California Criminal Discovery: Overcoming Constitutional Obstacles to a Statutory Scheme

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California Criminal Discovery: 
Overcoming Constitutional Obstacles 
To A Statutory Scheme

Recent California and federal case law\textsuperscript{1} and legislative activity\textsuperscript{2} indicate an increased interest in the development of a comprehensive scheme for pretrial criminal discovery. The purpose of this comment is to identify the major constitutional considerations attendant to the implementation and enforcement of a comprehensive criminal discovery statute in California. Preceding a discussion of these issues, the authors will present a summary of the evolution of criminal discovery in California within the context of the two-way street analogy—the principle that both the prosecution and defense should be entitled to discovery of relevant information prior to trial. A brief explanation of the defendant's discovery rights in California, as established by case law and statute, will be included in this discussion. The focus of the comment will then shift to the constitutional limitations placed upon the scope of pretrial prosecutorial discovery. In this regard, the elements of the privilege against self-incrimination will be analyzed to determine what types of information are protected from disclosure under current California and federal case law. The effect of the divergent approaches taken by the federal and California courts to an analysis of the privilege will then be discussed as it relates to the adoption of a criminal discovery scheme in California. The second portion of the constitutional analysis will examine problems which occur in the implementation of a criminal discovery scheme. The authors will compare the desirability of independent discovery rights with the characteristics of a conditional discovery system whereby the prosecution's right to discovery is dependent upon the defendant first seeking discovery from the prosecution. Additional due process considerations


respecting the implementation of such statutes will be analyzed. Finally, the comment will examine the advisability of utilizing a preclusion sanction, which bars the introduction of evidence by a party who refuses to comply with a discovery order, to enforce the requirements of a criminal discovery statute.

BACKGROUND: CALIFORNIA CRIMINAL DISCOVERY AS A TWO-WAY STREET

Reciprocity, defined as the mutual or cooperative interchange of favors or privileges, has traditionally been viewed as an essential component of any discovery procedure. Reciprocity suggests co-equal access to information by all parties to the litigation, and in civil discovery it has expedited the trial process by permitting the free flow of information between the plaintiff and the defendant. In contrast, opposition to the development of criminal discovery has historically been grounded in the argument that there could never be mutuality because the accused's privilege against self-incrimination would effectively bar any meaningful right of the prosecution to obtain the benefit of a discovery procedure. This position was premised upon the belief that justice could best be served by the maintenance of a balance between the state and the accused. It was felt to be fundamentally unfair to create an imbalance in the adversary system by permitting the fruits of a discovery procedure to flow only to the defendant. The pervasiveness of this argument, and its acceptance by the judiciary, prevented early experimentation with discovery procedures in criminal prosecutions.

4. D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY §13.01, at 777, 784 (2d ed. 1972) [hereinafter cited as LOUISELL & WALLY].
6. Opponents of criminal discovery maintained that the creation of defense discovery rights would unduly tip the balance of the adversary system already heavily weighted in favor of the defendant. In addition, opponents argued that a full view of the prosecution's case would permit the defendant to create a defense out of perjured testimony and fabricated evidence and would enable the defense to bribe and intimidate prosecution witnesses. Shatz, supra note 5, at 261. See also LOUISELL & WALLY, supra note 4, §13.01, at 792-93; Nakell, supra note 5, at 438; Moore, CRIMINAL DISCOVERY, 19 HAST. L.J. 865, 872-73, 878 (1968) [hereinafter cited as Moore].
7. See text and authorities note 6 supra.
8. An example of the prevalent view of the judiciary toward the development of defense discovery are the remarks of Justice Learned Hand:
   Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one
The antithetical climate surrounding the development of criminal discovery was radically altered during the 1960's.\(^9\) Reciprocity, as an obstacle to the recognition of a defense right to discovery, disappeared with several court decisions holding that the defendant's constitutional right to due process was violated if he was totally denied discovery from the prosecution.\(^10\) The focus of the judiciary shifted to a more solicitous concern for the rights of the criminal defendant in recognition of the fact that the trial process was not an adversary game, but rather a search for the truth.\(^11\) The prosecutor, as a representative of the state, was seen to be more than a mere advocate concerned only with obtaining convictions; prosecutorial duties were perceived to entail the additional responsibility of insuring that the defendant received a fair trial.\(^12\) Thus, the prosecution no longer had a legitimate interest in denying the defendant access to information material to the issue of guilt or punishment.\(^13\)

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9. During the 1960's the United States Supreme Court evidenced its concern for the protection of a defendant during criminal prosecution. Many of the fundamental rights guaranteed by the Bill of Rights were made applicable to the states by the fourteenth amendment. E.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (the right to confront opposing witnesses); Washington v. Texas, 388 U.S. 14 (1967) (the right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (the right to a speedy trial); Malloy v. Hogan, 378 U.S. 1 (1964) (the privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (the right to counsel). Further, additional safeguards were implemented to insure that the accused received a fair trial. E.g., Miranda v. Arizona, 384 U.S. 436 (1966) (protection of an accused during custodial interrogation); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule).


12. There is a direct correlation between the court's willingness to grant defense discovery and the changing role of the prosecutor within the criminal justice system. The conduct of the prosecution is inextricably bound with a defendant's constitutional right to due process, and as such, his role cannot be limited to that of an advocate. See Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 106-07 (1935); People v. Ruthford, 14 Cal. 3d 399, 405-07, 534 P.2d 1341, 1345-47, 121 Cal. Rptr. 261, 265-67 (1975); In re Ferguson, 5 Cal. 3d 525, 531-32, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971); Powell v. Superior Court, 48 Cal. 2d 704, 709, 312 P.2d 698, 701 (1957).

13. As pointed out in People v. Ruthford, 14 Cal. 3d 399, 405, 534 P.2d 1341, 1345, 121 Cal. Rptr. 261, 265 (1975):

The fundamental responsibility to present material evidence to the court includes a duty to disclose to the defense substantial material evidence favorable to the accused in appropriate cases. Unless the prosecutor is required to make such disclosures the adversary system of criminal justice would be reduced to...
A. Defense Discovery in California

The due process clause provided the foundation on which the right to defense discovery was to be built, and California has constructed an imposing edifice of discovery rights upon it. The United States Supreme Court has determined that a defendant has a constitutional right to discover exculpatory information upon request. The California Supreme Court has further expanded this due process right by holding that the prosecution has an affirmative duty to disclose, without prior request by the accused, all substantial and material evidence favorable to a defendant, whether it relates to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness. Thus California has extended the defendant’s discovery rights to include information as to witness credibility, and has shifted to the prosecution the burden to perfunctorily produce material information. In addition to requiring the prosecution to disclose information within its possession or control, the California Supreme Court has further expanded the defendant’s liberal discovery rights by holding that in certain circumstances due process requires the prosecution to obtain oth-

one in which the determination of guilt or innocence may be controlled by the prosecuting attorney’s tactical choice to suppress favorable evidence, or his negligent failure to disclose it, rather than by the well-informed decision of the finder of fact.

14. It has been suggested by one commentator that the compulsory process clause of the sixth amendment provides a more appropriate constitutional rationale for the principles of criminal discovery than does due process. Compulsory process was intended to permit the defendant to request governmental assistance (process) to obtain exculpatory evidence (witnesses in his favor). It is preferable to decide issues on the basis of a specific provision of the Bill of Rights rather than on general due process grounds, since more guidelines may be set. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 73, 123-31 (1974).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.

Id. at 87.

16. In re Ferguson, 5 Cal. 3d 525, 532-33, 487 P.2d 1234, 1239, 96 Cal. Rptr. 594, 599 (1971). In Ferguson, the court reasoned: [T]o condition the duty to disclose upon request would provide a trap for the unwary and place substantial additional burdens on our busy trial courts. The general practice of making the district attorney’s files available to defense counsel . . . can only serve to provide a trap for the unwary if the prosecuting attorney does not know that he is under a duty to disclose evidence favorable to the defense but instead feels that he is free to omit such favorable evidence from his file. . . . [If] the prosecutor has no such duty, defense counsel in the exercise of due caution to protect his client’s interests can be expected to refuse to rely upon the prosecutor’s file and to make in every case long and complex motions for discovery to ascertain whether the prosecutor is hiding anything. To adopt rules so greatly increasing the burden of our already busy criminal courts would not serve the efficient administration of justice.

Id. at 87.

17. People v. Ruthford, 14 Cal. 3d 399, 406, 534 P.2d 1341, 1346, 121 Cal. Rptr. 261, 266 (1975).
erwise unavailable information on the accused's behalf. Specifically, California courts have determined that the defendant has the right to discover, inspect, copy or examine the following types of information: extrajudicial statements (whether written, recorded, or oral) made by the accused or by prosecution witnesses; the names and addresses of the witnesses the prosecution intends to call at trial or witnesses shown to be potentially material to the defense; the identity of the state's expert witnesses and their reports concerning their examination of real evidence; the identity of informers material to the guilt or innocence of the accused; relevant police, arrest and crime re-

18. Evans v. Superior Court, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974). In Evans, the California Supreme Court based its decision on the due process rationale of Wardius v. Oregon, 412 U.S. 470 (1973), stating, "Because the People are in a position to compel a lineup and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence." 11 Cal. 3d at 623, 522 P.2d at 685, 114 Cal. Rptr. at 125. Thus California has taken the position that the duty of the prosecution to disclose favorable information, in some instances, encompasses the duty to acquire information that is sought but unavailable to, an accused. In Evans, there was a substantial possibility that an eyewitness had misidentified the defendant. Under these circumstances due process required that the state conduct a pretrial lineup to obtain evidence that might establish the defendant's innocence. Id. at 626, 522 P.2d at 686, 114 Cal. Rptr. at 126.

19. The basis of the defendant's right to discover many of these specific items would presumably fall within the expanded due process rights now afforded by California courts. See People v. Ruthford, 14 Cal. 3d 399, 406, 534 P.2d 1341, 1346, 121 Cal. Rptr. 261, 266 (1975). Information not falling within this due process right, however, may still be discovered upon request if: (1) good cause is demonstrated; (2) the information is described with sufficient particularity; (3) the request is timely and (4) the information requested is not privileged. E.g., Pitchess v. Superior Court, 11 Cal. 3d 531, 536, 522 P.2d 305, 309, 113 Cal. Rptr. 897, 901 (1974); Hill v. Superior Court, 10 Cal. 3d 812, 816-19, 518 P.2d 1353, 1355-56, 112 Cal. Rptr. 257, 259-60 (1974); Ballard v. Superior Court, 64 Cal. 2d 159, 167, 410 P.2d 838, 843, 49 Cal. Rptr. 302, 307 (1966); Shatz, supra note 5, at 265-94.


22. Norton v. Superior Court, 173 Cal. App. 2d 133, 141, 343 P.2d 133, 136 (1959). California Penal Code Section 943 requires that the names of all witnesses examined before the grand jury be inserted at the foot of the indictment and Penal Code Section 938.1 requires that a copy of the indictment be sent to the accused. In addition, Penal Code Section 870 permits the accused to examine and obtain a copy of the depositions taken on information. Thus the accused is permitted access to the names of possible witnesses that will testify at trial. Further, Penal Code Section 924.6 permits the court which has empaneled a grand jury to disclose all or part of the testimony taken whether or not an indictment is returned. See REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION, this volume at 376-79.


25. Id.

ports as well as notes taken by a police officer during interrogation and other relevant physical evidence within the possession or control of the prosecution.

It is apparent that in this state the channel of informational flow from the prosecution to the defendant has been extensively developed and remains relatively free from obstruction. Against this background of liberal defense discovery, interest developed in a similar prosecutorial discovery right, and cogent arguments emphasizing the need for this discovery were forcefully advanced. It was suggested that the development of prosecutorial discovery would greatly contribute to the efficient administration of justice by narrowing the issues prior to trial and would assist in the ascertainment of truth by enabling each side to obtain relevant information. Further, it was contended that prosecutorial discovery would safeguard against surprise at trial by affording the prosecution adequate opportunity to investigate the circumstances surrounding the crime. Despite the demonstrable need for the con-

30. See, e.g., Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228 (1964) [hereinafter cited as Traynor].
31. AMERICAN BAR ASSOCIATION, DISCOVERY AND PROCEDURE BEFORE TRIAL, §1.1 (1970 Approved Draft) [hereinafter cited as A.B.A. Recommendations]. The American Bar Association identifies the following procedural needs which can be served by fuller discovery: (1) expeditious and fair determination of the charges; (2) provide the accused with sufficient information to make an informed plea; (3) minimize surprise at trial; (4) avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues; (5) reduce interruptions and complications of trial by identifying issues collateral to guilt or innocence and determining them prior to trial; (6) effect economies in time, money, and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings. Id. at 23.

In commenting upon Rule 16 of the Federal Rules of Criminal Procedure, the House Judiciary Committee stated:

broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence . . . .

33. H.R. Rep. No. 94-247, supra note 31, at 1369. As Professor Millar has observed:

That manufactured alibi is one of the main avenues for escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such
struction of at least a limited right of prosecutorial discovery, the expansive protection accorded the privilege against self-incrimination led many jurists and commentators to the opinion that it was an insurmountable roadblock, limiting the operation of criminal discovery to a one-way street.

B. California Prosecutorial Discovery

In 1964, the California Supreme Court decided the leading case of *Jones v. Superior Court*. This important decision was to have a tremendous impact upon subsequent developments in the area of prosecutorial discovery. In *Jones*, a defendant charged with rape was granted a continuance so that he could gather medical evidence that past injuries had made him impotent and therefore physically incapable of committing rape. The trial court ordered the defense to disclose notice of intended defense as would enable it to confirm or refute the accused's assertion. Millar, *The Modernization of Criminal Procedure*, 11 J. Crim. L.C. & P.S. 344, 350 (1920). See text and authorities note 31 supra.


The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then, why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case.


37. In *Jones*, the California Supreme Court adopted a “timing rationale” as the basis for determining what information could be discovered by the prosecution without violating the accused's privilege against self-incrimination. The court reasoned that because a defendant was never compelled to give any evidence other than that which he would voluntarily give at trial the privilege was not violated. See note 90 infra. In 1966, Rule 16 of the Federal Rules of Criminal Procedure was amended creating a general prosecutorial right to discover information in the possession or control of the defendant. *Jones* was cited as the primary authority for the extension of this right:

State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination.

18 U.S.C. Rule 16, Appendix, at 4494 (1971) (Notes of Advisory Committee on Rules, Subdivision (c)); 1 Wright, *supra* note 172, §256 at 523. Thus the “timing rationale” of *Jones* with its emphasis on compulsion was apparently adopted by the Federal Rules. The California Supreme Court in *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970), however, expressly rejected this “timing rationale”. Instead, the court substituted a link-in-the-chain approach which focused upon whether the information could be incriminating and therefore protected by the privilege. See notes 85-90 infra and text accompanying. In 1975, Rule 16 was amended to further expand the prosecution's right to discovery, however, California's rejection of the “timing rationale” and adoption of the link-in-the-chain approach was never addressed. Thus the divergence between the federal and California approach to the privilege against self-incrimination within the context of criminal discovery can be traced to the *Jones* decision.
close to the prosecution the names and addresses of all physicians who had been summoned to testify or who had treated the accused prior to trial, as well as all medical reports and X-rays bearing upon the defense of impotence. The Supreme Court held:

Insofar as the trial court's order herein requires petitioner to reveal the names and addresses of witnesses he intends to call and to produce reports and X-rays he intends to introduce in evidence to support his defense of impotence, it does not violate the privilege against self-incrimination. Nor to this extent does it violate the attorney-client privilege. It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable.

Justice Traynor, writing for the majority, demonstrated that prosecutorial discovery could develop consistent with the privilege against self-incrimination. The court employed the concept of reciprocity to argue for the extension of discovery to the prosecution. In doing so, the court recognized the interrelation of defense and prosecutorial discovery and pointed out that just as the state had no interest in denying the defendant access to information in the absence of some justification, neither did the accused have a valid interest in denying the prosecution access to relevant information not protected by the privilege against self-incrimination or other statutory privilege. The court reasoned that the privilege against self-incrimination was not a complete bar to all prosecutorial discovery and, in the interest of the "orderly ascertainment of truth," criminal discovery should not operate as a one-way street. Thus the California Supreme Court in *Jones* employed the concept of reciprocity to justify a prosecutorial right to discovery and firmly established that, consistent with constitutional principles, criminal discovery could be conducted as a "two-way street."
Implicit within this holding was the concept that reciprocity did not mandate a *quid pro quo* exchange of information; rather the decision paved the road for a limited flow from the defendant to the prosecution of information which was not privileged. Of course, there exist in California many statutory privileges, and in the Federal courts, judicially created privileges which restrict the scope of both prosecutorial and defense discovery. However, the privilege against self-incrimination has been the principle obstruction to the flow of information to the prosecution along the “two-way street” of criminal discovery.

**The Privilege Against Self-Incrimination: Limiting the Scope of Prosecutorial Discovery**

Under the fifth and fourteenth amendments, an individual has the right to refuse to give self-incriminating testimonial evidence, and, absent a grant of immunity, any attempt by the government to compel this information will result in the exclusion of such evidence in a criminal action. Though it has been recognized that the privilege against self-incrimination does not act as a complete bar to pretrial prosecutorial discovery, difficulties remain in determining exactly what in-
formation the privilege protects from disclosure. Therefore, the privi-
lege against self-incrimination must be carefully analyzed to determine
the full extent of the prosecution’s ability to discover relevant informa-
tion in the possession or control of the defendant. Commentators and
courts agree that before a person may successfully claim the privilege,
the trial judge must make a preliminary finding\textsuperscript{52} that the information
sought is testimonial,\textsuperscript{63} incriminating\textsuperscript{54} and compelled.\textsuperscript{55}

A. Testimonial Evidence

The scope of the privilege against self-incrimination encompasses
only evidence which is testimonial in nature\textsuperscript{56}—that is, evidence which
involves the communication of a party’s mental processes, whether in
oral or documentary form.\textsuperscript{57} Consequently, two major categories of
evidence are discoverable without regard to the privilege. Real evidence,
consisting of tangible objects such as weapons and ammunition,
is not testimonial, and is thus unprotected.\textsuperscript{58} In certain situations, how-
ever, it is possible that the compelled production of real evidence by
a defendant involves testimonial communication, in that the accused
may make direct or implied statements about the item by the mere act
of complying with the prosecution’s request.\textsuperscript{59} Whether testimonial
communication is found depends upon the exact nature of the govern-

\textsuperscript{52} Hoffman v. United States, 341 U.S. 479, 486-87 (1951); Mason v. United
States, 244 U.S. 362, 366-67 (1917); United States v. Burr, 25 F. Cas. 38, 40 (Case No.
14,692e) (C.C.D. Va. 1807); Cohen v. Superior Court, 175 Cal. App. 2d 61, 68, 343
P.2d 286, 291-92; 8 Wigmore, \textit{supra} note 47, at $2271.


\textsuperscript{54} \textit{Id.} at $2260.

\textsuperscript{55} \textit{Id.} at $2263. \textit{See also} McCormick, \textit{supra} note 49, at $126.

\textsuperscript{56} “[T]he privilege protects an accused only from being compelled to testify
against himself, or otherwise provide the State with evidence of a testimonial
or communicative nature . . . .” Schmerber v. California, 384 U.S. 757, 761 (1966);
Blackford v. United States, 247 F.2d 745, 754 (9th Cir. 1957); People v. Ellis, 65 Cal. 2d 529, 533, 421 P.2d 393, 394-95, 55
Cal. Rptr. 385, 386 (1966); 8 Wigmore, \textit{supra} note 47, at $2263.

\textsuperscript{57} Boyd v. United States, 116 U.S. 616, 631-33 (1886).

\textsuperscript{58} 384 U.S. 757, 764 (1966); People v. Trujillo, 32 Cal. 2d 105, 113, 194 P.2d
681, 686 (1948). For a compilation of rulings on the admissibility of various items,
see F. Wharton, \textit{Wharton’s Criminal Evidence} §§624, 632, 635, 636, (and footnotes

\textsuperscript{59} Although courts have generally not extended the scope of testimonial evidence
to such a degree, it can be argued that if the defendant produces an item requested by
the prosecution, he or she thereby makes an implied testimonial statement, “the veracity
of which would depend on the perception and cognitive process of the defendant, and
on which the prosecutor would rely.” Comment, \textit{Prosecutorial Discovery under Pro-
posed Rule 16}, 85 Harv. L. Rev. 994, 1003 (1972). The defendant may also be indicat-
ing that he had an awareness of the item and its location. \textit{Id.} at 1004.
ment's request and a court's interpretation of the testimonial element. For example, an order requiring the suspect to state the location of the item prior to production is potentially testimonial. In addition, the privilege does not apply to compelled procedures such as blood tests, handwriting exemplars, voice identification tests and lineups which are conducted for the purpose of physical identification. Whether the defendant remains totally passive, as in a blood test, or must in some manner cooperate with the authorities, as by modeling clothing, is apparently immaterial; the controlling factor is whether the suspect is compelled to communicate ideas, knowledge or thoughts which are incriminating.

Aside from cases dealing with physical identification evidence, the testimonial aspect of the privilege has generally not been emphasized in opinions which analyze self-incrimination. However, dicta in a recent U.S. Supreme Court case and a California appellate decision indicate an increased judicial concern regarding the interpretation of this factor in the self-incrimination equation. These cases involved discovery of statements made by prosecution witnesses to the defendant's agent, rather than the more typical prosecution request for disclosure.

66. The privilege against self-incrimination forbids the use of physical or moral compulsion to exhort communications from the accused. It does not exclude the use of the defendant's body to obtain evidence after a lawful arrest, even if the defendant must physically cooperate and objects to doing so. Id. at 252-53.
67. Those who advocate a liberal interpretation of defendants' constitutional safeguards have criticized the traditional "testimonial" distinction as an overly narrow and technical interpretation of the fifth amendment. See, e.g., Gilbert v. California, 388 U.S. 263, 278 (1967) (Black, J., dissenting); Schmerber v. California, 384 U.S. 757, 774-78 (1965) (Black, J., dissenting). The California Supreme Court, however, has specifically adopted Wigmore's view that the privilege against self-incrimination was initially developed to prevent the compelled extraction of a defendant's knowledge of facts or his ideas and that the principal rationale behind the privilege is applicable only to testimonial evidence. People v. Trujillo, 32 Cal. 2d 105, 112-13, 194 P.2d 681, 685-86 (1948). In Schmerber v. California, the Supreme Court stated that its holding was not to be understood as an adoption of the Wigmore formula. 384 U.S. 757, 763 n.7. However, the reasoning in that case paralleled Wigmore's analysis and there has been no subsequent decision by the Court which diverges from those principles. The dictum in Schmerber did indicate the possibility of blurring the distinction between testimonial and physical identification evidence if confronted with tests which derive testimonial evidence from an analysis of physiological responses, such as lie detectors. Id. at 764.
70. In United States v. Nobles, the Court held that the fifth amendment did not bar discovery of such statements during trial because the privilege is personal to the defendant and does not extend to the testimony or statements of third parties called as witnesses at trial. 422 U.S. at 234. The Court stated that the privilege did not protect all incriminating private information, but only forced individual disclosure of testimonial
of statements made by defense witnesses. In contrast, prosecutorial
discovery of information regarding defense witnesses (including their
names, addresses, extrajudicial statements or expected testimony) has
been the subject matter of the leading California and federal cases
evaluating the constitutional limitations on notice of alibi statutes71 and
prosecutorial discovery in general.72 These cases have all regarded
such information as testimonial in nature,73 presumably on the ground
that disclosure would involve the communication of the defendant's
knowledge or ideas. Once such evidence has been deemed to be testi-
monial, a split in emphasis arises between the California and federal
courts respecting the remaining two elements of the privilege against
self-incrimination during pretrial discovery. The federal courts em-
phasize the element of compulsion, while the California courts focus
on the element of incrimination.

B. The California Approach: The Element of Incrimination

In determining whether requested testimony at trial might be in-
criminating, the courts have developed two sets of rules: one for de-
fendants in criminal trials and the other for ordinary witnesses in both
criminal and civil cases.74 Because of an assumption that anything
which the prosecution asks the defendant on the stand may prove to
be incriminating, the defendant is excused from answering all questions
in the courtroom.75 Although it might be argued that the defendant
evidence. Id. at n.7. During pretrial discovery under the Federal Rules of Criminal
Procedure, a work product provision exempts discovery of statements made by any wit-
ness to the defendant, his agents or attorneys. FED. R. CRIM. PRO. 16(b)(2).
Craig v. Superior Court involved a similar order during pretrial proceedings. In a
concurring opinion, it was suggested that statements made by persons other than the ac-
cused were not testimonial in that they did not encompass the defendant's personal com-
pelled testimony. 54 Cal. App. 3d 416, 428-29, 126 Cal. Rptr. 565, 571-73. The ma-
jority did not make this distinction and held the order to be unenforceable because it
was a violation of the privilege against self-incrimination. Id. at 422, 126 Cal. Rptr.
at 567.
3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974); People v. Hall, 7 Cal. App. 3d 562,
72. Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129
(1970); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879
(1962); Craig v. Superior Court, 54 Cal. App. 3d 416, 126 Cal. Rptr. 565 (1976);
People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973); People v. Bais,
31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973); McMullen v. Superior Court, 6 Cal.
App. 3d 224, 85 Cal. Rptr. 729 (1970); McGuire v. Superior Court, 274 Cal. App. 2d
583, 79 Cal. Rptr. 155 (1969); People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal.
Rptr. 672 (1969).
73. One dissent from this view is found in a footnote in Williams v. Florida to the
effect that it could be argued that testimonial disclosure only encompasses statements
relating to the historical facts of the crime, and not statements relating to the accused's
defense at trial. 399 U.S. 78, 86 n.17. No court has so held and there appears to be
no historical foundation for such a distinction.

74. LOUSELL & WALLY, supra note 4, §15.01.
75. 8 WIGMORE, supra note 47, at $2260.
could be called to the stand and then be excused from testifying, such a procedure would result in an unfavorable and prejudicial inference in front of the trier of fact.\textsuperscript{70} Thus, California courts have held it to be a violation of the privilege to call the defendant to the stand.\textsuperscript{77} To this extent, the privilege has been codified in California\textsuperscript{78} and in most other jurisdictions,\textsuperscript{79} and is sometimes referred to as a separate privilege.\textsuperscript{80} Witnesses, on the other hand, are never excused from taking the stand on the ground of self-incrimination.\textsuperscript{81} Instead, they are allowed to invoke the privilege as to any question put to them on the stand. Before their claim is sustained, however, the judge must determine that there is more than a mere imaginary possibility that an answer to the question could result in an injurious disclosure.\textsuperscript{82} Generally, the California courts have been liberal in construing the privilege as it relates to witnesses.\textsuperscript{83} To qualify as incriminating, the answer need not be one which alone would suffice to convict the witness of a crime or serve to establish a necessary element of that crime.\textsuperscript{84}

\textsuperscript{76} Id. at §2268.
\textsuperscript{78} CAL. EVID. CODE §930.
\textsuperscript{79} For a list of applicable statutes, see 2 WIGMORE, supra note 47, at §§8488, 579 (1961, Supp. 1975).
\textsuperscript{80} The Law Revision Commission's comment to California Evidence Code Section 940 (privilege against self-incrimination) states that the privilege should be distinguished from California Evidence Code Section 930 (privilege of defendant not to take the stand). PARKER'S EVIDENCE CODE OF CALIFORNIA, Comment, Law Revision Commission, §940.

Dicta in some cases has also suggested that the defendant has the absolute right to remain mute during all criminal proceedings. See, e.g., Helton v. United States, 221 F.2d 338, 341-42 (5th Cir. 1955); People v. Talle, 111 Cal. App. 2d 650, 664, 245 P.2d 633, 641 (1952); People v. Sawaya, 46 Cal. App. 2d 466, 471, 115 P.2d 1001, 1003 (1941). The "right to stand mute" has been used in support of the argument that any prosecutorial discovery is a violation of the privilege against self-incrimination. Jones v. Superior Court, 58 Cal. 2d 56, 63, 372 P.2d 919, 923, 22 Cal. Rptr. 879, 883 (1962) (Peters, J., dissenting). See also Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., dissenting). However, this idea seems to be the result of an inaccurate adoption of a phrase used in common law criminal pleading. Under the early common law, a defendant was said to "stand mute" if he refused to plead to a treason or felony charge. 21 AM. JUR. 2d, Criminal Law §462 (1965). Today, the right to refrain from entering any type of plea to a criminal charge remains. Id.; Woods v. United States, 128 F.2d 265, 274 (D.C. Cir.) (1942), and is still sometimes referred to as standing mute. B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §254 (1963). If a defendant so chooses, the court will enter a plea of not guilty. CAL. PEN. CODE §1024. By standing mute, however, the defendant may be barred from entering a subsequent special plea. People v. Hall, 220 Cal. 166, 30 P.2d 33 (1934), rehearing denied, 220 Cal. 116, 30 P.2d 996 (1934), appeal dismissed, 292 U.S. 614 (1934), cert. denied, 296 U.S. 656 (1936).

\textsuperscript{81} 8 WIGMORE, supra note 47, at §2268 (1961, Supp. 1975).
\textsuperscript{82} See note 52 supra.

\textsuperscript{83} "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." Cohen v. Superior Court, 173 Cal. App. 2d 61, 69-70, 343 P.2d 286, 291 (1959). In that case, the court indicated that a trial court must construe the questions addressed to the witness in view of the setting in which the questions are asked and the judge's personal perception of the circumstances in each case. Id. at 71, 343 P.2d at 291. A judge must be aware that "incrimination may be approached and achieved by obscure and unlikely lines of inquiry." Id. at 72, 343 P.2d at 292.

\textsuperscript{84} United States v. Burr, 25 F. Cas. 38, 40 (Case No. 14,692e) (C.C.D. Va. 1807).
is sufficient if the answer would furnish a "link in the chain" of evidence needed to convict the person of a crime.\(^8\)

During pretrial discovery proceedings, the defendant is not before the trier of fact, and therefore no prejudicial implication can be drawn from the accused's assertion of the privilege against self-incrimination.\(^8\) Thus, no justification exists for permitting the defendant to remain totally silent during pretrial discovery. Nonetheless, the defendant is still entitled to claim the privilege against self-incrimination during pretrial proceedings.\(^7\) In *Prudhomme v. Superior Court*,\(^8\) the California Supreme Court adopted the link-in-the-chain rule, previously used with respect to ordinary witnesses, as a guide in determining the incriminating effects of the discovery order made to the defendant. The essential consideration in evaluating the element of incrimination was found to be more than merely the relationship of the requested information to an "affirmative defense,"\(^9\) or the defendant's intent to introduce or rely upon the evidence at trial;\(^9\) rather the principal factor was determined to be whether disclosure could lighten the prosecution's burden of proving its case in chief by providing a link in the chain.

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85. Development of the link-in-the-chain began during the trial of Aaron Burr when Chief Justice Marshall stated that, "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any of them against himself." *Id.* at 40. Application of the link doctrine has been neither uniform nor easy, with judicial debate centering around how strong the link must be and how direct its relationship should be to the core of the crime. For a discussion of some of the relevant cases, see Falknor, *Self-Crimination Privilege: "Links in the Chain"*, 5 *VAND. L. REV.* 479 (1952). For an argument that the link test has been extended too far, see 8 *WIGMORE*, supra note 47, at 92260, and Justice White's dissent in *Malloy v. Hogan*, 378 U.S. 1, 33-38 (1964).

86. Cf. 8 *Wigmore*, supra note 47, at §2268(b) wherein it is noted that there is no violation of the privilege against self-incrimination if the prosecutor requests the accused to produce documents, so long as the request is not made in court and no reference is made to the request in court if the accused refuses to comply.


88. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).


90. The practice of limiting discovery to evidence which the accused intends to present at trial remains a factor in prosecutorial discovery schemes. In *Jones v. Superior Court*, Justice Traynor used this limitation to argue that disclosure of such information would not be incriminating, since the defendant was planning to present the same information as exculpatory evidence at trial. 58 Cal. 2d at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882. In the leading federal case dealing with the self-incrimination problem in prosecutorial discovery, the Supreme Court argued that this limitation negated any compulsion in the discovery order or statute. See text accompanying notes 100-110 infra. In *Prudhomme*, the California court declined to continue this denial of the constitutional privilege merely because an accused planned to present certain evidence at trial. 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133.
of evidence underlying the government's case. The decision held that as a prerequisite to the issuance of any prosecutorial discovery order a trial judge must scrutinize the information sought to determine whether the material could tend to incriminate the defendant. The court also stated that the request must be limited to evidence which the defendant intends to produce at trial. The court declined to delineate the perimeters of prosecutorial discovery, but rather noted:

We do not intend to suggest that the prosecution should be barred from any discovery. . . . A reasonable demand for factual information which . . . pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and thereby justify the trial judge in determining that under the facts and circumstances in the case . . . it clearly appears that the disclosure cannot possibly tend to incriminate the defendant.

Since Prudhomme, the link-in-the-chain test has been applied to prosecutorial discovery both before and during trial and to an order requiring disclosure of information after the presentation of the prosecution's case-in-chief. California's emphasis upon the element of incrimination as the dominant factor of the privilege has become the point of divergence between the California and federal approaches to the privilege against self-incrimination as applied to pretrial prosecutorial discovery.

C. The Federal View: Focus on Compulsion

Unlike the California court's approach to the privilege against self-incrimination in the context of criminal discovery, the U.S. Supreme Court has focused on the element of compulsion as the decisive factor in upholding or invalidating prosecutorial discovery orders. As noted earlier, evidence must be compelled as the result of governmental ex-

91. 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133.
92. Id. at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.
93. Id.
94. Id.
97. People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975). This is the only instance since the decision in Prudhomme v. Superior Court in which a prosecutorial discovery order has been upheld in California. Here, the court upheld an order to the defendants to turn over statements of defense witnesses and investigator's notes so that they could be used for possible impeachment. The trial judge screened the material before delivery to the prosecution and the appellate court found that the material neither lightened the prosecution's burden in proving its case-in-chief nor in any way incriminated the defendants. Id. at 378-79, 124 Cal. Rptr. 288-89.
exercise of power before it will fall within the protection of the privilege.\textsuperscript{98} Compulsion within this context has been held to encompass the type of mental pressures placed upon the defendant by the threat of sanctions for failure to comply with the court order or statutory provision.\textsuperscript{99} That is, the defendant's decision whether to comply with a request for discovery by the government is not truly a voluntary exercise of his or her free will if the accused is faced with the possibility of contempt proceedings or the preclusion of relevant evidence for failure to comply with the request. The U.S. Supreme Court, however, has not accepted this interpretation of compulsion in regard to one form of pretrial prosecutorial discovery—notice of alibi.

In \textit{Williams v. Florida},\textsuperscript{100} the Supreme Court upheld the constitutional validity of Florida's notice of alibi statute. The statute\textsuperscript{101} that was examined in \textit{Williams} required the defendant to provide notice of intent to use an alibi defense, plus information as to the defendant's whereabouts at the time of the alleged crime and a list of alibi witnesses. In analyzing the statute, the majority formulated an approach which has since been termed the "timing" rationale.\textsuperscript{102} Although the Court conceded that the information sought could be considered as both testimonial and incriminating,\textsuperscript{103} the critical element of compulsion was held to be lacking.\textsuperscript{104} The Court analogized the pretrial notice of alibi requirement with the dilemma faced by all defendants at trial—that is, whether to take the stand, which witnesses to call, and, in general, what line of defense to follow.\textsuperscript{105} Though the turn of events in the courtroom may severely pressure the defendant, the Court stated that such decisions have never been considered compelled when made at trial.\textsuperscript{106} The majority found that the pressures upon the defendant during pretrial procedures are of the same tactical nature as those experienced during trial.\textsuperscript{107} Since there is no constitutional bar to granting the prosecution a continuance if the defendant offers a surprise defense, the Court reasoned that there should be no bar to

\textsuperscript{98} See note 55 supra.
\textsuperscript{99} Sanctions which leave the defendant confronted with the "cruel trilemma of self-accusation, perjury or contempt . . ." are compelled within the meaning of the privilege against self-incrimination. \textit{Murphy v. Waterfront Comm'n}, 378 U.S. 52, 55 (1964). \textit{See also} cases collected in 8 Wigmore, supra note 47, at §2272.
\textsuperscript{100} 399 U.S. 78 (1970).
\textsuperscript{101} FLA. R. CRIM. PRo. 1.200, \textit{cited in} 399 U.S. at 104-105.
\textsuperscript{102} Scott v. State, 519 P.2d 774, 783 (Alaska 1974).
\textsuperscript{103} "However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments." 399 U.S. at 84.
\textsuperscript{104} \textit{Id}. at 83-85.
\textsuperscript{105} \textit{Id}. at 83-84.
\textsuperscript{106} \textit{Id}. at 84.
\textsuperscript{107} \textit{Id}. at 84-85.
the mere acceleration of notice that a particular defense will be introduced, or to the presentation of evidence which will be used to support that defense.\textsuperscript{108} The statute neither compels the defendant to present a certain defense nor prevents him from abandoning a defense; it merely goes to the question of timing.\textsuperscript{109} In this regard, the Court stated that:

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 his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.\textsuperscript{110}

Because the majority determined that the defendant in \textit{Williams} was not compelled to comply with the statute within the meaning of the fifth amendment, the question of incrimination was never reached. Thus, the Court did not confront the issue which served as the focal point in \textit{Prudhomme v. Superior Court}.

A serious problem inherent in the Court's reasoning is the majority's failure to examine the effect of the applicable statutory sanctions. The Florida statute in \textit{Williams} authorized a discretionary preclusion sanction providing that if the defendant failed to comply with the order he could be barred from presenting any testimony in support of an alibi other than his own testimony on the stand.\textsuperscript{111} As noted, many courts consider a court order or statute supported by sanctions for noncompliance as sufficient state action to constitute compulsion.\textsuperscript{112} By declining to consider the compulsive effect of the threatened preclusion sanction, the Court exposed itself to the criticism of incomplete analysis.\textsuperscript{113}

As Justice Black's dissent suggests, the pretrial pressures which the Court decided upon as the sole measure of compulsion appear to be factually and historically different than those generated during trial.\textsuperscript{114} At the close of the prosecution's case, the defendant must choose whether to remain silent or present a defense. Although the amount and type of the evidence presented by the prosecution will influence the defendant, the choice remains essentially that of the accused. Under the Florida statute, however, a defendant must reveal certain information regarding the defense prior to the prosecution's opening ar-

\textsuperscript{108} Id. at 85-86.
\textsuperscript{109} Id. at 85.
\textsuperscript{110} Id.
\textsuperscript{111} See note 101 supra.
\textsuperscript{112} See note 99 supra.
\textsuperscript{114} Williams v. Florida, 399 U.S. 78, 108-10.
argument. After hearing the state's case-in-chief, the defendant may choose to modify a line of defense and, for example, introduce a witness whose testimony had previously seemed irrelevant. Under the notice of alibi statute in Williams, the defendant would be prevented from introducing the testimony of a witness whom he had not decided upon prior to the commencement of trial.116 Furthermore, should the defendant decide to abandon the alibi defense prior to trial, information which is potentially incriminating might well remain in the hands of the prosecutor.116 These considerations point to the fallacies117 in the majority's timing rationale and lead to the conclusion that performance under such statutes is indeed compelled.

Though the Williams decision defines the limits of the constitutional law with regard to notice of alibi statutes, the California Supreme Court has indicated its reluctance to adopt the federal position. In Reynolds v. Superior Court,118 the court set aside an order to give the prosecution advance notice of an alibi defense and a list of alibi witnesses, similar to the information sought in Williams,119 but it declined to adjudicate the self-incrimination problem on the ground that the legislature was the proper entity to implement a notice of alibi procedure.120 In doing so, the court noted that state courts are free to interpret and enforce state constitutional provisions which parallel federal law in a more narrow and protective manner than that adopted by the United States Supreme Court.121 The California court further emphasized that the

115. FED. R. CRIM. PRO. 12.1 provides that the court may, in its discretion, modify the requirements of the rule for either party. It is thereby possible that a continuance might be granted to allow the defendant to introduce a witness hitherto not revealed. However, the frequent use of continuances would seem to obviate one of the primary advantages of a statutory scheme for criminal discovery.

116. 399 U.S. at 110. The federal notice of alibi statute provides that evidence of an intention to rely upon an alibi defense or of statements made in connection therewith may not be used in any civil or criminal proceeding if the alibi defense is later withdrawn. FED. R. CRIM. PRO. 12.1(f). However, before an accused withdraws an alibi defense, the government may well have obtained incriminating clues from the disclosure which could lead to the discovery of admissible evidence.

117. Assuming a defendant chose to present his alibi defense under the Florida notice of alibi statute examined in Williams, the prosecution would not be restricted to using the information obtained by discovery solely for rebuttal of the defendant's alibi defense. As a practical matter, such a limitation would be difficult, if not impossible, to enforce. Yet the majority's timing rationale in Williams rests on the questionable assumption that the notice statute neither compels nor inhibits the presentation of a defense. 399 U.S. at 84. The Court's argument is that the disclosure of information regarding the accused's defense is necessary to prevent the government from being unfairly surprised at trial. Id. at 81. But there is nothing to prevent the prosecution from using the information acquired, or the fruits thereof, in its case-in-chief. Thus, in the only meaningful sense, the defendant is incriminating himself.


119. The statute in Williams included an additional requirement that the accused specify the place at which he claimed to have been at the time of the alleged offense. FLA. R. CRIM. PRO. 1.200, cited in 399 U.S. at 104-05.


121. Id. at 842-43, 528 P.2d at 49-50, 117 Cal. Rptr. 441-42.
different approaches to prosecutorial discovery represented by Prudhomme and Williams, "put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires."  

As has been seen, the California Supreme Court and the U.S. Supreme Court have manifested significantly different approaches to the interrelationship between the privilege against self-incrimination and pretrial prosecutorial discovery. The U.S. Supreme Court has focused upon the degree and type of compulsion which brings evidence within the scope of the fifth amendment; the California court has concentrated on the incriminating effects of the requested material. The difference in these approaches will have a significant effect on the outcome of most pretrial prosecutorial discovery issues.

D. Application of the Federal and California Views of Self-Incrimination to Criminal Discovery Procedures

The range of information potentially discoverable by the prosecution is quite broad, and several types of prosecutorial discovery statutes have been developed in other jurisdictions. California should look to these statutes in developing its own statutory scheme. To evaluate the effect of the privilege against self-incrimination as it relates to the character of the information or material sought from the accused, the major types of discovery statutes must be examined in light of the California and federal viewpoints. Three categories of prosecutorial discovery will be considered: (1) simple notice of defense; (2) the typical notice of alibi statute, and (3) general discovery statutes.

1. Notice of Defense

The most limited type of pretrial discovery for the government is a simple notice of defense whereby the accused must merely notify the prosecution of his intent to present a particular defense. Notice is often required for alibi and insanity defenses, and occasionally for

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122. Id. at 843, 528 P.2d at 50, 117 Cal. Rptr. at 442.
124. See, e.g., FED. R. CRIM. PRO. 12.2; CAL. PEN. CODE §1016.
self-defense, entrapment and mistaken identity. A pure notice requirement appears to be acceptable under both the federal and California views. The Supreme Court specifically noted in *Williams v. Florida* that advance notice of defense was not unconstitutionally compelled. Under the *Prudhomme* doctrine in California, mere notice would not be violative of the privilege because it is unlikely to involve the disclosure of any incriminating information. Indeed, present California statutory law requires pretrial notification of an insanity defense.

2. Notice of Alibi Statutes

The typical notice of alibi statute calls for more than mere notice of intent to present an alibi defense. For example, like the Florida statute which was approved in *Williams*, Rule 12.1 of the Federal Rules of Criminal Procedure requires the defendant to disclose the location at which he claims to have been at the time of the alleged offense and a list of alibi witnesses. Under traditional analysis, these demands are considered testimonial in both federal and California courts in that they require the defendant to communicate his knowledge about his activities at the time of the crime and his ideas as to the type of defense he will present in response to the state's case against him. While it is clear that under the federal approach the

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125. See, e.g., ARIZ. REV. STAT., RULES OF CRIM. PROC., Rule 15.2(b) (1973); MONT. REV. CODES ANN. §95-1803(d) (1969).
126. 399 U.S. at 85-86.
128. Some advocates of prosecutorial discovery have characterized disclosure of information under notice of alibi statutes as a simple pleading problem. See, e.g., Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29 (1964); Millar, *The Function of Criminal Pleading*, 12 J. CRIM. L.C. & P.S. 500 (1922). See also Dean, *Advance Specifications of Defense in Criminal Cases*, 20 AM. B.J. 435 (1934), quoted with approval in *Jones v. Superior Court*, 58 Cal. 2d 56, 61-62, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882. The holding in *Jones v. Superior Court*, while not specifically based on the element of compulsion, rested on the idea that the privilege against self-incrimination was not violated by the accelerated disclosure of information which the defendant planned to introduce at trial. *Id.* This reasoning seems to foreshadow the *Williams* timing rationale, holding that the disclosure of such information is not compelled within the meaning of the privilege against self-incrimination. See text accompanying notes 104-114 supra.
129. In part, the federal rule reads:
Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

FED. R. CRIM. PRO. 12.1(a).
130. See text accompanying notes 71-73 supra.
requirements of a notice of alibi statute are not compulsive, the same conclusion has not been reached in California.

Although the California Supreme Court refused to commit itself in Reynolds v. Superior Court\(^{131}\) to a position regarding the incriminating effects of notice of alibi type requirements, the logical extension of the California approach delineated in Prudhomme is demonstrated by the Alaska Supreme Court's decision in Scott v. State.\(^{132}\) In Scott, the court examined a discovery order which included some of the same requirements as the order in Prudhomme and the statute in Williams.\(^{133}\) Executed under a state notice of alibi statute,\(^{134}\) the order in Scott called for notice of an alibi defense, a witness list, production or inspection of prospective witnesses' statements and the defendant's claim as to his whereabouts at the time of the alleged crime. The court considered both the California view and the Williams decision, and then systematically scrutinized the requirements of the discovery order to determine whether the information sought was testimonial, incriminating and compelled.\(^{135}\) The court found that all of the information requested was testimonial and compelled, and specifically rejected the Williams timing rationale concerning compulsion.\(^{136}\) Agreeing with Justice Black's dissent in Williams, the Alaska court determined that the strategy choices available to a defendant before and during trial are not identical and should not be treated as such in the interpretation of a constitutional right.\(^{137}\)

With respect to the incrimination element, the Alaska court adopted California's link-in-the-chain test and concluded that, aside from simple notice of alibi defense,\(^{138}\) the material requested could tend to incriminate the defendant. For example, the court noted that the witness list might contain names of persons known to be accomplices or individuals under police surveillance, and the accused's association with such persons might give rise to additional suspicions regarding the defendant's involvement in criminal activity.\(^{139}\) The Alaska court found similarly

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132. 519 P.2d 774 (Alaska 1974).
133. The discovery order was similar to the one in Prudhomme v. Superior Court in that it called for a witness list and expected testimony of the witnesses. 2 Cal. 3d 320, 322, 466 P.2d 673, 674, 85 Cal. Rptr. 129, 130. All of the requirements relating to alibi were contained in the order in Williams v. Florida, 399 U.S. 78, 79.
134. 519 P.2d at 775-776, citing ALASKA R. CRIM. PRO. 16(c), (f).
135. 519 P.2d at 785.
136. Id. at 783.
137. See text accompanying notes 115-117 supra.
138. 519 P.2d at 783-85.
139. Id. at 785.
demonstrable incriminating consequences in the remaining discovery requirements.\textsuperscript{140}

The fate of Alaska’s notice of alibi statute should be considered with respect to the prospect for a similar statute in California. During a discussion of notice of alibi statutes in \textit{Reynolds}, the California Supreme Court took note of the \textit{Scott}\textsuperscript{141} case and indicated an awareness of the disparity between the federal and California positions.\textsuperscript{142} If faced with a notice of alibi statute, the California court might well view the \textit{Scott} decision as a valuable precedent in this difficult area of the law.

3. General Discovery Statutes

General discovery statutes call for prosecutorial discovery of items unrelated to mere notice of an expected defense. Newly amended Rule 16 of the Federal Rules of Criminal Procedure\textsuperscript{143} and many state statutes\textsuperscript{144} call for disclosure of books, papers, documents, photographs, tangible objects, and results or reports of physical or mental examinations,\textsuperscript{145} scientific tests or experiments. Typical sanctions for failure to comply with a request for discovery include a court order to enforce the request, a continuance, and the preclusion of evidence not revealed at the proper time.\textsuperscript{146} Much of the information sought under such statutes is clearly nontestimonial real evidence, and thus no further inquiry is needed to demonstrate that such information is outside of the scope of the privilege against self-incrimination.\textsuperscript{147} However, certain types of information discoverable under these statutes may have a testimonial element. For example, the defendant’s private papers in his personal possession have a testimonial quality\textsuperscript{148} and, as such, the prosecution’s attempt to discover such items must be subjected to self-incrimination analysis under either the federal or California view.

Discovery under the federal rule\textsuperscript{149} is limited in that the government may discover only those items which the defendant intends to introduce

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\item Id. at 786-87.
\item 12 Cal. 3d 834, 842-43 n.10, 528 P.2d 45, 49-50 n.10, 117 Cal. Rptr. 437, 441-42 n.10.
\item See text accompanying notes 121-122 infra.
\item \textsuperscript{142} See Fed. R. Crim. Pro. 16. See note 171 infra. For a discussion of the conditional nature of the federal rule, see text accompanying notes 169-175 infra.
\item See statutes cited notes at 169 and 170 infra.
\item These items may be privileged from disclosure in California under the attorney-client privilege. \textit{City & County of S.F. v. Superior Court}, 37 Cal. 2d 227, 231 P.2d 26 (1951); \textit{People v. Lines}, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975).
\item See Fed. R. Crim. Pro. 16(d)(2).
\item See text accompanying note 58 supra.
\item \textsuperscript{147} See text accompanying note 58 supra.
\item \textsuperscript{149} \textit{Fed. R. Crim. Pro. 16(b)(1)(A), (B).}
\end{enumerate}
into evidence at trial.\textsuperscript{150} In this respect, the rules adopt the timing rationale of \textit{Williams v. Florida}\textsuperscript{151} so that prosecutorial discovery becomes permissible insofar as it relates to evidence which will be shortly revealed at trial.\textsuperscript{152} As this reasoning was used by the Court in \textit{Williams} to explain why information under the notice of alibi statute was not compelled within the meaning of the privilege against self-incrimination,\textsuperscript{153} it could be similarly utilized to uphold the provisions of the federal rules and those modeled after them. It is just such an extension of the \textit{Williams} rationale to discovery devices other than notice of alibi statutes which Justice Black predicted and feared in his dissent in \textit{Williams}.\textsuperscript{154}

Several states have since incorporated the timing rationale into general discovery statutes.\textsuperscript{155} Moreover, one state supreme court has applied the \textit{Williams} rule to the production of witness lists in all criminal proceedings, regardless of whether an alibi defense is anticipated.\textsuperscript{156} Regretfully, this trend involves a continuation of the weaknesses inherent in the \textit{Williams} analysis: the effect of the statutory sanctions in regard to compulsion remains to be analyzed and the potential for an abuse in the use of the information received by the prosecutor continues.\textsuperscript{157}

The fact that the California Supreme Court specifically rejected the

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\item[\textsuperscript{150}] Rule 16 also contains work product protection for internal defense documents made in connection with the investigation of the case, and a prohibition against discovery of any statements made by defense or government witnesses to the defendant, his agents or attorneys. \textit{Fed. R. Crim. Pro.} 16(b)(2). However, this provision does not apply to discovery of reports or results of medical or scientific tests or experiments, \textit{id.}, nor to information requested under the notice of alibi statute. See \textit{Fed. R. Crim. Pro.} 12.1.
\item[\textsuperscript{151}] 399 U.S. 78.
\item[\textsuperscript{152}] See text accompanying notes 110-114 \textit{supra}.
\item[\textsuperscript{153}] See text accompanying notes 110-114 \textit{supra}.
\item[\textsuperscript{154}] 399 U.S. at 107-08, 115-16 (Black, J., dissenting).
\item[\textsuperscript{156}] \textit{State ex rel. Keller v. Criminal Ct.}, 317 N.E.2d 433 (1974). The Indiana Supreme Court applied the \textit{Williams} rationale to the compelled production of books, documents, papers, medical and scientific reports, and generally the entire spectrum of information discoverable under the typical general discovery statute. Additionally, the court extended this reasoning to a provision requiring production of expected witnesses' testimony. \textit{Id.} at 437. Such disclosure is proscribed in the federal rule for general discovery by the work product protection clause. See note 150 \textit{supra}. In \textit{Keller}, the court also failed to distinguish between testimonial and physical identification evidence. Noting that a state's right to take blood, hair, etc., from the defendant had been established, the court wrote that, "it can scarcely be argued that to ask for a list of witnesses [the defendant] expects to produce at the trial is an invasion of his constitutional right against self-incrimination." \textit{Id.} at 437-38. This reasoning overlooks the fact that physical identification evidence does not fall within the scope of the privilege against self-incrimination. See text accompanying notes 62-66 \textit{supra}.
\item[\textsuperscript{157}] See note 117 \textit{supra}.
\end{itemize}
timing rationale in *Prudhomme v. Superior Court* has much significance for the future of prosecutorial discovery in California. The restriction of discovery to those items which the defendant intends to introduce into evidence at trial does not negate the fact that the accused is being compelled to submit potentially incriminating information at a critical stage in the criminal proceedings against him. Federal Rules 12.1 (notice of alibi) and 16 (general discovery), which embody the *Williams* timing rationale, do not provide for sufficient inquiry into the incrimination element to meet the burden of showing that disclosure of evidence will not lighten the prosecution's task of proving its case-in-chief. For this reason, the federal rules would not be acceptable in California. The inquiry in California must focus on whether the information sought is testimonial and incriminating, and the government may discover only information which could not possibly tend to incriminate the accused. The solicitude of the California Supreme Court for the defendant's privilege against self-incrimination may well thwart enforcement of any discovery scheme which overlooks the flexibility needed to meet the standards of incrimination as outlined in *Prudhomme*.

**IMPLEMENTATION OF A CRIMINAL DISCOVERY STATUTE**

The obstacles to the informational flow along the length of the "two-way street" of criminal discovery have been examined and the constitutional parameters of discoverable information defined. Since it has been determined what information can be discovered consistent with the privilege against self-incrimination, the emphasis of this comment will shift to a consideration of the major constitutional limitations to the implementation of a "two-way street" system of discovery in California. That is, the focus will shift from what information is available to the prosecution to how information can permissibly be discovered by both the prosecution and the defense. It is apparent that statutory implementation of criminal discovery would be preferable to its continued piecemeal judicial development. A statutory scheme would provide

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158. 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133.
159. FED. R. CRIM. PRO. 12.1.
160. FED. R. CRIM. PRO. 16.
161. Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133.
162. It is possible that the testimonial factor of the privilege might be interpreted in a more narrow manner to permit the extension of prosecutorial discovery to information which does not directly reflect the defendant's mental processes. In this respect, the holding in *Prudhomme*, which is highly protective of the defendant, might be modified to allow discovery of information about defense witnesses. See notes 68-70 *supra* and text accompanying.
both a uniform approach to pretrial discovery and sufficient notification to the parties as to their respective discovery rights. Finally, the California Supreme Court has evidenced its reluctance to expand prosecutorial discovery and has indicated that implementation of a discovery scheme is best left to legislative action.

163. When the permissibility of discovery is left entirely to the discretion of the trial court without statutory guidelines, confusion leading to the inconsistent treatment of defendants often results. Shatz, supra note 5, at 296. See Louise, & Wally, supra note 4, §13.01, at 794-95; Carr & Lederman, Criminal Discovery, 34 Cal. S.B.J. 23, 30-31 (1959).

A survey of the California District Attorneys' and Public Defenders' Offices revealed that many were dissatisfied with the present judicial implementation of criminal discovery. Many advocated the adoption of a legislative scheme clearly delineating the information subject to discovery.

An overwhelming majority of the District Attorneys indicated that there was a need for prosecutorial discovery and that a statutory scheme would be superior to judicial implementation. Further, many indicated that they were frequently surprised or handicapped by the introduction of a particular defense or piece of evidence at trial. Criminal Discovery Questionnaire distributed to the District Attorneys' and Public Defenders' Offices throughout the State of California by the authors (Jan. 1976). Responses on file at the Pacific Law Journal.

164. See Carr & Lederman, Criminal Discovery, 34 Cal. S.B.J. 23, 31 (1959) wherein the authors note:

The necessity for the establishment of clear and workable rules by the legislature seems plain. Such statutory provisions should inform the prosecution and defense counsel in definite terms as to: (1) What items are subject to discovery; and (2) The procedure to be followed in making requests for discovery and inspection and in opposing such requests.

Criminal discovery is a judicial creation, and as such its development has taken place in a piecemeal fashion. As a result, the rules concerning inspection and discovery are uncertain, Id. at 30, and inconsistently applied, see Shatz, supra note 5, at 296.


Although in Reynolds the California Supreme Court recognized that notice of admissible evidence had been validated by the United States Supreme Court in Williams v. Florida, it noted that such provisions had not been tested or construed pursuant to the California Constitution. 12 Cal. 3d at 842, 528 P.2d at 49, 117 Cal. Rptr. at 441. The court expressly affirmed its inherent rule-making power to promulgate such a notice requirement but left its implementation to the legislative process. Id. at 837, 528 P.2d at 46, 117 Cal. Rptr. at 438. The employment of the court's inherent rule-making power where necessary to protect an accused's constitutional rights was distinguished from its exercise merely to implement a socially desirable policy. Id. at 845-46, 528 P.2d at 673, 675, 85 Cal. Rptr. at 444. Thus the exercise of the court's rule-making power to create a prosecutorial discovery device would unnecessarily conflict with its function as constitutional umpire. Id. at 847, 528 P.2d at 54, 117 Cal. Rptr. at 446.

The goals of criminal discovery are to (1) enable courts to make an informed disposition of cases without trial; (2) minimize the undesirable effect of surprise; (3) help insure that the issue of guilt or innocence is accurately determined; and (4) effectuate the efficient administration of justice. H.R. Rep. No. 94-247, supra note 31, at 1369. See Prudhomme v. Superior Court, 2 Cal. 3d 320, 323, 466 P.2d 673, 675,
If the California Legislature determines that the adoption of a statutory scheme is the preferable means by which to effectuate criminal discovery, additional constitutional problems would require examination. This section will address three major constitutional issues raised by the implementation of a discovery statute. First, prosecutorial discovery will be examined to determine whether its operation should be independent of, or conditioned upon, a defendant's right to discovery. Second, the reciprocity requirement mandated by the United States Supreme Court in *Wardius v. Oregon* will be discussed in terms of its practical effect upon the extension of discovery rights to the prosecution. Finally, the permissibility of the preclusion sanction as an enforcement tool for prosecutorial discovery will be addressed.

A. Conditional or Defendant-Triggered Discovery

The various statutory schemes which have been developed to implement prosecutorial discovery can be divided into two categories—**independent** and **conditional** discovery statutes. Rule 16 of the recently amended Federal Rules of Criminal Procedure is illustrative of a conditional discovery statute in force in several states. Under Rule

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85 Cal. Rptr. 129, 131 (1970); Moore, *supra* note 6, at 871. These goals can be best served when discovery operates as a cohesive unit. To avoid fragmentation, the California Legislature should address the entire area of criminal discovery with the view of implementing a comprehensive statutory scheme.


171. Fed. R. Crim. Pro. 16(b)(1) provides in part:

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall
16, the right to prosecutorial discovery is dependent upon the defendant first seeking discovery; conversely, the defendant's right to discovery is conditioned upon extending to the prosecution reciprocal discovery rights. In practical effect, the defendant's acceptance of the benefit of discovery operates as a "waiver" of his right to object to the creation of corresponding prosecutorial discovery rights. Legislators and legal scholars have suggested that this conditional discovery approach circumvents possible self-incrimination restrictions to prosecutorial discovery. However, as will be demonstrated, this reasoning is inconsistent with the United States Supreme Court's position with respect to the conditioning of an individual's constitutional rights.

The Supreme Court has repeatedly held that any option which exacts a penalty upon the exercise of the privilege against self-incrimination is an unconstitutional condition. A penalty within this context is not restricted to a fine or possible imprisonment, but includes any sanction which makes the assertion of a fifth amendment privilege costly. Un-

permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

172. C. WRIGHT, 1 FEDERAL PRACTICE AND PROCEDURE, Criminal §256, at 526 (1969) [hereinafter cited as 1 WRIGHT].

Rule 16, as first amended in 1966, permitted the attachment of this condition at the discretion of the trial court. The employment of the conditional device was to be reserved for those situations where mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. 18 U.S.C. Rule 16, Appendix, at 4494 (1971) (Notes of Advisory Committee on Rules, Subdivision (c)). However, in 1975 when Rule 16 was amended to expand the amount of information which could be discovered by both defense and prosecution, the attachment of this condition became automatic. Although the Advisory Committee originally proposed that the prosecution's right to discovery be independent from the accused's right to discovery, 1 WRIGHT, supra note 172, §255, at 206 (Supp. 1975), the condition was reinstated to prevent or forestall possible fifth amendment challenges. See H.R. REP. No. 94-64, supra note 31, at 1369, 1399.

173. H.R. REP. No. 94-247, supra note 31, at 1369; LOUSELL & WALLY, supra note 4, 813.01, at 788; Nakell, supra note 5, at 503. See also 1 WRIGHT, supra note 172, §256, at 526.


175. See authorities cited note 173 supra.

176. For example, the prosecution cannot be permitted to comment upon a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 615 (1965). Further, a court cannot hold a person in contempt for asserting the privilege against self-incrimination. Malloy v. Hogan, 378 U.S. 1, 3 (1964).

See Amendments to Rules of Criminal Procedure for the United States District Courts, 39 F.R.D. 252, 277 (1965) wherein Justice Douglas expressed concern as to the constitutionality of the conditioning aspect of Rule 16:

To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.
under a conditional discovery scheme, the refusal of a defendant to waive the privilege against self-incrimination would preclude his access to material information within the possession of the prosecution.\textsuperscript{178} Thus, the denial of this discovery right would penalize the exercise of a defendant's fifth amendment right.\textsuperscript{179} It follows that a statute which conditions the right to defense discovery upon a waiver of the privilege against self-incrimination violates the principle against impermissible conditions.\textsuperscript{180} It is apparent from prior decisions that the Supreme Court views any conditions involving the privilege against self-incrimination as inherently suspect.\textsuperscript{181} To draft a statute which conditions the right to defense discovery upon permitting reciprocal discovery by the prosecution is to tread on dangerous ground. Even if a criminal discovery statute were to expressly exempt from its operation information falling within the protection of the privilege against self-incrimination, a conditional discovery statute would nonetheless be inappropriate under California case law.\textsuperscript{182} That is, the prosecution's ultimate right to obtain discovery would be left entirely to the discretion of the defendant—a needless restriction upon prosecutorial discovery that is inconsistent with the rationale advanced in \textit{Jones v. Superior Court}.\textsuperscript{183}

\textsuperscript{178} United States v. Fratello, 44 F.R.D. 444, 447 (1968). It is the consequences \textit{flowing from} the exercise of a constitutional right which invalidates the procedure and in the case of pretrial discovery, the accused's claim of the privilege against self-incrimination prevents that person from obtaining the benefit of discovery. \textit{Id.} at 447.

If the prosecution possesses material which the defense considers so crucial to its case that it would take advantage of discovery and waive the fifth amendment privilege, then perhaps the prosecution is under a "constitutional duty" to disclose such information. For a discussion of the prosecution's constitutional duty to disclose see Brady v. Maryland, 373 U.S. 83, 87 (1963). Rule 16 does not specifically exempt from its operation material discoverable pursuant to \textit{Brady}. If a defendant does not have an independent right to discover such information, then the practical effect of Rule 16 is to condition a defendant's due process right upon the waiver of the fifth amendment privilege against self-incrimination. This is clearly impermissible since the United States Supreme Court has stated: \textquotedblleft We find it intolerable that one constitutional right should have to be surrendered in order to assert another.\textquotedblright\ Simmons v. United States, 390 U.S. 377, 394 (1968); \textit{see} Flint v. Mullen, 372 F. Supp. 213, 217 (1974); 1 \textsc{Wright}, \textit{supra} note 172, \S256, at 527-28.

\textsuperscript{179} United States v. Fratello, 44 F.R.D. 444, 447 (1968).

\textsuperscript{180} It could be argued that a conditional discovery statute would further deter the defendant from exercising his constitutional right to discover exculpatory information. That is, a defendant may forego his constitutional right to discovery in order to prevent the prosecution from obtaining similar discovery rights. For a discussion of the constitutional right to discover exculpatory information see Brady v. Maryland, 373 U.S. 83, 87 (1963). Therefore, a condition which needlessly encourages the waiver of a constitutional right, whether that right is based on the privilege against self-incrimination or due process, would seem to be within the prohibition of the unconstitutional condition cases. \textit{See} Griffin v. \textit{California}, 380 U.S. 609, 615 (1965); \textit{Malloy v. Hogan}, 378 U.S. 1, 3 (1964).

\textsuperscript{181} \textit{See} cases cited note 176 \textit{supra}.


\textsuperscript{183} A conditional discovery statute would be antithetical to the analytical basis of prosecutorial discovery advanced in \textit{Jones v. Superior Court}, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In \textit{Jones}, the court firmly established the prosecution's
On the other hand, the statutory creation of independent discovery rights would alleviate the problems inherent in a conditional discovery statute. Not only is independent discovery consistent with the rationale enunciated in Jones, but its implementation would not require the defendant to forego the privilege against self-incrimination in order to exercise his discovery rights. Therefore, the course most compatible with the efficient administration of justice and the practical accommodation of the interests of both the prosecution and defense would be the creation of independent statutory discovery rights, supported by strong enforcement sanctions to insure compliance.\textsuperscript{184} The independent right of the prosecution to discover information within the possession or control of the defendant would potentially include all relevant information which is unprivileged. However, the statutory codification of prosecutorial discovery would require that the legislature give careful consideration to the due process-reciprocity requirement mandated by Wardius v. Oregon.\textsuperscript{185}

B. Wardius v. Oregon: Due Process as a Limitation on Prosecutorial Discovery

In Williams v. Florida,\textsuperscript{186} the United States Supreme Court determined that Florida's notice of alibi statute did not violate an accused's privilege against self-incrimination.\textsuperscript{187} The Court, however, noted:

We do not, of course, decide that each of these alibi-notice provisions [statutes in force in other states] is necessarily valid in all

\textsuperscript{185} 412 U.S. 470, 475-76 (1973).
\textsuperscript{186} 399 U.S. 78 (1970).
\textsuperscript{187} Id. at 85.
respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the state.  

In Wardius v. Oregon, the Court was squarely presented with the due process-reciprocity issue alluded to in Williams. The Oregon notice of alibi provision under consideration in Wardius did not provide a reciprocal right of discovery to the defendant. The Court held that the due process clause of the fourteenth amendment required that the creation of prosecutorial discovery rights by the state must be accompanied by the extension of reciprocal defense discovery rights. That is, "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street."  

At a minimum, due process requires that a viable statutory scheme extend to the defendant discovery rights comparable to those granted to the prosecution. In other words, if the state permits the prosecution the right to discover the identity of the defense witnesses to be called in support of an alibi defense, the state must also permit the defendant the right to discover the names of witnesses the prosecution intends to offer in rebuttal to the defendant's alibi witnesses. Likewise, the extension of prosecutorial discovery to the types of information falling within the purview of a general discovery statute (such as reports, tests, and documents), would require the extension of comparable discovery rights to the defendant. Thus, in drafting an independent prosecutorial discovery statute, the legislature must take care to permit the defendant the right to discover comparable information.

C. The Preclusion Sanction: The Right to Compulsory Process

It has been suggested that the incorporation of a preclusion sanc-

188. Id. at 82 n.11 (emphasis added).
190. Id. at 472, citing Ore. Rev. Stat. §135.875. The Wardius Court noted:
This court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the state when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.
Id. at 474 n.6, citing Washington v. Texas, 388 U.S. 14 (1967).
191. Id. at 475. The use of the "two-way street" language is potentially misleading since its genesis was within the context of Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), which was a prosecutorial discovery case. However, once it is noted that Wardius was concerned with a defendant's due process rights, it becomes clear that the decision was not intended to place a limitation on the right of a defendant to obtain discovery independent of any reciprocal or similar right in the prosecution. In fact, "[T]he State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." 412 U.S. at 475 n.9. Thus Wardius requires that the extension of prosecutorial discovery rights be accompanied by the extension of similar rights to the defendant. Id. at 475-76.
192. 412 U.S. at 475-76.
tion is vital to the enforcement of a statutory discovery scheme and necessary to the smooth operation of the "two-way street" concept of criminal discovery. This logically follows since the viability of a criminal discovery scheme is ultimately dependent upon a party's compliance with a lawful request for discovery and this requires that effective sanctions for noncompliance be incorporated into the discovery statute. A preclusion sanction prevents a party, who has failed to comply with a discovery request, from introducing that evidence at trial. Since preclusion operates to exclude relevant and material evidence it is the harshest and most drastic sanction that can be applied for the purpose of enforcing a discovery statute. The harshness of this enforcement measure raises the question of whether the preclusion sanction unnecessarily infringes upon a defendant's sixth amendment right to compulsory process.

In Washington v. Texas, the United States Supreme Court had occasion to determine whether the compulsory process clause of the sixth amendment was so fundamental and essential to a fair trial that its ap-

193. A preclusion sanction prevents a party, who has failed to comply with a discovery request, from introducing that evidence at trial. E.g., Fed. R. Crim. Pro. 12.1(d) and 16(d)(2).


195. The discovery statutes adopted by the various states and by the federal rules have included under the general heading of sanctions: (1) preclusion, (2) continuances, (3) citation for contempt levied against counsel, and (4) dismissal. However, only preclusion and contempt can be considered "sanctions" when applied to the defendant. This is because a continuance has always been within the court's power to grant, while a dismissal is applicable only to the prosecution.


197. The sixth amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to. . . have compulsory process for obtaining witnesses in his favor. . . ." U.S. CONST. amend. VI. The California Constitution provides in part: "The defendant in a criminal case has the right to. . . compel attendance of witnesses in the defendant's behalf. . . ." Cal. Const. art. 1, §15.

lication to the states was compelled by the due process clause of the fourteenth amendment. The Court held that:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.199

Although the decision in Washington was limited to the question of a witness's testimony200 as one facet of the right to present a defense, such a right would also encompass other types of evidence such as documents, reports, and tests.201 Therefore, a state statute which operates to prevent a defendant from exercising his right to introduce competent and relevant evidence necessarily conflicts with the defendant's right to compulsory process.

In Washington, the Court was presented with a Texas statute which prevented the defendant from introducing into evidence an accomplice's testimony while the statute permitted such testimony if introduced by the prosecution.202 The Court held that the statute violated the defendant's right to compulsory process "because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he has personally observed, and whose testimony would have been relevant and material to the defense."203

Two important principles are derived from the Washington decision that may be applied to criminal discovery. First, the Court indicated that the compulsory process clause comes into play where competent, relevant, and material evidence is being excluded—in other words, evidence which would be admissible but for the operation of the statute.204

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199. Id. at 19. Of necessity, the Court interpreted the literal wording of the sixth amendment compulsory process clause to include, not only the right to secure the attendance of witnesses, but also the right to put those witnesses on the stand. Id. The Court stated, "The Framers of the Constitution did not intend to commit the futile act of giving to the defendant the right to secure the attendance of witnesses whose testimony he had no right to use." Id. at 23.

200. See 388 U.S. at 19.


203. 388 U.S. at 23.

204. Id. at 19, 23. The Court was careful to note: Nothing in this opinion should be construed as disapproving testimonial privileges such as the privilege against self-incrimination or the lawyer-client or
Second, an arbitrary preclusion statute will be found facially invalid as a violation of a defendant’s sixth amendment right to present a defense. The Court based its finding of arbitrariness upon the following factors: (1) preclusion was the result of an a priori categorization which presumed all alleged accomplices unworthy of belief,\(^{205}\) (2) the operation of the statute resulted in the absolute exclusion of the testimony of all defense witnesses falling within the category,\(^ {206}\) and (3) the statute’s application was directed only to the defense since the prosecution was free to use the testimony without restriction.\(^ {207}\)

A criminal discovery statute which includes a mandatory preclusion sanction would appear to fall within the holding of Washington. Mandatory preclusion results in the automatic exclusion of evidence whenever a defendant fails to comply with the procedural requirements of the statute, and as such, is subject to the infirmity of arbitrariness. The fatal flaw of mandatory preclusion is its failure to take cognizance of the reasons for the defendant’s non-compliance. That is, plausible reasons may exist for a defendant’s failure to comply with a demand for discovery, such as a belief that the information is protected by some privilege, or that disclosure will lead to the intimidation of witnesses.\(^ {208}\) These reasons for non-compliance do not involve the defendant’s willingness to comply with a discovery statute or reflect upon the credibility

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\(^{205}\) The Washington Court pointed out that: [T]he Sixth Amendment was designed in part to make the testimony of a defendant’s witnesses admissible on his behalf in court, it could hardly be argued that a state would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.

\(^{206}\) 388 U.S. at 22.

of the withheld information. Therefore, the state’s legitimate interests in promoting compliance with its discovery statutes or insuring the truthfulness of evidence presented at trial are not necessarily furthered by the application of a mandatory preclusion sanction.

A mandatory preclusion sanction, however, is to be distinguished from a discretionary preclusion sanction which is not per se arbitrary. In United States v. Nobles, the Court was presented with the issue of whether preclusion of testimony was a proper sanction for the defendant’s failure to comply with a court order. Defense counsel had sought to impeach the credibility of key prosecution witnesses by the testimony of a defense investigator who had interviewed the witnesses shortly after a robbery. A report had been made of the interviews which the trial court ordered to be produced subsequent to the investigator’s testimony. Defense counsel refused to produce the report, and the court precluded the investigator from testifying. In response to the defendant’s charge that such preclusion violated his right to compulsory process, the Court stated:

The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.

It is apparent that the right to compulsory process is not an absolute right, and that it may be subjected to the legitimate demands of the trial process. Since it has been determined to be constitutionally permissible for the legislature to implement a prosecutorial discovery statute, it would be artificial to prevent its effective enforcement by not permitting the application of a preclusion sanction. Therefore, the

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209. By definition, a statute which merely permits preclusion at the discretion of the trial court is not on its face arbitrary. The exercise of the judge’s discretion, however, may be arbitrary.
211. Id. at 227-29.
212. Id. at 241.
213. This approach presupposes that a prior determination will have resolved any claims of privilege. Of course, the preclusion sanction cannot be employed to put the defendant to an election of either “waiving” his right to claim that information sought is protected by the privilege against self-incrimination or having such information excluded from introduction at trial. This would be an unconstitutional condition. See text accompanying notes 176-180 supra.
214. Since prosecutorial discovery has been determined to be judicially desirable and constitutionally permissible, it would be artificial to deprive the state of the means of effectively enforcing statutory requirements. In United States v. Nobles, 422 U.S. 225 (1975), the United States Supreme Court stated:

Deciding as we do, that it was within the court’s discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment.
Id. at 241.
important consideration is a determination of when application of a preclusion sanction is appropriate.

The setting of Nobles presented facts balanced strongly in favor of the permissibility of the preclusion sanction. The exclusion of testimony was necessary to prevent the presentation of a half-truth. In addition, the Court's order was narrow in scope, excluding privileged information and permitting the prosecution to scrutinize only that portion of the report relevant to the investigator's testimony. Finally, the Court afforded the defendant ample opportunity to produce the report before excluding the testimony. In contrast to Nobles, the factual setting presented in Webb v. Texas was heavily balanced in favor of finding an impermissible interference with the defendant's right to compulsory process. Although Webb was not directly concerned with the application of a preclusion sanction within the context of criminal discovery, it did involve the exclusion of relevant evidence and its subsequent effect upon an accused's right to compulsory process. The trial judge in that case undertook a lengthy and severe admonishment of the sole defense witness, resulting in his refusal to testify. Under these circumstances, the Court found that the defendant was effectively precluded from presenting a defense.

In the context of criminal discovery, these cases clearly indicate that before the application of the preclusion sanction is permissible, the trial court must balance the state's interest in precluding information against the resultant effect of preclusion upon a defendant's overall right to

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215. See 422 U.S. at 241.
216. 422 U.S. at 241.
217. Id. at 240.
218. Id. at 240-41.
220. The lower court's admonishment was as follows:
   "Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that stand under oath. You may tell the truth and if you do, that is all right but if you lie you can get into real trouble. The Court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking."
409 U.S. at 95-96.
221. 409 U.S. at 98. While the Court specifically based its holding on due process grounds, Washington v. Texas, 388 U.S. 14, 19 (1966), was cited as the sole authority for the decision. Thus, it appears that the infringement on the defendant's compulsory process right to present a defense resulted in a denial of his overall right to due process.
a fair trial. A court, in determining whether to exclude competent evidence should, therefore, be concerned with a consideration of the following important factors: (1) the prosecution's need for the information; (2) whether information is essential to a full and accurate presentation of a particular issue; (3) the character of the defendant's refusal (e.g., willful, negligent, innocent mistake); and (4) whether application of the preclusion sanction effectively results in preventing or substantially impairing a defendant's ability to present a defense.

The state's ability to enforce its discovery orders is vital to the success of a criminal discovery statute. As noted above, preclusion is an effective means of enforcement and has been suggested by some to be essential to the viability of "two-way street" discovery. Although a mandatory preclusion sanction would violate a defendant's right to compulsory process, a statute which leaves the application of the preclusion sanction to the sound discretion of the trial court is constitutionally permissible. A discretionary preclusion sanction may be incor-

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'[The Fourteenth Amendment does not provide "complete insulation against the slings and arrows of outrageous fortune," which may strike anyone at any time and are unfortunately, incidental to life itself," and accordingly, that the test is solely whether the state gave the defendant the fairest trial possible under the circumstances.]

223. In assessing the prosecution's need, a court should consider whether the information can be obtained from a source other than the defendant as well as whether the information is essential to the accurate presentation of the prosecution's case. See United States v. Nobles, 422 U.S. 225 (1975).

224. See 422 U.S. at 241.

225. See 422 U.S. 225. In Nobles, the Court afforded the defense adequate opportunity to disclose the investigator's testimony before the preclusion sanction was exercised. Cf. Barker v. Wingo, Warden, 407 U.S. 514, 530 (1972). In Barker, the United States Supreme Court adopted a balancing test with regard to the sixth amendment right to a speedy trial. The Court indicated that balancing would permit the conduct of both the prosecution and the defendant to be weighed in determining whether the defendant's right to a speedy trial had been violated. United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962). In Schaefer, a witness who had violated a trial court's sequestration order was prevented from testifying. While the appellate court held that it was error to exclude the testimony under these circumstances, it indicated that the application of a preclusion sanction would be proper where the witness violated the order with the "consent, connivance, procurement or knowledge of the accused." Id. at 631. Thus an important consideration to the court's decision was the affirmative conduct on the part of the defense which resulted in a violation of the court's order. But cf., People v. Tanner, 77 Cal. App. 2d 181, 175 P.2d 26 (1946). In Tanner, it was held that a witness's testimony could not be excluded solely for his violation of a sequestration order. However, this can be distinguished from Schaefer in that the violation of the court order was not the result of misconduct on the part of the defendant.

226. See Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1966). Preclusion which effectively results in preventing the accused from presenting a defense would be impermissible. Cf., Barker v. Wingo, Warden, 407 U.S. 514, 530, 532 (1972). In Barker, the Court identified "prejudice to the accused" as the most important factor to the determination of whether an accused's right to a speedy trial had been violated.

porated into a discovery scheme as a necessary and proper tool for the enforcement of the statutory requirements.

CONCLUSION

This comment has attempted to give the reader an understanding of the more important constitutional considerations inherent in the development and implementation of a statutory criminal discovery scheme. Clearly the privilege against self-incrimination remains the principle impediment to prosecutorial discovery, but it is no longer viewed as an insurmountable obstacle to a comprehensive discovery statute. Although the exchange of relevant information between the prosecution and defense cannot be conducted on a quid pro quo basis, criminal discovery in California can operate along a "two-way street" subject to the privilege against self-incrimination and other statutory privileges. It is apparent, however, that the divergent approaches to the concept of self-incrimination taken by the federal and California courts preclude the adoption in this state of the expansive prosecutorial discovery rights presently embodied in the Federal Rules of Criminal Procedure. That is, a constitutionally valid discovery statute in California must comprehend the link-in-the-chain test set forth in Prudhomme v. Superior Court.228

As discussed, the conditioning of a defendant's right to discovery upon a waiver of the privilege against self-incrimination is constitutionally impermissible. In this regard, the creation of independent statutory discovery rights is most compatible with efficient judicial administration and the legitimate needs of the prosecution and the accused. In drafting an "independent" system of criminal discovery, the legislature must use care to comport with the due process requirements of Wardius v. Oregon229 by extending to the defendant comparable discovery rights to those granted to the prosecution. Finally, the state's ability to enforce its discovery orders is essential to the validity of a "two-way street" criminal discovery scheme. A discretionary preclusion sanction is constitutionally permissible and may be incorporated into a discovery statute as a necessary and proper tool for its enforcement.

In conclusion, a California statutory scheme embodying "two-way street" criminal discovery is both constitutionally permissible and ad-

that the preclusion sanction is constitutionally invalid. The flaw in the author's reasoning is a failure to differentiate between the operation of a mandatory, as opposed to a discretionary, preclusion sanction.

228. 228. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).
ministratively feasible. In contrast to the present piecemeal judicial development, the adoption of a uniform criminal discovery statute would effectuate the free flow of discoverable information and contribute to the smooth operation of criminal discovery. An effective criminal discovery scheme is an essential tool for ascertaining the truth and facilitating the administration of justice. Such a statute would minimize the element of surprise, avoid unnecessary delays and continuances, reduce inconvenience to the court, counsel and witnesses, and permit more effective pre-trial preparation. Therefore, it is imperative that California adopt a comprehensive statutory scheme which will effectively implement "two-way street" criminal discovery.

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