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Pretrial Discovery in Minnesota

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Until recently the use of discovery procedures in criminal actions was granted to the defendant only. Those supporting this tradition argued that the fifth amendment prevents the prosecution from compelling *any* information from the defendant, and that the due process clause of the fourteenth amendment requires unilateral discovery by the defendant in order to offset the state's inherent advantage in prosecution.[1] These forceful constitutional arguments notwithstanding, the Supreme Court of Minnesota recently adopted rules of criminal procedure permitting both the prosecution and the defense to discover nonprivileged evidence intended for use by the opposition at trial.[2] This Article analyzes prosecutorial discovery in light of the self-incrimination clause of the fifth amendment and the due process clause of the fourteenth amendment, and concludes that recent interpretations of these provisions by the Supreme Court of the United States clearly support the constitutionality of the new rules.

I. PROSECUTORIAL DISCOVERY AND SELF-INCRIMINATION

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[3] The privilege against self-incrimination originally only protected the defendant from being compelled to make statements against his own case on the witness stand,[4] but in recent years the Supreme Court has broadened the privilege,[5] although its exact scope remains in dispute. In its most recent decisions, the Court has limited the privilege to personal communications

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1. *See* Katz, *Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform*, 5 CRIM. L. BULL. 445 (1969).

2. In re Proposed Rules of Criminal Procedure, Order of the Supreme Court of Minnesota, 299 Minn. (unnumbered page) (1974).

3. U.S. CONST. amend. VI. This clause has been incorporated into the fourteenth amendment and applied to the states. Spevack v. Klein, 385 U.S. 511, 513-15 (1967); Malloy v. Hogan, 378 U.S. 1, 8 (1964).

4. *See* 8 J. WIGMORE, EVIDENCE § 2263, at 378 (J. McNaughton rev. ed. 1961); Katz, *supra* note 1.

5. *See, e.g.*, Marchetti v. United States, 390 U.S. 39 (1968); Miranda v. Arizona, 384 U.S. 436 (1966).

by the defendant that, standing alone, implicate him in criminal conduct.[6]

Before promulgating the new rules of criminal procedure, the Minnesota supreme court had adopted a more expansive interpretation of the privilege than the Supreme Court's, including as privileged information "any circumstance or link in the chain of evidence which may tend to convict."[7] By permitting the prosecution to discover the defendant's case, the new rules appear to bring Minnesota more in line with the restrictive position taken by the United States Supreme Court. Although proponents of a broad interpretation of the privilege claim that any procedure requiring a defendant to provide such information is unconstitutional,[8] a more flexible approach, and that taken in this Article, is that the fifth amendment is not violated by limited forms of prosecutorial discovery.

In *Williams v. Florida*[9] the Supreme Court upheld a Florida statute requiring a defendant who intends to rely on an alibi to disclose the names of his alibi witnesses. The Court stated that "[h]owever 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments," because only the timing of an otherwise voluntary disclosure is compelled.[10] In *California v. Byers*[11] the Court validated a statute requiring a driver involved in an accident to notify the owner of damaged property of his name and address, holding that such evidence, though compelled, must itself implicate the defendant if its compulsion is to be found to violate the fifth amendment.[12] And in *Schmerber v. California*,[13] a case in which the defendant had been convicted of drunken driving, the Court held that blood tests, even though compelled, were not protected by the fifth amendment because they were not testimonial.[14]

6. California v. Byers, 402 U.S. 424 (1971); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Schmerber v. California, 384 U.S. 747 (1966).

7. State v. Gardiner, 88 Minn. 130, 139, 92 N.W. 529, 533 (1902); *accord*, State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966); State v. Mason, 152 Minn. 306, 189 N.W. 452 (1922).

8. *See, e.g.*, Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1001-11 (1972) [hereinafter cited as *Prosecutorial Discovery*]; Comment, *Amendments to the Federal Rules of Criminal Procedure—Expansion of Discovery*, 66 J. CRIM. L. & CRIMINOLOGY 23 (1975).

9. 399 U.S. 78 (1970).

10. *Id.* at 84.

11. 402 U.S. 424 (1971).

12. *Id.* at 434.

13. 384 U.S. 757 (1966).

14. *Id.* at 765.

Thus, the Court appears to be saying that the fifth amendment privilege is violated only if (1) the government *compels* disclosure of evidence that the defendant does not plan to reveal at trial, (2) the evidence itself is *incriminating*, and (3) the evidence is *testimonial*. Avoidance of any one of these defects will seemingly preserve the validity of a particular discovery procedure. In the sections that follow I will elaborate on these tests and apply them to those provisions of the new Minnesota Rules of Criminal Procedure relating to prosecutorial discovery.

A. MINN. R. CRIM. P. 9.02(1) (1) (2)—DISCOVERY OF DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS

Upon request of the prosecution, without a court order, the defendant must disclose and permit inspection and reproduction of (1) any books, papers, documents, photographs, or tangible objects that the defendant intends to introduce at trial,[15] (2) any buildings or places concerning which the defendant intends to offer evidence at trial,[16] and (3) any results or reports of physical or mental examinations, scientific tests, experiments, or comparisons that the defendant intends to introduce in evidence or that have been prepared by a witness whom the defendant intends to call at trial.[17] This rule does not *compel* the defendant to provide information because, like the notice-of-alibi statute involved in *Williams v. Florida*, it limits discovery to evidence that he intends to introduce at the trial.[18] The decision whether

15. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce books, papers, documents, photographs, and tangible objects which the defendant intends to introduce in evidence at the trial or concerning which the defendant intends to offer evidence at the trial, and shall also permit the prosecuting attorney to inspect and photograph buildings or places concerning which the defendant intends to offer evidence at the trial.

MINN. R. CRIM. P. 9.02(1) (1).

16. *Id.*

17. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments and comparisons made in connection with the particular case within the possession or control of the defendant which he intends to introduce in evidence 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.

MINN. R. CRIM. P. 9.02(1) (2).

18. Restricting discoverable evidence to that which the defendant intends to use at trial coincides with the limitation contained in the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 16(b) (1). This limitation also appears in the ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 3.2 (Approved Draft, 1970) [hereinafter cited as ABA STANDARDS], and the NATIONAL ADVISORY COMM'N ON

to introduce the evidence remains the defendant's.[19]

In *Jones v. Superior Court*,[20] a California trial court had required the defendant to give the prosecution the names of all physicians subpoenaed by the defendant, all physicians who had examined or treated certain of his injuries, and the relevant medical reports and X-rays. Sustaining this action, the California supreme court emphasized that the discovery order was limited to matters the defendant *intended to introduce at trial.* Rather than compelling the defendant to reveal or produce anything, the court reasoned, the disclosure order merely regulated the procedure by which the defendant presented his case.[21] The only effect on the defendant was that he had to decide earlier whether to remain silent or to reveal the information sought, and thereby lost the element of surprise at trial. Control over the timing of this decision was of little strategic value to the defendant, because when such surprises occur, the prosecution is usually granted a continuance.[22] In *Williams v. Florida*[23] the United

CRIMINAL STANDARDS AND GOALS § 4.9 (1973) [hereinafter cited as ADVISORY COMM'N STANDARDS]. Each of the advisory committees agreed that this limitation avoided both the involuntary and the incriminatory aspects of the privilege against self-incrimination. *See* Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 315 (1974); ABA STANDARDS, *supra*, § 3.2, Commentary; ADVISORY COMM'N STANDARDS, *supra*, § 4.9, Commentary. The supreme court's advisory committee on the Minnesota Rules of Criminal Procedure concluded that the restriction on mandatory disclosure by the defendant was necessary to avoid the possibility of infringing the right against self-incrimination. MINN. R. CRIM. P. 9, Comment.

19. Williams v. Florida, 399 U.S. 78, 84 (1970).

20. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

21. *Id.* at 60-62, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-82.

22. Justice Traynor, who authored the *Jones* decision, has observed:

> [S]uch a continuance would not impair the privilege against self-incrimination or the due process requirements of a fair trial. Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours. Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense. Surely he can be required to make that decision before trial if he is given discovery of the prosecution's case before trial.

Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 248-49 (1964).

23. 399 U.S. 78 (1970).

States Supreme Court adopted the *Jones* position, concluding that

> [n]othing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, 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.[24]

Because rule 9.02(1) limits discovery to evidence that a defendant intends to introduce on his own behalf, it does not require him to *incriminate* himself in the constitutional sense.[25] Although discoverable tangible evidence might lead the prosecution to incriminating rebuttal evidence, this risk is no greater than that faced by a defendant when he testifies himself and calls witnesses whose cross-examination may prove incriminating.[26] Again, rule 9.02(1) affects only the timing of the defendant's decision to offer certain evidence; the only real loss is the element of surprise, which is not protected by the fifth amendment.[27]

Finally, discovery under rule 9.02(1) is limited to documentary evidence that is not *testimonial*, for rule 9.02(3) protects any such evidence from disclosure if it contains "the opinions, theory, or conclusions of the defendant."[28] In *Schmerber*, the Supreme Court carefully distinguished testimonial, communicative evidence from physical evidence, such as fingerprints, photographs, measurements, handwriting, and gestures.[29] In *Couch v. United States*[30] the Court reiterated the familiar notion that the privilege against compulsory self-incrimination is an "intimate and personal one,"[31] which adheres to communications by the person and not to incriminating information possessed by others.[32] And, most recently, in *United States v. Nobles*[33] the

24. *Id.* at 85.
25. *See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); *cf. Prosecutorial Discovery, supra* note 8, at 1004.
26. *See* Williams v. Florida, 399 U.S. 78, 83-86 (1970); *cf. Prosecutorial Discovery, supra* note 8, at 1004.
27. Williams v. Florida, 399 U.S. 78, 85 (1970).
28. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain the opinions, theories, or conclusions of the defendant or his counsel or persons participating in the defense are not subject to disclosure.
MINN. R. CRIM. P. 9.02(3).
29. 384 U.S. 757, 764 (1966).
30. 409 U.S. 322 (1973).
31. *Id.* at 327.
32. *Id.* at 328-29.
33. 422 U.S. 225 (1975).

Court further refined the scope of the testimonial privilege in emphasizing that by merely obtaining statements on his own behalf the defendant cannot convert information possessed by others into his personal communications.[34] These cases provide ample authority for the discovery of statements by defense witnesses and reports prepared by third persons in anticipation of testifying. Only the defendant's personal communications are constitutionally protected, and Minnesota has ensured the necessary protection in rule 9.02(3).

B. MINN. R. CRIM. P. 9.02(1) (3) (a) (3)—NOTICE OF DEFENSES AND DEFENSE WITNESSES

Upon request of the prosecution, without a court order, the defendant must disclose in writing any defense, other than not guilty, that he intends to assert at trial.[35] Defenses included are alibi,[36] self-defense, entrapment, mental illness or deficiency,[37] duress, double jeopardy, statute of limitations, collateral estoppel, intoxication,[38] and the multiple offense rule.[39]

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34. *Id.* at 233-34.

35. The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial, including but not limited to the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitations, collateral estoppel, defense under Minn. Stat. § 609.035, or intoxication. The defendant shall supply the prosecuting attorney with the names and addresses of persons whom the defendant intends to call as witnesses at the trial.

If the defendant gives notice that he intends to rely on the defense of mental illness or mental deficiency he shall also notify the prosecuting attorney whether he also intends to rely on the defense of not guilty.

MINN. R. CRIM. P. 9.02(1) (3) (a).

36. If he intends to rely on an alibi defense, the defendant must disclose the specific place where he claims he was when the crime was committed:

If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends he was when the alleged offense occurred and shall inform the prosecuting attorney of the names and addresses of the witnesses he intends to call at the trial in support of the alibi.

MINN. R. CRIM. P. 9.02(1) (3) (c).

37. If the defendant intends to assert the defense of mental illness or deficiency, he must disclose to the prosecution whether he also plans to rely on the defense of not guilty. *Id.* 9.02(1) (3) (a).

38. *Id., quoted in* note 35 *supra.*

39. Except as provided in section 609.585, if a person's conduct constitutes more than one offense under the laws of this state he may be punished for only one of such offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All such offenses may be included in one

The defendant must also disclose the names and addresses of persons he intends to call as witnesses at trial,[40] although he is not required to indicate those he intends to use for each specific defense except in the case of an alibi.[41]

Application of the fifth amendment tests to prosecutorial discovery of defenses and defense witnesses reveals that while these matters may be "testimonial" they are neither "compelled" nor "incriminatory." Rule 9.02 limits the disclosure of defenses and witnesses to those the defendant intends to present at trial. Such a procedure was sanctioned in *Williams*,[42] where the Supreme Court held that prosecutorial discovery of a defendant's alibi defense—the place where he claims to have been and the names and addresses of the alibi witnesses—was not "compelled" under the fifth amendment.[43]

Because a defendant is required to disclose only the defenses and witnesses he intends to introduce *on his own behalf*, rule 9.02 also excludes self-incriminating evidence.[44] Again, while it is true that discovery of a defendant's defenses and witnesses might better prepare the prosecution for rebuttal at trial, under past practice a continuance followed by an investigation accomplished the same thing.[45] Nothing in rule 9.02 increases the danger to a defendant that his own defenses or witnesses might incriminate him.

The production of a list of defenses and witnesses, however, usually results from communications between a defendant and either his attorney or the prosecutor. Thus, unlike blood tests, for example, this evidence originates in the perception and cog-

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prosecution which shall be stated in separate counts.
MINN. STAT. § 609.035 (1974).

40. MINN. R. CRIM. P. 9.02(1)(3)(a).

41. *Id.*, Comment. Disclosure of defenses and witnesses as provided by rule 9.02(1)(3) is recommended in the approved ABA Standards regarding prosecutorial discovery, ABA STANDARDS, *supra* note 18, § 3.3, and is consistent with the recent amendments to the Federal Rules of Criminal Procedure. Proposed Fed. R. Crim. P. 12.1, 12.2, 16(b)(1)(C), 62 F.R.D. 271, 292-93, 295, 306 (1974). *See also* NATIONAL ADVISORY COMM'N, *supra* note 18, § 4.9. Presumably the Supreme Court would not have adopted rules permitting discovery of certain defenses and defense witnesses if it felt there was a fifth amendment problem.

42. 399 U.S. 78 (1970).

43. *Accord*, Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

44. *See* text accompanying notes 25-27 *supra*.

45. For a discussion of use of the continuance to avoid surprise, see *Prosecutorial Discovery*, *supra* note 8, at 1010.

nitive processes of the defendant. Therefore, it may for constitutional purposes be viewed as testimonial.[46] On the other hand, the Court noted in *Williams* that "[i]t might also be argued . . . that the 'testimonial' disclosures protected by the Fifth Amendment include only statements relating to the historical facts of the crime, not statements relating solely to what a defendant proposes to do at trial."[47] In any case, since discovery of these matters is neither compelled nor incriminating, the rule does not run afoul of the fifth amendment.[48]

C. MINN. R. CRIM. P. 9.02(1)(3)(d)—DISCOVERY OF CRIMINAL RECORD

The defense attorney must disclose his client's prior convictions to the prosecution, provided the prosecutor reciprocates and

46. *Id.* at 1003. Rule 9.02(1)(3)(b) provides that on request of the prosecution, and without leave of the court, the defendant must permit the prosecutor to inspect and reproduce any relevant written or recorded statements of witnesses he intends to call at trial, as well as written summaries of any oral statements made to defendant's attorney or obtained by defendant at the direction of his attorney. It seems clear that this provision does not violate the self-incrimination clause. The discovery of statements of witnesses is not compelled because it is limited to those of witnesses who will be called by the defendant. *See* note 15 *supra*. Such statements would ordinarily be producible in any event when the defendant has the witness testify. Because the statements are those of the defendant's own witnesses, most are likely to be exculpatory, and therefore not incriminating; those statements containing information that might aid the prosecution still do not violate the fifth amendment because they are made by third parties and are not, therefore, testimonial.

47. 399 U.S. at 86 n.17.

48. Arguably, discovery of the defendant's defense and witnesses violates his right to effective counsel guaranteed by the sixth amendment. Under this theory, such evidence would be regarded as an attorney's work product; requiring defense counsel to divulge any portion of it before trial might inhibit preparation of the defendant's case by making the defendant less forthright in the presentation of his case to his attorney. Although this argument is not wholly unappealing, it is difficult to imagine how discovery of defenses and witnesses would inhibit attorney-client candor. The defendant's statements to his attorney are not discoverable under the rules. MINN. R. CRIM. P. 9.02(1)(3)(b), (3). *See also id.* 9.03(5) (protective order provisions). Moreover, the attorney, not the defendant, decides who the witnesses will be and what defenses should be raised. Since nothing the defendant relates to his attorney is directly discoverable or necessarily inferable from the attorney's choice of defenses and witnesses, the sixth amendment argument loses much of its force.

The Supreme Court did not address the sixth amendment issue in *Williams*, but in denying the fifth amendment claim, it rejected the argument that surprise merits constitutional protection. 399 U.S. at 85-86. Since preparation of a defense is not inhibited by discovery of defenses and witnesses, defense counsel appears to lose only the element of surprise.

reveals prior convictions of the defendant known to him.[49] This discovery does not constitute compulsory self-incrimination. In Minnesota, a defendant's criminal record can be used only for impeaching his credibility; no reference may be made to it until the defendant subjects himself to cross-examination by voluntarily taking the witness stand on his own behalf.[50] So long as the defendant's record may be revealed only under these circumstances, the choice remains with him, and the issue again becomes one of timing and strategy, rather than compulsion.[51]

Evidence of a defendant's criminal record may nevertheless tend to incriminate him. While such evidence is admissible only to impeach the defendant's testimony on his own behalf and not as direct evidence of a crime, most courts and commentators agree that prior criminal convictions may nevertheless prejudice his case; a jury is often unable or unwilling to treat such "character" evidence as affecting only the defendant's credibility.[52] This tendency on the part of juries, however, provides no justification for treating the rule providing for discovery of a defendant's criminal record differently than the courts have in the past—that is, as an evidentiary matter falling within the court's discretion.[53]

Disclosure of prior convictions does not appear to involve eliciting testimonial communications from the defendant, since the prior conviction is contained in a public record, though perhaps unknown to the prosecution. The disclosure is similar to requiring a defendant to provide a fingerprint[54] or a voice sample,[55] both of which may constitutionally be demanded, as

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49. Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys.
MINN. R. CRIM. P. 9.02(1)(3)(d).

A similar provision was contained in the proposed amendments to the federal rules, Rules of Criminal Procedure for the United States District Courts, 16(a)(1)(iii), 48 F.R.D. 553, 547 (1970), but was not finally adopted; nor is such a provision included in the ABA Standards.

50. *See, e.g.*, State v. Johnson, 291 Minn. 407, 192 N.W.2d 87 (1971); State v. West, 285 Minn. 188, 173 N.W.2d 468 (1970).

51. Constitutional considerations aside, this provision will certainly limit potentially prejudicial disputes in the presence of the jury as to what a defendant's criminal record may actually be. *See* State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973).

52. *Id.*

53. *Cf.* MINN. R. CIV. P. 43.02.

54. Davis v. Mississippi, 394 U.S. 721 (1969).

55. United States v. Wade, 388 U.S. 218 (1967).

assumed by rule 9.02(2)(1).[56]

II. PROSECUTORIAL DISCOVERY AND DUE PROCESS

Critics frequently argue that coupling prosecutorial discovery with the state's overwhelming investigatory powers and superior financial resources deprives a defendant of his liberty without due process of law by upsetting "the balance of forces between the accused and his accuser."[57] The Supreme Court has concluded, however, that limited prosecutorial discovery does not offend due process as long as the defendant has the same or similar right to discovery.[58]

In *Williams v. Florida*[59] the Court held that the notice-of-alibi requirement did not violate due process because the state had a legitimate interest in protecting itself from eleventh hour defenses and because the rule imposed reciprocal duties of disclosure on the prosecution and made other discovery devices

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56. Upon a motion by the prosecution and a showing that the discovery procedure sought "will be of material aid in determining whether the defendant committed the offense charged" the court may order a defendant to:

(a) Appear in a lineup;

(b) Speak for identification by witnesses to an offense, or for the purpose of taking voice prints;

(c) Be fingerprinted or permit palm prints or footprints to be taken;

(d) Permit measurements of the body to be taken;

(e) Pose for photographs not involving a re-enactment of a scene;

(f) Permit the taking of samples of his blood, hair, saliva, urine, and other materials of his body which involve no unreasonable intrusion thereof; provided, however, that the court shall not permit a blood test to be taken except upon a showing of probable cause to believe that the test will aid in establishing the guilt of the defendant;

(g) Provide specimens of his handwriting; and

(h) Submit to reasonable physical or medical inspection of his body.

MINN. R. CRIM. P. 9.02(2)(1). Inasmuch as the evidence obtained by the prosecutor under rule 9.02(2) is not limited to material she intends to introduce at trial and is extracted from the defendant only by virtue of a court order, it is clearly compelled, and may prove to be incriminating. Such physical evidence, however, is not testimonial. The privilege against self-incrimination protects the defendant's written or oral expressions of thought or state of mind, but it does not protect information obtained from his body. *See* text accompanying notes 29-34 *supra*.

57. Wardius v. Oregon, 412 U.S. 470, 474 (1973); *see* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); *Prosecutorial Discovery*, *supra* note 8, at 1017.

58. Wardius v. Oregon, 412 U.S. 470, 475 (1973); Williams v. Florida, 399 U.S. 78, 81 (1970).

59. 399 U.S. 78 (1970).

available to the defendant.[60] The Court noted approvingly that "the search for truth [was enhanced] by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."[61] In *Wardius v. Oregon*[62] the Court again emphasized reciprocity in reversing a conviction because a notice-of-alibi statute failed to require the prosecution to reveal the names and addresses of witnesses it planned to use to refute the alibi defense disclosed by the accused.[63]

The discovery provisions of the Minnesota Rules of Criminal Procedure afford the defendant the same or similar discovery rights and restrictions as the prosecution.[64] While discovery is available to both parties, neither side is deprived of discovery because of the other's reluctance to proceed; the right of discovery does not depend on the strategy of the opposing side.[65]

A defendant may also utilize certain procedures other than those provided in rule 9 to discover the prosecution's case. She may move to obtain a verbatim transcript of the testimony of all witnesses appearing before the grand jury that issued the indictment charging her.[66] Perhaps the best additional source of

60. FLA. R. CRIM. P. 3.220 provides that the defendant may discover the names and addresses of all persons known to the prosecutor who may have information relevant to the offense charged, and statements made by such persons; statements by the accused known to the prosecutor; statements of co-defendants known to the prosecutor; recorded grand jury minutes containing testimony of the accused; tangible papers or objects belonging to the accused; whether the state has information provided by confidential informants or obtained through electronic surveillance, or documents seized in relation thereto; expert reports; any tangible papers or objects not obtained from the accused; and any other material information that tends to negate the guilt of the accused.

61. 339 U.S. at 82.

62. 412 U.S. 470 (1973).

63. *Id.* at 475.

64. Rule 9.01 provides that the prosecution must disclose the names and addresses of witnesses it intends to call at trial together with their prior record of convictions; statements obtained from the defendant and his accomplices; documents and tangible objects that were obtained from the defendant or that the prosecutor intends to introduce at trial; reports of examinations and tests; prior convictions of the defendant known to the prosecutor; and any exculpatory information in the prosecutor's possession.

65. The sole exception to this principle of independence is that the defendant need not disclose his prior criminal record unless the prosecutor reciprocates. MINN. R. CRIM. P. 9.02(1)(3)(d), *quoted in* note 49 *supra*. *Compare* ABA STANDARDS, *supra* note 18, §§ 3.1, 30.2, 3.3 *with* FED. R. CRIM. P. 16(c) (prosecutorial discovery dependent on defendant first obtaining discovery). The ABA Standards, like FED. R. CRIM. P. 16, impose no such restriction.

66. MINN. R. CRIM. P. 18.05.

discovery for the defendant is the omnibus hearing provided for by rule 11.[67] At this hearing, the prosecution must offer evidence sufficient to establish probable cause[68] to believe that the defendant committed the crime charged and must defend the constitutionality of the means by which the evidence against the defendant was obtained.[69] The prosecution must also notify the defendant of any additional offenses it intends to urge at the trial.[70]

Since the Minnesota Rules of Criminal Procedure make substantial discovery procedures available to defendants, consistent with the Supreme Court's holdings in *Williams* and *Wardius*, the limited prosecutorial discovery procedures do not violate due process of law under the fourteenth amendment.

III. CONCLUSION

It appears reasonably clear that rule 9 does not violate either the fifth or the fourteenth amendments. Moreover, emphasis on its constitutionality tends to divert attention from the significant practical advantages of criminal discovery that serve the interests of both the defendant and the prosecution. Discovery avoids surprise, discourages false defenses, and aids in the detection of perjury by witnesses. More importantly, discovery saves time and expense in criminal proceedings. Reciprocal discovery, if used to its fullest extent, will encourage negotiated

67. *Id.* 11.02, .04.

68. Recent interpretations of the omnibus hearing provisions, however, leave the probable cause requirement in doubt. *See, e.g.*, State v. Florence, 239 N.W.2d 892 (Minn. 1976). For a discussion of the Minnesota supreme court's recent treatment of the probable cause hearing, see Comment, *The Probable Cause Hearing in Minnesota*, 60 MINN. L. REV. 773 (1976).

69. Evidence subject to constitutional challenge includes:

> (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping; (2) any confessions, admissions or statements in the nature of confessions made by the defendant; (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant; or (4) any identification procedures that were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons.

MINN. R. CRIM. P. 7.01.

70. *Id.* 7.02. Notwithstanding the balance of discovery procedures, it of course remains true that the prosecution carries the burden of proof beyond a reasonable doubt, the defendant may remain silent throughout his trial, and the jury must convict unanimously. MINN. R. CRIM. P. 26.01(1)(5). These advantages still weigh heavily in favor of the defendant.

pleas or dismissals and avoid lengthy trials much in the same way discovery in civil actions avoids the expense of unnecessary litigation. Nevertheless, some defense counsel are currently declining to comply with rule 9, arguing that they do not want to be confined to defend only with evidence they have disclosed to the prosecution. These attorneys claim that they cannot anticipate what rebuttal evidence will be necessary until they've heard the prosecution's entire case. Although occasionally prosecution evidence presented during trial may prompt the defense to add or delete witnesses and exhibits, this argument is unsupportable when asserted by the defendant to avoid disclosing a defense of alibi, mental illness, self-defense, or any other affirmative defense, or to avoid disclosing the identity of his probable witnesses. To ensure that the advantages of discovery accrue from the rules, trial courts should require defense counsel to abide by both the spirit and the letter of rule 9. The rule permits a defendant to add or eliminate witnesses when genuinely surprised during trial; but if the defendant has fully availed himself of pretrial discovery, he will have sufficient information both to construct his defense and to make full and suitable disclosure to the prosecution.