge of the state's case against him and with the testimony of all the witnesses before him, the defendant will mold his testimony to meet the exigencies of his case. Again, this is a fundamental concern. Yet, when is the threat of perjury most urgent? The probability of perjury is unlikely with tangible evidence.[97] Likewise, "[d]efenses based on expert testimony and scientific experiment are not as susceptible of fabrication in light of the professional character of the witnesses involved."[98] In addition, the probability of fabrication is reduced with defenses relying on the use of witnesses and documents. The state seeks to protect itself from the possibility of undetected perjury. Yet, in compliance with Canon 7 of the *ABA Code of Professional Responsibility*, the defendant's conduct is constantly marshalled by an officer of the court—the defense counsel. Furthermore, whenever the defendant's testimony conflicts with that of other more credible witnesses or with the weight of the evidence, its credibility will be questioned by the trier of fact. In most cases, by effective use of its investigative resources, the state should be aware of the potential for perjured testimony.

The final justification for prosecutorial discovery is that it will produce greater efficiency in the slow and cumbersome criminal justice system. In the discussion of surprise and perjury, a continuance was suggested as the appropriate remedy available to the state. But a continuance is an impure device. In a jury trial, the disruption caused by a continuance can be disadvantageous to the parties, as well as work an unnecessary hardship

[94]Indiana does not require pretrial notice to the state of an impotency defense.

[95]Dyer, *Prosecutorial Discovery: How Far May the Prosecution Go?*, 7 U. San Francisco L. Rev. 261, 278 (1973).

[96]Note, *supra* note 55, at 380.

[97]*Id.* at 381.

[98]*Id.*

on the jury. A continuance is costly, inconvenient due to disruption of the trial, and serves to clog an already backlogged docket.

However, although continuances cause administrative problems, these must be overlooked if justice, in the end, is served. Expedition is a valid goal, but so too is the preservation of constitutional rights. Engraved in the Bill of Rights are a defendant's rights to a fair trial,[99] to trial by jury,[100] to counsel,[101] and to protection against self-incrimination. These rights were extended to the accused in a criminal trial by design, not by chance. And, when it appears that there is a conflict between constitutional rights and administrative procedures, the former must prevail. "The disadvantage of disrupting the trial process is slight when compared to constitutional interests of the accused."[102]

Prosecutorial discovery should not be coextensive with defense discovery. On the state level, the prosecution has massive information-seeking resources at its disposal. And, nowhere in the United States Constitution is there a provision which protects the rights of the state at trial. *Brady v. Maryland*[103] serves as a model for the relative positions of the accused and the state. In *Brady,* the prosecution failed to show the defense a co-defendant's statement in which he admitted committing the homicidal act. Speaking for the majority, Justice Douglas said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.[104]

It is interesting to note that *Keller* attempts to require the defense to produce evidence favorable to the prosecution, an overt distortion of *Brady.* For example, *Keller* requires the defense to disclose all medical or scientific reports or examinations, regardless of whether the defense intends to rely on them at trial. Arguably, a discovery order of this type may well be a violation of an accused's fifth amendment privilege against self-incrimination.

VI. The Privilege Against Self-Incrimination

Three elements must be present before the defendant can successfully assert a violation of his constitutional privilege against

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[99]U.S. Const. amends. V, VI, XIV.
[100]U.S. Const. amend. VI.
[101]U.S. Const. amend VI.
[102]Note, *supra* note 55, at 380.
[103]373 U.S. 83 (1963).
[104]*Id.* at 87.

self-incrimination. The communication must be testimonial, legally compelled, and incriminating.[105] The scope of discovery endorsed by *Keller* is not exempt from a fifth amendment attack based upon an analysis of the self-incrimination elements.

The United States Supreme Court held that the privilege is violated only when the accused is forced to provide the state with evidence of "a testimonial or communicative nature."[106] Justice Traynor of the California Supreme Court intimated in *People v. Ellis*[107] that a testimonial communication is one in which "the State relies on the veracity of the accused."[108] Another authority suggests that the fifth amendment protects "activities whose value as evidence to prove guilt is in any way related to the reliability of the accused's cooperation."[109] Still another author states that the privilege protects only those disclosures which reveal the "thoughts or state of mind of the accused."[110]

Regardless of the distinctions apparent in the interpretations of "testimonial or communicative" evidence, information sought under an order for prosecutorial discovery is, arguably, testimonial, because the information is discovered by obtaining the benefit of the defendant's knowledge.[111] *Keller* provides for the disclosure of a list of witnesses whom the accused intends to call at trial. There is no doubt that the prosecutor will rely on the list. The prosecutor will learn as much as possible concerning the forthcoming testimony of the witnesses, and, if the opportunity presents itself, he will use the witnesses in his case against the accused. In this instance, it would be naive to deny that the veracity or trustworthiness of the witness list depends on "the perception and cognitive processes"[112] of the accused. Therefore, it would be a testimonial disclosure. Likewise, disclosure to the state of documents prepared by the defendant would be testimonial if the prosecution

[105]McCormick's Handbook of the Law of Evidence §§ 123-25 (2d ed. E. Cleary 1972).

[106]Schmerber v. California, 384 U.S. 757, 761 (1966). The Court held that the taking of blood samples to prove drunkenness is not violative of the privilege against self-incrimination because the evidence was not of a testimonial or communicative nature.

[107]65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966). In a case of assault with intent to commit rape, the court overruled defendant's contention that requesting him to speak so that the victim might attempt to identify his voice was a violation of his privilege against self-incrimination.

[108]*Id.* at 534 n.4, 421 P.2d at 395 n.4, 55 Cal. Rptr. at 387 n.4.

[109]McCormick's Handbook of the Law of Evidence § 126, at 266 (2d ed. E. Cleary 1972).

[110]Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 Harv. L. Rev. 994, 1002 (1972).

[111]Dyer, *supra* note 95, at 271.

[112]Note, *supra* note 110, at 1003.

relies on their substantive content for evidence or leads to evidence.[113] Another example of a testimonial disclosure would be the discovery by the state of tangible evidence that the defendant intended to introduce at trial. Here, the defendant would be communicating that the item exists and that, in his estimation, it is relevant to the case.[114]

Perhaps the most questionable disclosure endorsed by *Keller* is in the area of medical or scientific reports. As noted earlier, *Jones v. Superior Court*[115] denied the prosecution the right to discover any medical reports other than those that the accused intended to introduce at trial.[116] For the most part, this reasoning has prevailed in the area of prosecutorial discovery for over twelve years. The justification in foreclosing the state from discovering all reports in the accused's possession is that the state would be seeking "the benefit of his [the accused's] knowledge of the existence of possible witnesses and the existence of possible reports and x-rays for the purpose of preparing its case against him."[117] Clearly, *Keller* transgresses these limits.

Like the "testimonial" requirement, prosecutorial discovery may also contravene the "incrimination" element of the privilege. *Hoffman v. United States*[118] states that the self-incrimination privilege must be accorded liberal construction.[119] Indeed, *Hoffman* extended the privilege to disclosures "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[120]

The danger of incrimination is more than a possibility with the disclosures endorsed by *Keller*. There is an obvious threat of incrimination if the defendant is forced to reveal the names of witnesses whom he intends to call at trial.[121] The witness may serve to support one portion of the defendant's case. Yet, if the witness has knowledge of information that might incriminate the

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[113] *Id.*

[114] *Id.* at 1004.

[115] 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

[116] *Id.* at 58, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[117] *Id.* at 57, 372 P.2d at 921, 22 Cal. Rptr. at 881.

[118] 341 U.S. 479 (1951). Petitioner, a known racketeer, was convicted of criminal contempt when he refused to answer questions put to him by the grand jury concerning his occupation and his connections with a fugitive witness sought by the grand jury.

[119] *Id.* at 486.

[120] *Id.* On the state level, the California Supreme Court, in *Prudhomme*, employed the "link of the chain" standard, which requires the judge to determine that disclosure cannot possibly tend to incriminate the defendant before discovery can be granted to the prosecution. Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

[121] Dyer, *supra* note 95, at 276.

defendant, disclosure would supply the state with information that it could use in its case-in-chief against the defendant.[122] For example, if the defendant intends to call a certain witness to testify that the defendant was forced to kill in self-defense, disclosure would provide the prosecution with its sole eyewitness to the defendant's homicide.[123] And, as illustrated in *Prudhomme*, "consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a 'last resort' to testify that defendant only committed a lesser-included offense."[124] The risk of self-incrimination also exists where the order is for discovery of tangible evidence or documents. For example, in a murder trial, the defendant may possess articles of clothing on which there are blood stains. This evidence could be relevant to self-defense.[125] And finally, even where the evidence or witnesses disclosed are exculpatory, they may lead the prosecution to other evidence which could be used against the defendant.[126]

Proponents of prosecutorial discovery contend that since discovery is conditioned on the defendant's intent to introduce the disclosed information or evidence at trial, it is unlikely that such evidence will be incriminating.[127] But where there is a chance that potentially incriminating evidence may serve to exculpate the defendant, such as in the self-defense example, he must disclose it prior to trial in order to rely upon it at trial. Thus, the defendant faces a dilemma. And, in *Keller*, state discovery of medical and scientific reports is not conditioned on the defendant's intent to introduce the disclosed evidence at trial. In fact, if the accused chooses not to use evidence in support of his case, it may often be assumed that the evidence is incriminating in character.[128]

The third requirement in the trilogy of elements that comprise the privilege against self-incrimination is that the communication must be legally compelled. It is on this ground that pro-

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[122]*Id.*

[123]*See* Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970); Dyer, *supra* note 95, at 276; Note, *supra* note 55, at 374.

[124]2 Cal. 3d at 327, 466 P.2d at 677, 85 Cal. Rptr. at 133.

[125]Note, *supra* note 55, at 374.

[126]Note, *supra* note 110, at 1005.

[127]Note, *supra* note 55, at 374.

[128]Nakell, *Criminal Discovery for the Defense and Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 483, 501 (1972). In Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), the California Supreme Court denied state discovery of all medical reports in the accused's possession, although one of the reports may have concluded that Jones was physiologically capable of rape. But, the report may have also indicated that psychological impotency was a real possibility, and psychological impotency often is accompanied by aggressive tendencies.

ponents of broad prosecutorial discovery are most likely to argue the inapplicability of the fifth amendment privilege.[129]

In *Williams v. Florida*,[130] the United States Supreme Court held that the privilege against self-incrimination is not violated by "a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses."[131] Although alibi had been previously distinguished from most other defenses because of the ease with which it can be fabricated and the difficulty of rebuttal,[132] *Williams* presents a strong argument for prosecutorial discovery. The Florida notice-of-alibi statute[133] required the defendant to give pretrial notice to the state of his alibi defense. And, if the defendant did not comply with the statute, any evidence that would support an alibi, other than the defendant's testimony, would be excluded at trial.[134] The Supreme Court reasoned that "[h]owever 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered compelled . . . ."[135] The rule only required the defendant to accelerate the *timing* of his disclosure.[136]

In support of the proposition that pretrial disclosure is only a matter of timing, the Court reasoned that since no violation of the privilege would result if the state were permitted a continuance following discovery, "then surely the same result may be accomplished through pretrial discovery, . . . [thus] avoiding the necessity of a disrupted trial."[137] However, there are inherent fallacies in this approach. First, depending upon how well the state carries its burden of proof, the defense does not know prior to trial what it should risk introducing into evidence.[138] Second, pretrial disclosure is more beneficial to the prosecution than is disclosure at trial, because, in the latter situation, "the prosecution has already presented its case and can only use the knowledge obtained to rebut the defense."[139] Permitting pretrial disclosure of witnesses only adds to the probability that the state will use the witnesses or

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[129]Note, *supra* note 55, at 374.

[130]399 U.S. 78 (1970).

[131]*Id.* at 83.

[132]Note, *supra* note 55, at 381.

[133]FLA. R. CRIM. P. 1.200.

[134]*Id.*

[135]399 U.S. at 84.

[136]*Id.* at 85.

[137]*Id.* at 86.

[138]ABA STANDARDS at 5 (Oct. Supp.).
Where as the prosecution necessarily sets a formal "battle plan" to be followed, the defense frequently seeks to achieve maximum flexibility, having certain arguments and evidence in readiness, the use of which is contingent upon the defense's evaluation of the prosecution's presentation and the exigencies of the courtroom situation.

[139]Dyer, *supra* note 95, at 274-75.

evidence revealed in its case-in-chief, thereby increasing the chance of incrimination.

Although *Williams* held that there is no compulsion when the defendant is forced to reveal his alibi defense and witnesses prior to trial, the opinion emphatically stated that, since the defendant chose to comply with the requirements of the statute, the validity of the threatened sanction (exclusion of all evidence relevant to the defense) was not taken into consideration.[140] The question raises sixth amendment problems, but the Court had "no occasion to explore" them.[141] However, by ignoring the sixth amendment implications which were intertwined with the enforcement of the alibi statute, the Court avoided the very issue that it had embarked upon deciding—the issue of legal compulsion in light of the defendant's fifth amendment privilege.

It can be assumed that a defendant will comply with a *Williams*-type alibi statute because, if he does not comply, he will be pre-empted from presenting his defense. By threatening to strip the defendant of his sixth amendment right to present a defense,[142] the statute coerces the defendant to disclose to the state testimonial evidence which is potentially incriminating. A defendant should not be faced with the dilemma of having to sacrifice one constitutional right in order to preserve another.[143]

In *Malloy v. Hogan*,[144] the Supreme Court, in dicta, stated that the fifth amendment guarantees the right of a person to "remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty for such silence."[145] In light of *Malloy*, an example of legal compulsion was found in *Griffin v. California*.[146] There, the Court held that adverse comment by a judge or prosecutor upon the defendant's failure to testify was sufficient compulsion to violate the fifth amendment privilege.[147] In reference to the *Griffin* holding, one critic states that "[b]y comparison . . . the loss of the opportunity to present evidence in one's defense which could result from failure to dis-

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[140]399 U.S. at 83 n.14.

[141]*Id.*

[142]U.S. CONST. amend. VI.

[143]Note, *supra* note 110, at 998.

[144]378 U.S. 1 (1964). After pleading guilty to a gambling misdemeanor, petitioner was ordered to testify before a referee appointed by a state court to investigate gambling. Petitioner refused to answer questions concerning the circumstances of his arrest on the ground that the answers might incriminate him. The Court upheld this contention.

[145]*Id.* at 8.

[146]380 U.S. 609 (1965).

[147]*Id.* at 614.

close is surely a greater penalty."[148] Logically, legal compulsion should include forcing the accused to reveal his evidence prior to trial in order to preserve his constitutional right to introduce the evidence at trial.

Keller does not suggest any means by which to enforce the state's right to pretrial discovery of the defendant's case. However, preclusion of the accused's right to present evidence at trial is a permitted sanction for non-compliance in the Federal Rules of Criminal Procedure[149] and in state provisions which endorse broad prosecutorial discovery.[150] Alternative sanctions are a court order, contempt charges against the attorney (although the attorney-client privilege may be an obstacle), prohibiting further discovery by the defendant, or a continuance, which is supported by the ABA.[151]

Two years after the *Williams* decision, the Court decided *Brooks v. Tennessee*.[152] At issue was a state statute, which required that if the defendant chose to testify in his own behalf, he must do so prior to any other defense testimony or else waive his right to testify later in the defense's case-in-chief. Writing for the majority, Justice Brennan stated:

> [T]he rule . . . is an impermissible restriction on the defendant's right against self-incrimination . . . . [A] defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it "may open the door to otherwise inadmissable evidence which is damaging to his case," . . . .[153]

Brooks appears to undermine *Williams*. *Williams* justified pretrial disclosure accompanied by a preclusion sanction because it was only a matter of "timing." In *Brooks*, timing was also a factor. If the defendant intended to testify in his own behalf, surely forcing him to testify at the onset of the defense's case-in-chief would not prejudice him. And, certainly, the chance of the defendant's perjuring himself would be greatly reduced, because he would not have an opportunity to mold his testimony around that of other defense witnesses. Yet, two years after *Williams*, the Supreme Court recognized the obvious threat to the defendant's constitutional rights. Commenting upon the consequences

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[148]Note, *supra* note 110, at 1006.

[149]FED. R. CRIM. P. 16(d)(2).

[150]*See, e.g.*, ILL. R. CRIM. DISCOVERY § 413(d).

[151]ABA STANDARDS § 3.3, at 6 (Oct. Supp.).

[152]406 U.S. 605 (1972).

[153]*Id.* at 609, *quoting from* McGautha v. California, 402 U.S. 183, 213 (1971).

of forcing the defendant to testify first, Justice Brennan said: "By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case."[154] The same observation can be made with respect to requiring the defendant to divulge his case prior to trial. The Court recognized the defendant's interest in preserving his option to present a defense in the manner most advantageous to his case.

VII. Conclusion

The adversary system was founded on the proposition that, regardless of the crime involved, the accused has certain individual rights which must not be usurped. Having learned from the tactics of the courts of Star Chamber and institutions in other less democratic lands, Indiana and other states, when searching for the truth, should conscientiously weigh the value of the accused's right not to be a witness against himself.

As the crime rate increases across the country, the means of controlling the incorrigible become more stringent. Society must protect itself from itself. Yet, some values are too basic to sacrifice in the interests of restraint and authority. Clearly, the accused in the criminal courts is being threatened with the usurpation of his right not to be a witness against himself. As stated in *Brady v. Maryland*,[155] "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[156]

Tony H. Abbott

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[154]406 U.S. at 612.
[155]373 U.S. 83 (1963).
[156]*Id.* at 87.