Application of the Pretrial Discovery Rules in Minnesota--Some Constitutional Considerations

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Note: Application of the Pretrial Discovery Rules in Minnesota—Some Constitutional Considerations

None of the new Minnesota Rules of Criminal Procedure generates more disagreement between prosecutors and defense counsel than the provision for prosecutorial discovery. It had long been assumed that to compel an accused to disclose any information tending to establish his guilt would violate his constitutional privilege against self-incrimination.¹ Recent pronouncements by the United States Supreme Court have substantially undermined that assumption, however, and have formed the foundation for prosecutorial discovery in Minnesota. Whether the Court's holdings are broad enough to support the Minnesota rule is the subject of this Note.

The Minnesota rule implements a broader scope of prosecutorial discovery than does any other such rule currently in effect and may serve as an experimental model for other states. Its constitutionality is thus a novel and important question. This Note demonstrates that, although prosecutorial discovery may generally be, as the Supreme Court has said, a "salutary development which . . . enhances the fairness of the adversary system,"² certain foreseeable applications of the new rule will violate the defendant's fifth amendment privilege. Moreover, application of one aspect of the rule will violate due process because it imposes no reciprocal obligation on the prosecution. The due


process problem can be obviated by simply amending the rule to require equivalent disclosure by the prosecution. The fifth amendment problem is more difficult to solve. It arises because the rule permits the prosecution to use the information compelled from the defendant to prove its case-in-chief and to rebut the defense regardless of whether the defense employs the disclosed information at trial. On a case-by-case basis, the problem lies in the difficulty of ascertaining whether the prosecution has used the information impermissibly. The Note concludes, therefore, by urging the courts to protect the fifth amendment privilege by exercising vigilance in discerning improper prosecutorial uses of the compelled information or, failing that, by holding the rule unconstitutional.

The discussion is divided into three parts. The first briefly sets forth the provisions of the rule and the extent to which it departs from the Federal Rules of Criminal Procedure. The second evaluates its constitutionality. The third deals with possible solutions to the constitutional problems.

I. PROSECUTORIAL DISCOVERY IN MINNESOTA

The new Minnesota rule implementing prosecutorial discovery requires unprecedented pretrial disclosure by the defendant. First, he must disclose the names and addresses of persons

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3. This Note does not undertake a thorough exposition of the provisions of the new rule. A broad overview is sufficient to give the reader an appreciation of the constitutional issues raised. For an analysis of the relation of significant judicial decisions to the new rule, see MINN. R. CRIM. P. 9, Comment.

4. The prosecution still has access to the only means of discovery that was available to it before the rule was adopted: records of police interrogation of the defendant and prospective witnesses. See Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149, 1191 (1960) [hereinafter cited as Goldstein]. Additional information may be available to the prosecution by virtue of the state's ability to require the defendant to appear in a lineup, United States v. Wade, 388 U.S. 218 (1967), speak, State v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971), or give part of his hair, blood, or urine for testing. Schmerber v. California, 384 U.S. 757 (1966). The state also enjoys tremendous investigatorial capabilities and scientific facilities. See generally Goldstein, supra, at 1182-83; Note, Criminal Law—Discovery in Criminal Cases, 18 VAND. L. REV. 1640, 1642-43 (1965). Moreover, the prosecution may employ the grand jury as a discovery device; it can use a grand jury to obtain testimony from every person connected with a crime. And a defendant cannot claim that a prosecutor has obtained enough evidence for an indictment and is using the grand jury process for further discovery. See United States v. Sweig, 441 F.2d 114 (2d Cir. 1971). Even after an indictment is returned, a grand jury may continue to sit and gather evidence relevant to the crime charged, if its investi-
whom he intends to call at trial. Similar provisions appear in the American Bar Association's proposed standards for pretrial discovery and in the Supreme Court's Proposed Federal Rules of Criminal Procedure. The congressional conference committee charged with finalizing the federal rules rejected this provision, however, as well as one that would have required the government to disclose the names of its witnesses before trial, on the ground that such disclosures might lead to “[d]iscouragement of witnesses and improper contacts directed at influencing their testimony.” Apparently the committee determined that

gations are directed to another crime. United States v. Doe [Elsberg], 455 F.2d 1270 (1st Cir. 1972).

Minnesota's alibi statute, Minn. Laws 1935, ch. 194, § 3 (codified at Minn. Stat. § 630.14 (1974)), which had required the defendant to disclose upon request “the county or municipality in which the defendant claims to have been at the time of the commission of the alleged offense,” was supplanted by the new rule. Minn. R. Crim. P. 9.02(1) (3) (c).

5. Minn. R. Crim. P. 9.02(1) (3) (a). The defendant must also disclose any defense on which he intends to rely at trial. See note 10 infra and accompanying text. However, the defendant “is not required to indicate the witness he intends to use for each defense except in the case of the defense of alibi.” Minn. R. Crim. P. 9, Comment.

6. ABA Standards Relating to Discovery and Procedure Before Trial § 3.3 (Approved Draft, 1970) [hereinafter cited as ABA Standards].


8. H.R. Rep. No. 414, 94th Cong., 1st Sess. (1975) (Conference Report). The committee concluded that to require the prosecution to divulge the names of its witnesses before trial might jeopardize their safety. Testimony before the House Subcommittee revealed that in 32 federal districts surveyed there were 713 “specific instances of assassinations, assaults, beatings, threats, attempts to bribe witnesses and to suborn perjury.” Hearings on Amendments to Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 6, at 105 (1975). The immediate dangers of these practices are, obviously, unavailability of the witness or alteration of his testimony. The long-term danger is discouraging potential witnesses from cooperating with the police and prosecution.

Likewise, it was thought that disclosure of defense witnesses might result in their intimidation by the police. Id. at 162. For instance, the police might ask defendant's alibi witness, “We have arrested X for burglary and he says you were with him that night—is that true?” Fearful of being arrested as an accomplice, the alibi witness might lie and deny being with the defendant. If he later changed his mind at trial and testified that he was with the defendant, his prior inconsistent statement would be available to impeach him.

The proposal was also criticized on the ground that, though formally reciprocal, it in fact favored the prosecution because few defense witnesses would refuse to talk to the police for fear of being implicated. However, most government witnesses would be aware of and often exercise their right to refuse to discuss a case with a defense investigator. See id. at 33.
countervailing considerations, namely, concern for the well-being and proper treatment of witnesses, outweighed whatever benefits might inhere in pretrial discovery of their names and addresses. Accordingly, Congress chose not to provide for such discovery in the federal rules.

Second, the new rule requires the defendant to disclose written statements or written summaries of oral statements of the persons whom he intends to call as witnesses at trial. This provision has no counterpart in the ABA Standards or in either the actual or proposed Federal Rules of Criminal Procedure. That the federal rules protect witnesses' pretrial statements is not surprising, inasmuch as Congress refused even to permit discovery of witnesses' names.

Third, the defendant must disclose any defense other than not guilty that he intends to assert at trial. This provision was adopted, with reservations, in the ABA Standards. It has no counterpart in the proposed federal rules, however, and accordingly was not adopted by Congress in the Federal Rules of Criminal Procedure.

Fourth, the rule requires the defendant to permit the prosecution to inspect and reproduce documents, tangible objects, and reports of examinations and tests made in connection with the case that he intends to introduce at trial. Similar provisions were included in the ABA Standards and the Proposed Federal Rules of Criminal Procedure. The rule finally adopted by Congress, however, differs in one important respect from the Minnesota rule. The latter grants the prosecution an inde-

9. MINN. R. CRIM. P. 9.02(1) (3) (b).
10. Id. 9.02(1) (3) (a).
11. ABA STANDARDS, supra note 6, § 3.3. One "concern" of the ABA Advisory Committee was in distinguishing between the specific defenses that the standard would require the defendant to disclose, and a general denial, which would not be subject to discovery. The Committee found the distinction "difficult to articulate." Id. at 5.
12. MINN. R. CRIM. P. 9.02(1) (1).
13. Id. 9.02(1) (2).
14. The Advisory Committee would have allowed the prosecution to inspect and reproduce "any reports or . . . statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons." ABA STANDARDS, supra note 6, § 3.2.
15. The proposed federal rule would have permitted the prosecution to discover documents and tangible objects and reports of examinations and tests that the defendant "intends to introduce as evidence in chief at the trial." Proposed Fed. R. Crim. P. 16(b) (1) (A), (B), 62 F.R.D. 271, 306 (1974).
pendent right to discover this information, while the federal rule allows prosecutorial discovery only if the defendant requests similar discovery from the prosecution.\textsuperscript{16} Thus, under the federal rule, the defense may prevent the prosecution from discovering substantive features of the defendant's case by declining to participate in similar discovery.

In sum, then, the Minnesota rule permits prosecutorial discovery broader in several respects than that provided for in either the Supreme Court's Proposed Rules of Criminal Procedure or the final version of those rules enacted by Congress. Whether as a result Minnesota has exceeded the limits of the self-incrimination and due process clauses is the question addressed in the following sections.

II. CONSTITUTIONAL LIMITATIONS

The new Minnesota rule providing for prosecutorial discovery is based on the premise that "the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases."\textsuperscript{17} Accordingly, the discovery provisions were enacted "to give the defendant and prosecution as complete discovery as is possible under constitutional limitations."\textsuperscript{18}

A. THE FIFTH AMENDMENT AND PROSECUTORIAL DISCOVERY

The principal constitutional objection to prosecutorial discovery is that it violates the defendant's fifth amendment privilege against self-incrimination.\textsuperscript{19} The issue under the present rule is whether the defendant, by being required to disclose his defenses and to produce a list of witnesses, documents, and items of physical evidence, is "compelled . . . to be a witness against himself."\textsuperscript{20} Unfortunately, the fifth amendment is not

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  \item \textsuperscript{16} FED. R. CRIM. P. 16(b) (1) (A), (B). The Senate version of the rule would have given the Government an independent right to discovery similar to that granted by the new Minnesota rule. The House version made the Government's right dependent on the defendant's exercise of its right. The conference committee accepted the House version without comment. S. REP. No. 336, 94th Cong., 1st Sess. (1973) (Conference Report).
  \item \textsuperscript{17} Wardius v. Oregon, 412 U.S. 470, 473 (1972).
  \item \textsuperscript{18} MINN. R. CRIM. P. 9, Comments.
  \item \textsuperscript{19} See Lancashire v. Wayne Circuit Judge, 218 Mich. 16, 187 N.W. 319 (1922).
  \item \textsuperscript{20} U.S. CONST. amend. V.
\end{itemize}
gifted with "the guidance of a clear spoken text or meaningful history,"21 and thus, "the law and the lawyers . . . have never made up their minds just what [the privilege] is supposed to do or just whom it is intended to protect."22 It is nonetheless generally clear, as Justice Frankfurter suggested, that the fundamental "concern of the privilege is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to criminal acts."23

During the 1960's the Supreme Court appeared in several cases to be taking an expansive view of the fifth amendment. For example, in Griffith v. California24 the Court concluded that where a defendant declines to take the stand during trial the prosecution cannot comment on his silence. Otherwise, the Court reasoned, the defendant would effectively be compelled to take the stand rather than exercise his fifth amendment privilege. And in Miranda v. Arizona25 the Court made clear that the privilege against self-incrimination "is fully applicable . . . [from the point at which the government begins] custodial interrogation."


The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' . . . It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; our respect for the inviolability of the human personality and the right of each individual "to a private enclave where he may lead a private life" . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

On the other hand, Chief Justice Burger has stated that he is "no longer sure that the Fifth Amendment concept, in its present form and as presently applied and interpreted, has all the validity attributed to it." L. LEVY, AGAINST THE LAW 18 (1975).
In other cases, however, the Court appears to have retreated to a literal reading of the self-incrimination clause. Thus, in *Schmerber v. California*\(^{26}\) the Court concluded that, although the defendant was in custody, the government could constitutionally extract blood samples from him against his will because blood is "physical," not "testimonial," evidence and the amendment explicitly concerns testimony. The Court has also distinguished testimonial communications from other forms of physical evidence, such as handwriting,\(^{27}\) voice exemplars,\(^{28}\) and physical characteristics, consistently holding that the privilege applies only to the former.\(^{29}\) In *Couch v. United States*\(^{30}\) the Court determined that the evidence must not only be testimonial, it must be "personal" to the party seeking to raise the privilege. Thus, the government could constitutionally require the defendant's accountant to disclose a report he had prepared concerning defendant's taxes. In *Williams v. Florida*\(^{31}\) the Court concluded that a rule requiring the defendant to notify the prosecution of his intention to raise an alibi defense was constitutional, on the theory that the choice to raise the defense remained with the defendant—he was not "compelled" to reveal anything at all. And Justice White, concurring in *Maness v. Meyers*,\(^{32}\) emphasized that the fifth amendment is concerned with "incrimination," stating:

The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very pri-

32. 419 U.S. 449, 473-74 (1975) (White, J., concurring). On the other hand, the Court has recognized that "[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Miranda v. Arizona, 384 U.S. 436, 476 (1966). Accordingly, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486-87 (1951). The privilege embraces every answer "which would furnish a link in the chain of evidence needed to prosecute." Id. at 486, quoted in Malloy v. Hogan, 378 U.S. 1, 11 (1964).
vate indeed, but unless it is incriminating and protected by the Amendment . . . it must be disclosed.

These cases indicate that the Court would evaluate the constitutionality of the Minnesota discovery provisions by asking whether they compel the defendant in a particular case to disclose incriminating, testimonial information personal to the defendant. Apparently, unless application of the rule would violate all of these conditions, as defined by the Court, it will not in the particular case run afoul of the fifth amendment privilege.

1. **Private Communications**

Advocates of prosecutorial discovery argue that documents, tangible objects, examination reports, tests, and witnesses' recorded statements do not reflect personal communications of the defendant. 33 Therefore, they assert, these items are not testimonial in a constitutional sense and are not protected by the fifth and fourteenth amendments. Support for this position may be found in *Couch v. United States*, 34 where the Court held that information possessed by third parties is not protected, and in the line of cases in which the Court distinguished "physical" from "testimonial" evidence. 35 More recently, however, the Court confronted this problem in *United States v. Nobles* 36 and appeared to be willing to protect certain "third party" reports. In *Nobles*, a district court had refused to allow defendant to introduce testimony by his investigator that would have impeached prosecution witnesses with prior inconsistent statements, unless the defense would disclose the relevant portions of the investigator's report so that the investigator could be cross-examined thereon. The Supreme Court affirmed, stating that "the privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial" and holding that disclosure of the investigator's report would not violate the fifth amendment. 37 The Court was careful to note, however, that "[defendant] did not prepare the report and there

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34. 399 U.S. 78 (1969).
35. See notes 26–29 supra and accompanying text.
37. Id. at 234. The Court also held that the attorney work-product doctrine was not available to prevent disclosure of the investigative report because the defendant had waived the privilege by electing to present the investigator as a witness. Id. at 239.
is no suggestion that the portions subject to the disclosure order reflected any information he conveyed to the investigator. Of course, if a report is prepared by the defendant, it reflects his “personal communications.” So does it also, as the dictum in Nobles suggests, if the report is compiled of information from the defendant to the investigator.

This statement strongly suggests that Nobles imposes a limitation that the Minnesota rule fails to recognize. Since the Minnesota rule providing for discovery of documents and reports fails to distinguish between those made or prepared solely by third parties and those prepared with the assistance of or participation by the accused, certain applications of the rule would appear, in light of Nobles, to violate the fifth amendment where the disclosure was “compelled” and “incriminating” in the constitutional sense.

2. Self-Incrimination

It also has been argued that the information discoverable under the rule is not incriminating, because the prosecution is entitled only to that which defendant intends to introduce at trial. This argument ignores the fact that the rule requires the defendant to determine whether evidence is incriminating before he observes the prosecution’s case-in-chief. There is great potential for error in that premature determination. Of course, the potential is reduced as the defendant becomes better informed about the prosecution’s case. Certainly, where the facts of the case are clear and the defendant has the benefit of pretrial disclosure, he can make an educated decision whether his evidence is incriminating. In many cases, however, the evidentiary issues will be sufficiently clouded to render the defendant’s pretrial decision mere guesswork. In these situations, evidence that appears to be exculpatory before trial may later prove inculpatory. Thus it is not true as a general proposition that simply because the rule requires disclosure only of information that the defendant intends to reveal at trial, it necessarily does not violate the fifth amendment privilege.

38. Id. at 234.
39. The defendant’s rights to pretrial discovery under the new Minnesota rules are equal to or greater than the discovery rights of the prosecution except in that the prosecution can withhold the names and addresses of its prospective witnesses if it certifies that disclosure might subject them to physical harm or coercion. Minn. R. Crim. P. 9.01-.02. It is argued that this exception violates due process. See text accompanying notes 56-57 infra.
40. Indeed, it may be argued that requiring defense counsel to de-
3. Compulsion

Finally, because the rule requires the defendant to disclose only information that he intends to introduce at trial, proponents argue that it does not “compel” disclosure and thus does not violate the fifth amendment privilege. Similar reasoning underlies the Supreme Court's decision in Williams v. Florida. There the Court upheld the Florida notice-of-alibi statute against the argument that it compelled disclosure and thus violated the defendant's privilege against self-incrimination. The Court reasoned:

At most the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, 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.

The Court emphasized that absent the notice-of-alibi rule, it would have been constitutionally permissible for the district court to grant the state a continuance on the ground of surprise as soon as the alibi witness was called. By providing for pretrial discovery, the state was merely accomplishing the purpose served by a continuance while avoiding its disruptive effect on the trial.

The foundation of the Court's acceleration-of-timing rationale in Williams is that the defendant is not compelled to disclose information when he intends to introduce it at trial. The defendant is in "precisely the same position . . . as he would be if
he remained silent [until trial],"\textsuperscript{44} losing only "the right to surprise the State with an alibi defense."\textsuperscript{45} However, two uses by the prosecution of information obtained by pretrial discovery under the new rule may violate the defendant's fifth amendment privilege regardless of the fact that he intended to use the disclosed information at trial.

a. Prosecution's case-in-chief

The prosecution traditionally had no opportunity for formal discovery, and inasmuch as its case-in-chief always preceded the defense, it could not prove that case with evidence introduced by the defense. Information in the hands of the defendant was available to the state only for cross-examination and rebuttal.

The effect of the new rule is to allow the prosecution to use the results of discovery to prove its case-in-chief.\textsuperscript{46} The rule thus affects a fundamental change in the criminal justice system in Minnesota. Although Williams might be read to support so sweeping a change, it is doubtful that the Supreme Court meant in that case to announce the broad proposition that the states may constitutionally extract from the accused any evidence he intends to introduce at trial. Had the Court meant Williams to sanction such discovery, any statements the accused himself intended to offer at trial would be fair game. Thus it is crucial to recognize that in Williams it was unlikely that the prosecution could have used in its case-in-chief the knowledge of defendant's alibi that it gained by discovery, because in relying on an alibi at trial the defendant contended that he was not at the scene of the crime when the crime occurred. The only possible assistance that the prosecution could have derived from pretrial discovery of the alibi was in cross-examination of the alibi witness or in rebuttal of the alibi claim. Thus, the Court did not con-

\textsuperscript{44} Kastigar v. United States, 406 U.S. 441, 468 (1972) (Marshall, J., dissenting).
\textsuperscript{46} For instance, by disclosing the name of an eyewitness before trial and notifying the prosecution that he intends to plead self-defense, the defendant admits the forbidden act. The state can use the eyewitness to establish that the defendant is guilty of murder. See Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994, 1004 (1972). This situation creates an incentive for prosecutorial abuse. Without enough evidence to establish guilt beyond a reasonable doubt, the prosecution, rather than dropping the matter, may demand discovery from the defendant and thereby obtain sufficient information to prove its case-in-chief.
front and Williams should not be read to sanction prosecutorial use of discovered information to prove its case-in-chief.

b. Prosecution's rebuttal

Again, before adoption of the new rule, the prosecution's only access to the defendant's case was the evidence that the defendant introduced at trial. The state could use this evidence to uncover new leads during the course of trial in order to develop its case in rebuttal. Under the new rule, the defendant is required to disclose before trial evidence that he intends to introduce at trial. The purpose of this discovery is to enable the prosecution to more effectively counter the evidence at trial. If, however, the defendant changes his mind after disclosure and chooses not to introduce the evidence at trial, the prosecution may nonetheless use it to rebut the defendant's case as well as to prove its case-in-chief.

As indicated above, this result is inconsistent with the Williams acceleration-of-timing rationale. Moreover, it serves to demonstrate a flaw in the Court's reasoning in that case. To the majority in Williams, the defendant's decision whether to introduce particular evidence at trial is influenced by the same factors regardless of whether it is made before trial or during trial.\(^47\) However, "[a]ny lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about."\(^48\) Therefore, the pretrial choice required of defendant under prosecutorial discovery is "a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind."\(^49\)

To illustrate the points raised with regard to whether the new rule compels disclosure within the constitutional meaning of that term, assume that a defendant is required to disclose potentially incriminating information before trial. If the prosecution employs that information in its case-in-chief, the defendant's subsequent choice not to introduce the information is bereft of content. Alternatively, assume that the prosecution chooses not to employ the information in its case-in-chief, and the defendant chooses not to introduce it on his own behalf. If the prosecu-

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\(^{47}\) 399 U.S. at 85.
\(^{48}\) Id. at 109 (Black, J., dissenting).
\(^{49}\) Id.
tion were then permitted to enhance its rebuttal with the disclosed information or evidence derived therefrom, the defendant's earlier choice not to introduce it would be meaningless.\textsuperscript{50}

Inasmuch as the Minnesota rule fails to preclude the prosecution from employing disclosed information in its case-in-chief and in rebuttal even when the defendant chooses not to introduce the information on his own behalf, it goes beyond Williams. Although the Court has not addressed the precise issue raised by the Minnesota rule, there is ample ground for concluding that the disclosure that the rule requires is compelled.

B. Due Process and Reciprocity

The due process clause also imposes limitations upon prosecutorial discovery. In \textit{Wardius v. Oregon},\textsuperscript{51} the Supreme Court held Oregon's notice-of-alibi statute violative of due process because it did not require the state to reveal to the defendant the names and addresses of witnesses it planned to use to refute the alibi defense. The Court stated:

\begin{quote}
[\text{I\text{]] in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as "a search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.}\textsuperscript{52}
\end{quote}

The Court also noted that "the 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."\textsuperscript{53}

\begin{itemize}
\item[50.] Defendant's position at trial is also weakened substantially under the new rule in that the prosecution, in addition to using the discovered information in its case-in-chief, may derive indirect benefits from the information. These include focusing the investigation, evaluating other evidence, and planning trial strategy.
\item[51.] 412 U.S. 470 (1973).
\item[52.] Id. at 475.
\item[53.] Id. n.9.
\end{itemize}

Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within lim-
The Minnesota rule lacks the reciprocity required by Wardius in that it grants the prosecution the right to certify that pretrial disclosure of the names of its witnesses might subject the witness to physical harm or coercion but requires the defendant to show cause in order to obtain similar protection from the trial court. No limitations are imposed on the prosecution’s right to certify. It may do so on the slightest suspicion, or on none. Thus it is likely that in some cases the state will withhold the names of one or all of its witnesses while the defendant will be required to comply with all discovery provisions. In Wardius, the Court stated that “[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning the refutation of the very pieces of evidence which he disclosed to the State.”

Because of its lack of reciprocity, aggravated by a strong potential for abuse, the rule as it currently stands violates due process.

III. ENSURING CONSTITUTIONAL PROTECTION UNDER THE RULE

A. FIFTH AMENDMENT PROTECTION

Since certain applications of the Minnesota rule providing for discovery of documents and reports may be both incriminating and compelled, the rule must be narrowed so as to exclude discovery of any such items that are also testimonial. Discovery must not be permitted where the documents or reports were pre-its, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant.

Id. at 475-76 n.9 (quoting Note, Prosecutorial Discovery Under Proposed Rule 16, 85 HARV. L. REV. 994, 1018-1019 (1972)).

54. MINN. R. CRIM. P. 9.01(3) (2).
55. Id. 9.03(5).
56. Indeed, the prosecutor might be remiss in not certifying on the basis of any plausible suspicion, for witnesses can be encouraged to testify candidly only if there is some assurance that they will not be threatened or injured. See note 8 supra.
57. 412 U.S. at 476.
pared with the assistance of or participation by the accused. Even so narrowed, however, the rule would still violate the fifth amendment unless the prosecution's use of disclosed information were limited to cross-examination and, if the defendant introduces the disclosed evidence at trial, to rebuttal. Although to so limit the prosecution may be exceedingly difficult, one means of doing so is suggested by the approach taken by the majority in Kastigar v. United States. 58 There the Supreme Court concluded that use and derivative-use immunity is co-extensive with the fifth amendment privilege because it leaves "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege," if the government is required to carry "the heavy burden of proving that all the evidence it proposes to use was derived from legitimate independent sources." 60 A minority of the Justices dissented on the ground that, although theoretically consistent with the privilege, use and derivative-use immunity is too susceptible to abuse by the government to ensure preservation of the privilege. 60

It may be argued that imposing on the prosecution a similar burden of showing that it did not impermissibly use the benefits of discovery at trial would adequately protect the defendant's

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58. 406 U.S. 441 (1972). Kastigar concerned the validity of a federal immunity statute, 18 U.S.C. § 6002 (1970). The statute authorizes a district court to order a witness to testify over a claim of fifth amendment privilege but provides that no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

By supplanting the fifth amendment privilege with immunity statutes, legislatures have attempted to relieve the tension between the government's need for information and the personal interests protected by the privilege. See Kastigar v. United States, 406 U.S. 441, 443-47 (1972). See also Note, Kastigar v. United States: The Required Scope of Immunity 58 VA. L. Rev. 1099 (1972); Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568, 1571-74 (1963).


60. Id. at 466-67 (Douglas, J., dissenting); id. at 469-71 (Marshall, J., dissenting). Justice Marshall argued that although the use and derivative-use ban is theoretically co-extensive with the fifth amendment, in practice such a ban would be inadequate to ensure that the government's case is based on evidence derived from a legitimate independent source. Id. at 468. It would prove inadequate, he asserted, because of "the inevitable uncertainties of the fact-finding process," id., and because "the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities" so that they would often be able to carry their burden by the mere assertion that the ban had been honored. Id.
fifth amendment privilege from infringement by prosecutorial
discovery. As a practical matter, however, such a rule would be
as susceptible to abuse as is use and derivative-use immunity.61
Moreover, even if one accepts the Kastigar majority's view that
abuse is obviated by imposing the burden on the prosecution,
the rule would cause problems. If the courts are to rigorously
test the prosecution's claim of permissible use, the task of trac-
ing the sources of the prosecution's evidence in order to deter-
mine whether they are "legitimate and independent" may be
extremely difficult. Indeed, it is possible that strict imposition
of the burden would deprive the prosecution of evidence validly
acquired.

Recognizing the problems that inhere in imposing the bur-
den of proof on the prosecution, although disagreeing as to
whether the brunt of the difficulty falls on the defendant or the
prosecution, the lower federal courts applying Kastigar have
developed three devices for simplifying the determination of
whether the burden has been met. It is worthwhile examining
these tests in order to determine whether any of them could be
used to ensure that information discovered from the defendant
under the new rule was not used in the prosecution's case-in-
chief or, if not used at trial by the defendant, in rebuttal of the
defense.

One standard creates, in effect, an irrebuttable presumption
that the evidence used at trial by the prosecution is tainted if
the prosecution has pretrial knowledge of the defendant's prior,
immunized testimony.62 Obviously, this standard provides no
assistance here inasmuch as prosecutorial discovery and an irre-

61. See note 60 supra.
62. In United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973),
vacating 449 F.2d 832 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972),
the United States Attorney received a transcript of the defendant's earlier
compelled testimony given under transactional immunity granted by
North Dakota law. See N.D. Cent. Code § 16-20-10 (1971). Although the Government was able to show an independent source
for the evidence introduced at defendant's trial, the Court of Ap-
peals for the Eighth Circuit held that the Government failed to meet
the burden imposed by Kastigar. "Such [impermissible] use could con-
ceivably include assistance in focusing the investigation, deciding to
initiate prosecution, refusing to plea-bargain, interpreting evidence,
planning cross-examination, and otherwise generally planning trial strat-
egy." 482 F.2d at 311. Thus the prosecution's knowledge of the defend-
ant's prior immunized testimony created, in effect, an irrebuttable pres-
sumption of taint due to its "immeasurable subjective effect" on the
prosecution. Id. at 312. Cf. United States v. Dornau, 359 F. Supp. 684
buttable presumption of impermissible use are incompatible. The prosecution must have access to the disclosed information to benefit from prosecutorial discovery.

The second standard creates a presumption of misuse but allows the prosecution to rebut that presumption by showing that the evidence used at trial was certified against the accused before he testified under the grant of immunity. A similar procedure could be implemented with respect to prosecutorial discovery by requiring the prosecution to certify its evidence against the defendant before participating in discovery. This method would be the most certain to ensure that the prosecution does not use discovered information to prove its case-in-chief or, if the defendant does not introduce the disclosed evidence at trial, to rebut the defense. However, certification might unjustifiably impede the prosecution. If, after discovery, the government independently found evidence other than that disclosed by discovery, the certification requirement would bar its use at trial. Certification would in that instance impair the search for truth that the discovery rule is intended to promote.

The third standard applied in federal courts interpreting *Kastigar* allows the prosecutor in charge of a case to swear that neither he nor his assistants impermissibly used the immunized testimony. Similarly, under the new rule, the prosecutor could swear that he did not impermissibly use the discovered information. Perhaps the prosecutor's awareness of the penalty for perjury and of the dangers of suspension and disbarment would ensure his honesty. But it would seem incongruous if the person prosecuting the defendant could discharge without more than his sworn statement the burden of showing that he did not impermissibly use the benefits of discovery. "If those who enforced the law could be trusted, there would be no need for the Bill of Rights, let alone the Fifth Amendment." Constitutional protection must rely on more than good faith.

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64. See, e.g., United States v. First Western State Bank, 491 F.2d 780, 783 (8th Cir. 1974) ("If the prosecuting sovereign has made its independent investigation and can show nonuse of the immunized testimony, . . . by . . . direct statements made in good faith that it did not use the immunized testimony, it should have a clear right to proceed with its own prosecution.").
There does not, then, appear to be an entirely satisfactory method of ensuring that the prosecution will not use the fruits of discovery to prove its case-in-chief or to impermissibly rebut the defendant's case when the defendant has not introduced the disclosed evidence at trial. Furthermore, there is no justification for an assumption that these impermissible uses of disclosed information will not occur under the new rule. And if courts are unwilling to either declare prosecutorial discovery unconstitutional or adopt a certification device in order to preserve its constitutionality, they should at least remain vigilant lest, by assuming the prosecution's evidence is untainted, they inadvertently impose upon the defendant the burden of proving that it is. As the Supreme Court stated in *Malloy v. Hogan* and assumed in *Kastigar*, requiring the defendant to prove that his disclosure constituted a criminal hazard "would be . . . [to compel him] to surrender the very protection which the privilege is designed to guarantee." This result would be particularly lamentable in view of the fact that the burden would be a very difficult one for the defendant to carry, for he has no means of ascertaining whether and how the prosecution used the information he disclosed.

B. DUE PROCESS

It is far easier to suggest the solution to the due process infirmities of the discovery rule. The rule appears unconstitutional on its face because the prosecution is allowed to certify that disclosure of the identity of his witnesses would subject them to physical harm or coercion while the defendant must show cause to avoid such disclosure. To ensure that the rule complies with the reciprocity requirement of *Wardius*, one standard should govern both parties. Because the certification procedure contains great potential for abuse, each side should be required to show cause in order to obtain a protective order allowing it to refuse pretrial disclosure. This is the provision that was adopted by the Supreme Court in the Proposed Federal Rules of Criminal Procedure.

IV. CONCLUSION

The new Minnesota rule allowing pretrial discovery by the prosecution can easily be brought into conformity with the re-

68. Id. at 11.
69. See text accompanying notes 54-56 supra.
quirements of due process. It need only be made reciprocal in all respects. It is far less certain whether prosecutorial discovery can coexist with the fifth amendment privilege. Before adoption of the prosecutorial discovery provision, our accusatorial system of justice “required the government ‘to shoulder the entire load.’”\footnote{Miranda v. Arizona, 384 U.S. 436, 460 (1966).} The system demanded “that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”\footnote{Id.} The new discovery rule, however, compels the defendant to disclose substantive features of his case and enables the prosecution to use the fruits of discovery to prove its case-in-chief and to rebut the defendant’s case even if the defendant did not employ the disclosed information. The Supreme Court of Minnesota has, therefore, but two alternatives. It can either declare the rule unconstitutional, or confront directly the difficult problem of ensuring that—on a case-by-case basis—prosecutors confine their use of discovered information to cross-examination and, if the defendant discloses the information at trial, to rebuttal.