Chapter 7: Criminal Law and Procedure

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CHAPTER 7

Criminal Law and Procedure

EVAN T. LAWSON

A. IDENTIFICATION

§7.1. Introduction. In recent years the courts have become increasingly burdened with the problem of procedures used by law enforcement officers to obtain identification evidence. Since the landmark decisions of United States v. Wade,1 Gilbert v. California,2 Stovall v. Denno3 and Simmons v. United States,4 the Supreme Judicial Court has been barraged with appeals challenging pretrial identifications either because the identification was conducted in the absence of defense counsel as in Wade and Gilbert or was impermissibly suggestive as was claimed in Stovall and Simmons.5

The earlier attempts of the Supreme Judicial Court to deal with the multifarious and complex questions of identification have been carefully examined in prior issues.6 Yet, despite an impressive array of decisions, Evan T. Lawson is a partner in the law firm of Glickman, Lawson & Scheffy, Boston.

§7.1. 1 388 U.S. 218 (1967).
2 388 U.S. 263 (1967).
3 388 U.S. 293 (1967).
5 In Wade the Supreme Court held that a post-indictment lineup confrontation between a witness and the accused for purposes of identification is a "critical stage" of prosecution and violates the Sixth Amendment if conducted in the absence of defense counsel. The Court did not expressly decide whether the Sixth Amendment right to counsel extended to every pre-trial lineup, pre- or post-indictment, although much of the Court's reasoning would clearly apply to any pre-trial lineup. But see §7.3., infra.

Although in Gilbert, a companion case to Wade, the Court held that testimony concerning an illegal lineup was per se excluded, Wade sanctions a witness' in-court identification if the prosecutor demonstrates by "clear and convincing evidence" that the in-court identification is founded upon an origin independent of the illegally conducted lineup. Stovall held that Wade did not apply retroactively but that evidence of pre-trial identifications was inadmissible if the lineup was so "unnecessarily suggestive" as to deny the defendant due process of law. Simmons extended Stovall to include "impermissibly suggestive" pre-trial photographic identifications. The foregoing Supreme Court cases are extensively analyzed in 1969 Ann. Surv. Mass. Law §§12.1 et seq.

the stream of appeals continues unchecked. In 16 cases decided during the 1972 Survey year, the Court considered challenges to findings by trial judges on questions of suggestiveness or other allegedly improper procedures in the conduct of witness-accused confrontations. Expressing its frustration, the Court, in Commonwealth v. Murphy,7 listed forty-seven appeals in which it had been “occupied” with identification issues since the decisions in Wade, Gilbert, Stovall and Simmons.8 In an apparent attempt to discourage future defendants from seeking review on questions of the admissibility of identification evidence, the Court “repeat[ed] reaffirm[ed] and emphasize[d]” its earlier position by declaring that:

Effective and constitutionally adequate administration of criminal justice does not require us in the face of such [careful] findings to second guess the trial judge who is certainly in a far better position than we to determine the facts upon which a ruling on the admissibility of an in-court identification is based.9

The implication from the foregoing is that questions concerning identification evidence may, in the future, be disposed of summarily. In an earlier case, Commonwealth v. Ross,10 the Court did fully treat defendants’ contentions that evidence of pretrial and in-court identifications was erroneously admitted. The subsequent discussion of identification problems in criminal cases, therefore, will focus on the issues dealt with by the Court in Ross.

Also within the Survey year the United States Supreme Court decided Kirby v. Illinois,11 holding that a defendant’s right to counsel during critical stages of the criminal prosecution does not extend to pretrial lineups conducted after arrest but before commencement of judicial proceedings. Kirby and its probable impact in Massachusetts will be examined in this chapter.

§7.2. Independent origin of in-court identifications: Admissibility of inculpatory gestures: Right to counsel at photographic showings. In Commonwealth v. Ross1 two defendants were convicted on indictments charging armed robbery and related assault offenses. Shortly before the robbery, an automobile occupied by three men had stopped at a gas station and the occupants engaged in conversation with one Lembeck, the attendant on duty. Lehane, the robbery victim, drove into the gas pump area about twenty minutes later and one of the three men got out of the automobile and conversed briefly with him. Thereafter, Lehane

8 Id. at 1684 n.2, 289 N.E.2d at 575 n.2.
drove from the station followed by the three men in their automobile. When Lehane parked his automobile the three men parked nearby, attacked Lehane with knives, robbed him and fled. About an hour later the police pursued an automobile matching the description of the assailants' automobile, stopped it and arrested the three defendants and a fourth male occupant. Later the same day Lembeck accompanied the police to the Roxbury District Court where, prior to defendants' arraignments, he casually observed about a dozen men in the "lockup" area and without direction from the police singled out two of the defendants, one of whom, the defendant Ross, made an inculpatory gesture to Lembeck. On three subsequent occasions Lembeck identified all three defendants from a group of fourteen photographs and on one occasion Lehane, the victim, identified from the same group of photographs the defendant he had conversed with at the gas station, but he was unable to identify the other two.

At a voir dire hearing the trial judge allowed defendants' motions to suppress evidence of all pretrial identifications by the two witnesses but during the trial the judge allowed into evidence Lembeck's testimony concerning the inculpatory gesture made by Ross at the Roxbury District Court. Defendants' motions to suppress in-court identifications were denied by the judge who ruled that the "Commonwealth had satisfied its burden of proving the independence of the in-court identifications by 'clear and convincing evidence' as [Wade] requires."

Conceding that the confrontation between the defendants and Lembeck at the Roxbury court house might have contained "an element of suggestiveness," the Supreme Judicial Court concluded that the in-court identifications were properly admitted because the witness's prior observation of the defendants was an independent source for the in-court identification. In determining whether to permit an in-court identification, the Court noted that Wade required consideration of various factors. Of the factors to be considered, however, the Court declared that "[i]f greater weight is given to any single factor, '[i]n the extent of the wit-

2 Ross raised a forefinger to his lips suggesting that Lembeck keep silent and with his other hand gave Lembeck the "peace sign." Id. at 876, 883-84, 282 N.E.2d at 73, 77. There was a third man arraigned at the Roxbury District Court with the two defendants Lemback recognized. Apparently, he was the fourth man in the automobile which the police stopped shortly after the crime.


4 Id. at 878, 282 N.E.2d at 74.

5 The Supreme Court enumerated six factors: (1) the prior opportunity to observe the criminal act; (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to the lineup of another person; (4) the identification by picture of the defendant prior to the lineup; (5) the failure to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged criminal act and the lineup. In addition, the Court stated that it was relevant to consider facts concerning the conduct of the lineup, presumably facts disclosing suggestiveness. 388 U.S. at 241.
ness's opportunity to observe the defendant at the time of the crime . . . seems most important. Clearly the firmer the contemporaneous impression, the less is the witness subject to be influenced by subsequent events.'

In similar fashion the Court disposed of defendants' remaining contentions that the suggestiveness of the photographic identification procedures tainted the witness' initial impression of them.

It is at once obvious that for an in-court identification to originate independently from pretrial confrontations, there must be some basis for determining that the witness had sufficient opportunity to make a contemporaneous observation of the defendant. In *Ross* the Court emphasized the factors present during Lembeck's observation of the trio:

The pump area of the filling station was well lighted, and Lembeck could see the features of the three occupants clearly. Although he talked mainly with Daniels, he had some conversation with all three men, he was in their presence for approximately twenty minutes, and he leaned inside the automobile at one point and gave each man a cigarette. Later, he saw Daniels outside the automobile as he conversed with Lehane. The atmosphere during Lembeck's prolonged encounter with the trio was not casual, but gave Lembeck reason to feel uneasy and thus to be more conscious and aware of them.

Clearly, the Court was correct in concluding that Lembeck had ample opportunity to observe the three occupants of the automobile. Such a conclusion, however, would not appear to justify the Court's failure to examine the remaining *Wade* factors or, at least, to articulate the reasons for not doing so. Otherwise, the implication to be drawn is that contemporaneous observation alone is controlling.

While an examination of the remaining factors would probably have been unavailing to the defendants in *Ross*, it should be recognized that the underlying significance of those factors is not related to the extent of the witness' opportunity to observe contemporaneous with the crime, but rather to the extent of the witness' mental ability to recall his observations. Thus, as a basis for an in-court identification, the efficacy of a contemporaneous encounter identical to that experienced by Lembeck at the gas station might be wholly negated under *Wade* by the witness' failure to identify the defendant who is present in a lineup.


8 See note 5, supra.

9 The witness, Lembeck, about a week after the crime, had no difficulty identifying the defendant Williams from a group of fourteen photographs. Williams had not been present at the Roxbury District Court when Lembeck viewed the prisoners in the "lockup" area. Although the Court noted these facts, it did not relate them to Lembeck's ability to recollect his initial impression of the defendants.
shortly after the crime. Moreover, a careful reading of the remaining *Wade* factors indicates that the extent of the witness' power of recollection must be determined as it existed prior to any illegal identification procedures. It can be argued, therefore, that a finding of independence of an in-court identification, to be in accord with *Wade*, must include at least two determinations, viz., that the witness had sufficient opportunity to observe the perpetrator at the time of the crime and that misidentifications or errors in description, if any, made by the witness prior to an illegal identification procedure, were not sufficient to negate the independent origin of the in-court identification. The Supreme Judicial Court, however, has apparently adopted the rule that the admissibility of a challenged in-court identification is dependent only upon the factual circumstances of the witness' observations contemporaneous with the crime.\(^\text{11}\)

The defendant Ross claimed, in addition, that the trial judge's failure to exclude evidence of the inculpatory gesture made by Ross to Lembeck at the Roxbury District Court violated his Sixth Amendment right to counsel as interpreted by *Gilbert*. The Court assumed that the rule of *Wade* would have applied to the pre-indictment lineup in question,\(^\text{12}\) but found the purposes of *Wade* were "to provide the accused . . . with an adequate basis at trial to recount any unfairness in pretrial police identification procedures and to enable an informed cross examination of identification witnesses."\(^\text{13}\) Since the defendant's claim did not relate to either purpose but was a "voluntary act and in no sense the result of police exploitation,"\(^\text{14}\) the Court found no error.

Although the purposes suggested by the Court are consistent with the rationale of *Wade* and *Gilbert*, the right to counsel guaranteed by those cases would seem to encompass all the advantages that could reasonably accrue to a defendant advised by competent counsel. Arguably, had Ross been afforded defense counsel for the Roxbury court house confrontation with Lembeck, he would not have volunteered the gesture. The evidence of the incriminating gesture very likely had as much probative value in the minds of the jurors as evidence of a voluntary confession. If voluntary confessions made when the assistance of counsel has been denied or not intelligently waived are inadmissible under the Supreme Court decision in *Escobedo v. Illinois*,\(^\text{15}\) and if Ross had a consti-

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\(^\text{10}\) "Illegal" in this context refers to either a suggestive pre-trial confrontation violative of due process as in *Simmons* or a pre-trial confrontation violative of the Sixth Amendment right to counsel as in *Wade*.

\(^\text{11}\) Of course, misidentification of the defendant by the witness after a suggestive lineup has occurred is more relevant but would seem to be a rare happening. One purpose of a lineup is to fix the defendant's features irrevocably in the mind of the witness, thus enabling him to make an unequivocal in-court identification. 388 U.S. at 240.

\(^\text{12}\) See note 5, §7.1, supra.


\(^\text{14}\) Id.

\(^\text{15}\) 378 U.S. 478 (1964).
tutional right to counsel under Wade during the confrontation, as the Supreme Judicial Court assumed, there seems to be no reason why evidence of the gesture could not have been challenged on the basis of the Fifth Amendment and Escobedo.

Another issue decided by the Court has been the subject of recent conflicting federal court decisions. One of the Ross defendants, apparently in reliance on Simmons, objected to the various photographic showups conducted in the absence of his counsel. The Court observed that ten states and the majority of circuits of the United States Court of Appeals had resolved the question consistently with United States v. Bennett, a Second Circuit decision holding that the presence of counsel at photographic showups is not constitutionally compelled. In rejecting the defendant's contention, the Supreme Judicial Court agreed with Judge Friendly's conclusions in Bennett: (1) that "to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant . . . is not present would press the Sixth Amendment beyond any previous boundary" and (2) since Wade expressly allows consideration of pre-lineup photographic identifications on the issue of independence of an in-court identification, it can be "clearly" implied that photographic identifications are permissible even in the absence of defense counsel.

In United States v. Ash, the Court of Appeals for the District of Columbia criticized Judge Friendly's first conclusion as "too narrow a reading of [the] Sixth Amendment right" and held that an in-custody defendant has a right to counsel at photographic showups:

[I]t is Judge Friendly's view that a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone. . . . However, Wade itself demonstrates the possibility of other forms of prejudice. . . .

The Ash court did not challenge Judge Friendly's second conclusion. However, it may be noted that the question in Bennett and Ash—the right to counsel at photographic showups—was not before the Wade Court. Although Wade condones "the identification by picture of the defendant prior to the lineup," that phrase was not necessarily intended to include a photographic showup of in-custody defendant without the benefit of counsel. "Identification by picture" often occurs in investigative stages before the defendant's arrest when, clearly, the right to counsel has not obtained.

18 409 F.2d at 899.
20 461 F.2d at 101.
21 The Third Circuit Court of Appeals reached a similar result in United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).
22 461 F.2d at 101.
23 388 U.S. at 241.
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The *Ash* rationale is based on the premise that the danger of misidentification present in suggestive corporeal lineups is equally present in suggestive photographic showups. Indeed, the danger of misidentification in a photographic showup may be greater than in a corporeal lineup because even the defendant’s presence at the latter insures at least a reasonable possibility that suggestive procedures will be called to the court’s attention. Another consideration supporting the *Ash* view is that the police may tend to limit the use of corporeal lineups attended by defense counsel and rely instead on the more hazardous photographic showups. In any event, an authoritative decision on the issue appears imminent. The United States Supreme Court granted certiorari in *Ash* and oral argument has been heard.

§7.3. Kirby v. Illinois: A limitation on the right to counsel. In a 1970 decision, *Commonwealth v. Guillory*, the Supreme Judicial Court held that the right to counsel under *Wade* extends to pretrial identifications conducted even before the defendant’s arrest. Consistently with *Guillory*, the Court in *Commonwealth v. Mendes* reversed conviction for armed robbery on the grounds that the trial judge erred in failing to suppress evidence of a pretrial lineup identification in the absence of defense counsel. In *Mendes* the defendant was in police custody; however, he apparently had not been formally charged at the time the robbery victim identified him from an eight man lineup at the police station.

Two months after the *Mendes* decision was rendered, the United States Supreme Court, in *Kirby v. Illinois*, ruled that the right to counsel under *Wade* does not apply to lineups after arrest but before the initiation of adversary judicial criminal proceedings. Justice Stewart, writing for the majority, attempted to distinguish *Kirby* from previous right to counsel cases:

1 406 U.S. 682 (1972).

2 461 F.2d at 102.


26 United States v. Ash, 41 U.S.L.W. 3385 (U.S. Jan. 16, 1973). In view of the present Supreme Court’s disenchantment with *Wade*, it is unlikely that the right to counsel will be extended to photographic showups. See §7.3., infra.

§7.3. 1 406 U.S. 682 (1972).

2 356 Mass. 591, 254 N.E.2d 427 (1970). Guillory involved a prosecution for rape where, about 10 months after the crime, the defendant was summoned to police headquarters and, prior to his arrest, was identified by the victim.


4 The opinion does not elaborate on the circumstances of the defendant’s arrest. Presumably, he was in custody as a suspect in the armed robbery.


6 The nature of the proceedings contemplated by the Court was a “formal charge, preliminary hearing, indictment, information or arraignment.” Id. at 689.


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... while members of the Court have differed as to [the] existence of the right to counsel in the contexts of some of the [prior] cases, all of those [cited] cases have involved points of time at or after the initiation of adversary judicial criminal proceedings. . . .8 (Court's emphasis).

Noting that Escobedo v. Illinois9 was a "seeming deviation" from the foregoing distinction, Justice Stewart declared that "the 'prime purpose' of Escobedo was not to vindicate the constitutional right to counsel as such, but, like Miranda, [v. Arizona]10 to guarantee full effectuation of the privilege against self-incrimination. . . ."11 Moreover, observed Justice Stewart, Escobedo had subsequently been limited by the Court to its own facts which were not "remotely akin" to the facts of Kirby.12

The majority reasoning, if indeed it can be termed reasoning, appears to be that:

The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. (Citations omitted).13

It seems clear, however, that pragmatic considerations prevailed in Kirby rather than any constitutional limitation inherent in the Sixth Amendment right to counsel. First, it is likely that the Court, reflecting recent changes in its philosophical posture, sought to avoid placing further limitations on law enforcement officials during investigative stages of the criminal process. It is reasonable to assume the majority was mindful of the lamentations following Miranda, Escobedo and other decisions of the 1960's that the police were being "handcuffed" by the Court. Secondly, the Kirby decision, arguably, was intended by the majority to devitalize the Wade-Gilbert per se exclusionary rule to the extent that, after Kirby, "'substantially all lineups [will] be conducted prior to indictment or information.'"14 Finally, the majority noted that under Stovall the due process clause of the Fifth and Fourteenth Amend-

8 406 U.S. at 689.
11 406 U.S. at 689.
12 Id. at 689, citing Johnson v. New Jersey, 384 U.S. 719 (1966) (refusing to apply Miranda and Escobedo retroactively).
13 406 U.S. at 689-90.
14 Id. at 699 n.8 (dissenting opinion) citing the California case of People v. Fowler, 1 Cal.3d 355, 344, 82 Cal. Rptr. 363, 370, 461 P.2d 643, 650 (1969).
ments affords sufficient protection against police abuse of identification procedures. Consequently, before formal charge, "Stovall strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." 16

Justice Brennan, in the dissenting opinion, pointed to numerous passages in Wade which, taken together, compel the conclusion that the majority view is inconsistent with the Wade rationale. Futhermore, he explained that the Wade Court had relied on both Miranda and Escobedo in finding a constitutional right to counsel at a pretrial lineup, yet the majority considered those cases distinguishable for reasons that would have also distinguished them in Wade. Criticizing the majority reasoning Justice Brennan declared that:

If [the] propositions [of the majority] do not amount to "mere formalism," . . . it is difficult to know how to characterize them. . . . An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." . . . A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." 18

The actual impact of Kirby in Massachusetts is, of course, difficult to predict. However, one observation might be made. It is doubtful that Kirby will significantly reduce the number of appeals taken to the Supreme Judicial Court on questions of admissibility of identification evi-

15 406 U.S. at 691. Purporting to rely on Wade, the majority in Kirby quoted from that case and stated that "... it is always necessary to 'scrutinize any pretrial confrontation ....'" (Emphasis in original). Id. at 691. However, the majority failed to include the following essential language from the Wade quotation: "... of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U.S. at 227.

16 406 U.S. at 691.

17 In a footnote, the dissenters listed the division among the state and federal circuit courts on the issue in Kirby. Only five states had not applied Wade to pre-indictment identifications, while "at least" 13 states, including Massachusetts, and all eight circuits which had considered the question found Wade controlling. 406 U.S. at 704 n.14.

18 406 U.S. at 698-99 (dissenting opinion) (quoting from Wade).
Of 16 such appeals heard during the Survey year, only Mendes involved a question controlled by Kirby. Assuming law enforcement officials elect to exercise the less restrictive procedure sanctioned by Kirby and conduct lineups before arraignment or other formal judicial proceedings, the absence of defense counsel may encourage some degree of procedural laxity on the part of the police. Since defense counsel is now deprived of first-hand knowledge, he must attempt to independently reconstruct any real or imagined suggestiveness in the lineup. Thus, challenges to the introduction of pretrial identification evidence can be expected to increase.

B. Other Developments

§7.4. Right to a speedy trial: Delay prior to arrest or indictment: Application for a speedy trial. Between November 11, 1971 and January 20, 1972, four noteworthy cases dealing with the seldom-invoked Sixth Amendment speedy trial provision1 were decided: Commonwealth v. Jones2 and Commonwealth v. Horan3 by the Supreme Judicial Court, United States v. Daley4 by the First Circuit Court of Appeals, and United States v. Marion5 by the United States Supreme Court. A later case, Commonwealth v. Loftis6 decided by the Massachusetts Court, concerned the interpretation of G.L., c. 277, §72A, a statute providing for trial of an incarcerated defendant within six months following his application for a speedy trial.

In Commonwealth v. Jones, supra, the Supreme Judicial Court was presented with the question whether the defendant's Sixth Amendment right to a speedy trial was violated by an unexplained delay of nearly two years between the issuance of an arrest warrant and the defendant's actual arrest. On July 31, 1968 a warrant issued for the defendant's arrest in connection with an armed robbery committed some two weeks earlier. Thereafter, the police, on at least one occasion, attempted to serve defendant at his mother's home, but in December 1968 the warrant was returned to the district court without service. Following the defendant's arrest on September 4, 1970 on an unrelated charge, he was served with a warrant for the armed robbery, was indicted about one month later and was subsequently convicted. Claiming a violation of his

Of course, it is impossible to predict how many future defendants, if any, will be deterred from seeking review because of the Supreme Judicial Court's announced disfavor of appeals on identification questions. See text at note 9 §7.1, supra.

§7.4. 1 See United States v. Marion, 404 U.S. 307, 314-15 nn.5-8 (1971) for a brief review of the history of the speedy trial provision and a listing of the federal cases construing it.

4 454 F.2d 505 (1st Cir. 1972).
right to a speedy trial, the defendant moved to dismiss the indictment and, presumably, to set aside his conviction. Upon denial of the motion by the trial judge, defendant appealed to the Supreme Judicial Court.

Rejecting the defendant’s contention, the Court declared that the “mere delay in serving a complaint warrant, prior to indictment,” was insufficient to constitute a denial of the right to a speedy trial. On the other hand, the Court did recognize that a pre-arrest delay could be found an unconstitutional failure to afford a speedy trial if the defendant had proved either “substantial prejudice to [his] ability to defend himself,” or, in the alternative, “deliberately improper police conduct.” The Court noted that the failure of timely service may have been the result of police inefficiency or negligence, but the evidence did not show that the consequent delay was intentional. During the trial, defense counsel had apparently attempted to establish prejudice arising from the defendant’s inability to recall his whereabouts and actions at the time the crime was committed. The Court found no error in the trial judge’s exclusion of a leading question intended to demonstrate prejudicial inability to remember, inasmuch as defense counsel did not thereafter renew that line of questioning. In addition, the Court pointed out that the defendant was “in no worse position than if his indictment, without prior complaint, had occurred toward the end of the applicable statute of limitations.”

Shortly after Jones was decided, the United States Supreme Court handed down its decision in United States v. Marion, a case involving a Sixth Amendment speedy trial question surprisingly similar to that in Jones. Marion was a direct appeal by the government challenging the district court’s dismissal of indictments for failure to afford a speedy trial. The defendants, in their motions to dismiss, had claimed that the government had been aware of the crimes charged for more than three years before the indictments were returned, that the indictments would require recollection of events long past and that the delay was caused by the negligence or indifference of the United States Attorney. The Supreme Court reversed the district court and held that “the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an ‘accused,’ an event which occurred [in Marion] only when [the indictments were returned].” A defendant becomes an “accused,” according to the Court, upon “either a formal

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8 Id.
9 Id.
10 Jones was decided on November 11, 1971, Marion on December 20, 1971.
12 At the time of the government’s appeal 18 U.S.C. §3731 authorized a direct appeal to the Supreme Court by the government when, in a criminal case, a district court sustained a motion to bar prosecution before the defendant is put in jeopardy.
13 404 U.S. at 313.
indictment or information or . . . the actual restraints imposed by arrest and holding to answer a criminal charge.”

With respect to defendants’ claims that the delay would be prejudicial to them at trial, the Court found the Sixth Amendment inapposite inasmuch as statutes of limitations are intended to protect a defendant from potential prejudice arising from pre-accusation delay. Since the defendants in Marion had not been tried they could not claim actual prejudice. However, the Court briefly discussed the issues in the event the defendants ultimately claimed actual prejudice caused by the pre-indictment delay. The relevant constitutional provision relied on by the Court was not the Sixth Amendment right to a speedy trial, but rather the due process clause of the Fifth Amendment. With respect to the proof necessary to establish a due process violation that would require dismissal of an indictment, the Court cited the government’s brief where it was conceded that dismissal was appropriate if the defendants proved at trial that “the pre-indictment delay . . . caused substantial prejudice to [the defendants’] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over [them].” (Emphasis added.) The Court then determined that since there was no proof of either actual prejudice or intentional delay, the defendants had not “adequately demonstrated” a due process violation.

It is important to note that the Court expressly declined to decide “when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.” (Emphasis added). Therefore, it cannot be said that the Court accepted the government’s suggestion as to the extent of the defendants’ burden of proof, even though the Court apparently applied the suggested burden in rejecting defendant’s due process claims. Implicit in the Court’s statement, however, is a requirement that the defendant show at trial actual as distinguished from potential prejudice. Thus, the question remains unanswered whether the defendant must show, in addition to actual prejudice, intentionally improper police conduct before his motion to dismiss will be allowed. Undoubtedly, in most circumstances such a showing would be essential, for, as the Court stated: “Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant’s case should abort a criminal prosecution.” On the other hand, it should be noted that even if proof of both actual prejudice

14 Id. at 320.
15 Id. at 322-23.
16 Id. at 325. Indeed, it could be argued that the due process clause, as presently interpreted by the Court, would encompass the guarantee of a speedy trial absent the express constitutional provision.
17 Id. at 324.
18 Id. at 325.
19 Id. at 324.
20 Id. at 324-25.
and deliberate delay is a prerequisite for ordering dismissal of an indictment, the same quantum of proof may not be necessary to show a due process violation that might be remedied by appropriate orders short of dismissal. The Court's seeming adoption of the government's position,\(^{21}\) at least insofar as concerns a due process violation, is not inconsistent with the foregoing observation, for the opinion concludes with the statement that "[e]vents of the trial may demonstrate actual prejudice, but at the present time [defendants'] due process claims are speculative and premature."\(^{22}\)

After the Supreme Court's decision in *Marion*, the Supreme Judicial Court again considered the Sixth Amendment speedy trial provision in *Commonwealth v. Horan*,\(^{23}\) a case reported to the Court by the trial judge pursuant to G.L., c. 278, §30A.\(^{24}\) In *Horan*, indictments charging manslaughter were returned against four defendants in connection with the deaths of three persons in the collapse, 31 months earlier, of a bridge span under construction. Most of the 31-month delay resulted from a year and a half investigation by a board of inquiry and four months of inquest proceedings followed by a year's delay in the judge's filing of the inquest report. Before trial, the defendants moved to dismiss the indictments on the ground that the delay resulted in the loss of witnesses (three witnesses had died) and physical evidence.

Expressly following *Marion*, the Supreme Judicial Court ordered denial of the motion to dismiss for the reasons that the defendants had not shown intentional delay or harassment by the prosecutor and the trial judge had made no finding of actual prejudice.\(^{25}\) The Court rejected as premature the contention that the loss of witnesses was prejudicial. By adopting *Marion*, the Court impliedly overruled *Jones* to the extent that *Jones* held the Sixth Amendment speedy trial provision applicable to pre-arrest and pre-indictment delay. Presumably, claims of prejudicial pre-accusation delay after *Horan* will be considered against the background of *Marion* and the Fourteenth Amendment due process clause.

In *United States v. Daley*,\(^{26}\) the First Circuit rejected the defendant's contention that his motion to dismiss an indictment should have been granted on the ground that pre- and post-indictment delay deprived him of his constitutional right to a speedy trial. Defendant, the business agent of a local roofers' union and a trustee of the union's pension fund,

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\(^{21}\) See text at note 18, *supra*.

\(^{22}\) 404 U.S. at 326.


\(^{24}\) G.L., c. 278, §30A provides: "If, prior to the trial of a person in a criminal case in the superior court, a question of law arises which, in the opinion of the presiding justice, is so important or doubtful as to require the decision of the supreme judicial court thereon before trial, in the interest of justice, he may report the case so far as necessary to present the question of law arising therein; and thereupon the case shall be continued for trial to await the decision of the supreme judicial court."


\(^{26}\) 434 F.2d 505 (1st Cir. 1972).
allegedly embezzled monies from the fund on two occasions, once in May 1966 and again in December 1967. The F.B.I. commenced an investigation in August 1968 and indictment on two counts of embezzlement followed in August 1969. Pre-indictment delay, therefore, was over three years on Count I and on Count II almost two years. With regard to the pre-indictment delay the First Circuit, citing *Marion*, stated:

The primary guarantee against bringing overly stale criminal charges is the appropriate statute of limitations, although where pre-indictment delay causes actual prejudice and was intentionally employed by the government to gain a tactical advantage, there may be a violation of due process. . . . Since neither actual prejudice nor purposeful governmental delay has been shown, the pre-indictment time lapse is irrelevant.27

The First Circuit thus construed *Marion* to require proof of both actual prejudice and intentionally improper police conduct if a defendant is to prevail on a claim of due process violation.

Massachusetts provides in G.L., c. 277, §72A that an incarcerated defendant may make application for a speedy trial and "within six months after such application is received by the court, [the defendant shall] be brought into court for trial . . . unless the court shall otherwise order."28 The defendant in *Commonwealth v. Loftis*,29 pursuant to the statute, applied for a speedy trial on December 8, 1970. Because of several delays, some at the request of defense counsel, the trial did not commence within the statutory six month period and defendant moved to dismiss the indictments against him. The trial judge denied the motion and the defendant was tried in July 1971 and subsequently convicted. On appeal to the Supreme Judicial Court, the defendant claimed that although "[t]he statute does not explicitly provide that prosecution shall be barred if there is no trial within six months. . . . such a remedy must be implied or the right would be meaningless."30 The Court declined to adopt the defendant's interpretation, pointing out that the statute's concluding phrase, "unless the court shall otherwise order," would be rendered meaningless if the remedy of dismissal were mandatory. By

27 Id. at 508.
28 G.L., 277, §72A provides in pertinent part: "The commissioner of correction, the sheriff, master or keeper of a jail or house of correction . . . shall, upon learning that an untried indictment, information or complaint is pending in any court in the commonwealth against any prisoner serving a term of imprisonment in any correctional institution . . . which is under his supervision or control, notify such prisoner in writing thereof, stating its contents, including the court in which it is pending, and that such prisoner has the right to apply, . . . to such court for prompt trial or other disposition thereof. . . . "Any such prisoner shall, within six months after such application is received by the court, be brought into court for trial or other disposition of any such indictment information or complaint, unless the court shall otherwise order."
30 Id. at 722 n.5, 281 N.E.2d at 261 n.5.
tolling the statute for the periods of time that the delays were "for the benefit of the defendant," the Court found the trial to be timely within the meaning and intent of the statute, a practical, although somewhat mechanical, approach to statutory interpretation.

On the facts of Loftis, the defendant's claim of error would appear to be unsupportable since "a substantial part of the delay... was obviously caused by him and, in addition, was for his benefit." That is not to say, however, that the defendant's interpretation of the statute is wholly without merit or justification. Section 72A would seem to be a legislative implementation of the state and federal constitutional right to a speedy trial, analogous to Rule 48(b) of the Federal Rules of Criminal Procedure. Rule 48(b) provides for discretionary dismissal of a charge if, after arraignment, there has been "unnecessary delay" in the defendant's trial or formal accusation. Arguably, the concluding phrase of section 72A, "unless the court shall otherwise order," can be construed as authorizing the court to exercise its discretion either by ordering dismissal in appropriate cases (for example, where the prosecutor intentionally causes delay), or by denying a motion to dismiss in cases similar to Loftis. The statutory six month period merely represents a legislative determination of the period of time beyond which delay might be deemed "unnecessary." In addition, the statute, in two places, employs the phrase "trial or other disposition," clearly implying that dismissal of an indictment was not beyond the legislature's contemplation. So construed, section 72A strikes the appropriate balance between a defendant's right to a speedy trial and the Commonwealth's interest in the sound administration of criminal justice.

§7.5. Pretrial disclosure of alibi defense. In Gilday v. Commonwealth and a companion case, the defendants were charged with a widely publicized murder and armed robbery. Realizing the probability that the jurors would be sequestered during what would likely be a

31 Id. at 723, 281 N.E.2d at 261.
32 Id. at 722, 281 N.E.2d at 261.
33 Fed. R. Crim. P. 48(b) provides: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."
34 See Commonwealth v. McGrath, 348 Mass. 748, 752, 205 N.E.2d 710, 714 (1965) where the Supreme Judicial Court, in passing on a motion to dismiss commonwealth indictments against a federal prisoner, declared: "We hold that the right to a speedy trial contemplates that the Commonwealth will take reasonable action to prevent undue delay in bringing a defendant to trial, even though some expense may be involved in bringing him into the Commonwealth and returning him to Federal custody. The Commonwealth must, within a reasonable time, either secure the defendant's presence or dismiss the indictments."

2 Bond v. Commonwealth. The trial of a co-defendant, Bond, had previously been ordered severed.
lengthy trial, a superior court judge ordered, upon the Commonwealth's motion, that each defendant, prior to trial, disclose whether he would interpose either an insanity or alibi defense. If an alibi defense was contemplated, the judge's order further provided that the names, addresses and birth dates of intended alibi witnesses must be disclosed. The Supreme Judicial Court noted that review of the judge's order was outside the scope of statutory interlocutory appeals, but because the order, if erroneous, might be incurable even by a new trial, the Court allowed the appeal under its "general superintendence powers."

The Court observed that in *Williams v. Florida* the United States Supreme Court held that the Florida notice-of-alibi rule did not violate a defendant's Fifth and Fourteenth Amendment privilege against self-incrimination nor his right of due process. Although *Williams* would seem to be controlling on the issue in *Gilday*, the Supreme Judicial Court recognized that certain language in *Williams* necessitated a narrow interpretation of the decision and that the constitutional questions presented were rather ill-defined.

In *Williams*, the Supreme Court rejected the defendant's "suggestion" that the disclosure of an alibi defense and alibi witnesses violated due process. That rejection, however, seemed to be based on the "fairness" of the reciprocity provisions in the Florida rule, for the Court stated that "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with


4 The Florida alibi-notice rule, Fla. R. Crim. P. 1.200, provides in pertinent part: "Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial . . . file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and . . . the names and addresses of the witnesses by whom he proposes to establish such alibi. No less than five days after receipt of defendant's witness list . . . the prosecuting attorney shall file and serve upon the defendant the names and addresses . . . of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself . . . If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. . . . For good cause shown the court may waive the requirements of this rule."

5 399 U.S. at 83.

6 Id. at 81-82.
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reciprocal duties requiring state disclosure to the defendant."7 The Court noted that at least 15 other states had similar notice-of-alibi rules, then thoughtfully added:

We do not, of course, decide that each of [the cited state] alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State. (Emphasis added).8 Notwithstanding the inapplicability of the privilege against self-incrimination to pre-trial alibi discovery, the Court clearly implied that the absence of reciprocal discovery provisions in an alibi-notice statute or rule could subject it to due process scrutiny.

In view of the foregoing constitutional uncertainties, the Supreme Judicial Court prudently declined to rule on the constitutional questions presented in Gilday. Instead, the Court vacated so much of the judge's order as required alibi defense and witness disclosure and stated that "as long as the law remains uncertain, the defendants should not be ordered to identify alibi witnesses in advance of trial, at least until appropriate discovery procedures can be established."9

STUDENT COMMENT

§7.6. Constitutional right of indigent accused of felony to free typewritten transcript of probable cause hearing: Commonwealth v. Britt.1 Two questions were before the Supreme Judicial Court in Commonwealth v. Britt, on interlocutory report from the Superior Court of Suffolk County. The first was whether the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and Articles XI and XII of the Declaration of Rights of the Constitution of Massachusetts require the Commonwealth to provide an indigent defendant charged with a felony with a free typewritten transcript of the proceedings at his probable cause hearing2 held before the district court. The second was whether, in the event that such a defendant had been denied such a transcript, the Superior Court might order the district court to conduct a de novo probable cause hearing, this time providing a stenographer and a free transcript of the proceedings.3

7 Id. at 81.
8 Id. at 82 n.11.
9 1971 Mass. Adv. Sh. at 1351, 274 N.E.2d at 592. The Court approved without discussion that part of the order requiring disclosure of an insanity defense, if any.
2 For a discussion relating to the place occupied by the probable cause hearing in Massachusetts criminal procedures, see "Necessity: Whether a transcript of a probable cause hearing in Massachusetts is needed for an effective defense or appeal" in text at notes 36-53, infra.
The questions arose in five companion cases involving two defendants, Samuel Britt and Joel Taylor. Both were arraigned on felony charges, were found indigent, and received appointed counsel. At the inception of his probable cause hearing defendant Taylor moved for a transcript of the proceedings. The motion was denied. He moved that the testimony of the witnesses be reduced to writing and signed. This motion was denied. He then moved for permission to record the proceedings electronically, presumably with a tape recorder and at his own expense. This motion was also denied. At the inception of his probable cause hearing, defendant Britt moved "to have the proceedings transcribed at the expense of the Commonwealth or Suffolk County." This motion was denied.

Both hearings proceeded, probable cause was found to bind over both defendants to the grand jury, and indictments charging the commission of felonies issued in each case. Pending determination by the Supreme Judicial Court of the issues presented by the denial of these motions, the Superior Court withheld consideration of motions by both defendants to dismiss the indictments.

Since the record failed to show that either defendant had a stenographer present in the courtroom or that indigence had actually prevented either one from hiring a stenographer and buying a transcript, the Court held that no question as to denial of equal protection was presented.

Although this holding effectively disposed of the appeals, the Court proceeded to analyze the two questions reported and concluded that, even if the questions were properly before it, an indigent defendant charged with felony in a Massachusetts district court has no right to a free transcript of his probable cause hearing. G.L., c. 22 §91B provides, in relevant part: "At any hearing or proceeding in connection with a criminal case . . . at which a court stenographer is not present, the defendant may have the proceedings taken by a stenographer provided at his own expense. . . ." Since the private stenographer, and not the Commonwealth, is the purveyor of the transcript, the Court concluded that the statute does not deny equal protection of the laws.

Justice Reardon, believing that the constitutional questions were properly before the Court, dissented. He would have answered both questions in the affirmative and held that the Commonwealth is required to provide free transcripts in such cases. He reasoned that the end result is the same, regardless of whether the State grants the right to a transcript by allowing the defendant to buy it from a court directly, or by allowing

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4 G.L., c. 276, §§21 and 40 provide, in substance, that testimony taken in the district courts be reduced to writing and signed if the judge considers it necessary.
6 Id. at 1444, 285 N.E.2d at 781-82.
7 Id. at 1446, 285 N.E.2d at 783.
8 Id. at 1448-49, 285 N.E.2d at 784-85.
9 Id. at 1448, 285 N.E.2d at 784.
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the defendant to hire a private stenographer. The state, by either method, grants an important right whose exercise depends on the ability to pay a fee. In either case a defendant may be deprived of a needed transcript simply because he is indigent. 10

This casenote will analyze the Britt opinion in view of the major United States Supreme Court decisions concerning the indigent's right to free transcripts. Brief mention is also made of the recent and proposed changes in the Massachusetts district court procedures affecting recordation and transcription of proceedings therein.

In Griffin v. Illinois, 11 the watershed case in the area of the indigent's right to free transcripts, Illinois had granted the right of direct appeal from criminal convictions to all defendants. A mandatory record of the trial, consisting of the pleas, orders and other papers of the trial was available free of charge to all defendants, but this record did not include a transcript of the testimony at trial. 12 To procure a certified transcript of the trial, defendant-appellant was required to pay a fee except in cases of capital convictions where the transcript was free. Justice Black, announcing a five to four decision and writing for four of the majority judges, observed that the state is not required to grant appellate review, but it may not discriminate on the basis of poverty when it does grant such a review. A requirement that the defendant must purchase a transcript in order to perfect his appeal was held to deny due process and equal protection:

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts. 13

In subsequent cases the Court has held that states may not deny a free transcript for appeal because the public defender or the trial judge finds the appeal to be frivolous, 14 because the appeal is from a denial of habeas corpus relief and not a direct appeal from trial, 15 or because the appeal is from a conviction for a non-felony involving only a fine as a penalty. 16 In all such cases the defendant has a right to a record which is sufficient to allow proper presentation of his claims to the appellate court, notwithstanding his ability to pay. In any case where the state contends that an alternative for this purpose exists, such as a bystander's

10 Id. at 1449-51, 285 N.E.2d at 785.
12 Id. at 13 n.2.
13 Id. at 19.
bill of exceptions, the burden of proving its adequacy lies with the state.

Only two Supreme Court cases have dealt with an indigent defendant's right to a free transcript for uses other than appeal. One involved the right to a transcript of a preliminary hearing sought for use at trial, and the other involved the right to a transcript of a prior mistrial for use at a subsequent trial. In the first case, Roberts v. LaVallee, a statute provided that a transcript of a preliminary hearing would be furnished by the state on payment of a fee. The defendant Roberts was denied a transcript of the hearing because he was unable to pay the fee. The Supreme Court reversed his subsequent conviction, holding per curiam that "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." The defendant's right to a free transcript was affected neither by his failure to illustrate how this particular transcript would have benefited him in this particular case, nor by the fact that his counsel at all stages was the same.

In the second case, Britt v. North Carolina, an indigent defendant's request for a free transcript of a mistrial was denied, and defendant was convicted at a second trial. The Supreme Court affirmed Britt's conviction on the ground that the trial judge had denied the defendant's request for a free transcript in view of the wholly adequate alternatives that Britt had. The Court articulated and applied a general constitutional standard in free transcript cases:

*Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior

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17 A bystander's bill of exceptions is a report of the proceedings prepared from someone's memory in condensed and narrative form and certified by the trial judge. See *Griffin v. Illinois*, 351 U.S. 12, 14 n.4; *Draper v. Washington*, 372 U.S. 487, 495.


19 Perhaps three. In *Gardner v. California*, 393 U.S. 367 (1969), an indigent prisoner denied habeas corpus relief was held entitled to a free transcript for use in a de novo application for habeas corpus relief even though state procedure required no assignment of errors, only a brief statement of the proceedings below. Justices Harlan and Stewart dissented.


23 Id. at 42.

24 These factors were stressed by Justice Harlan in his dissent. Id. at 43-44.

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proceedings when that transcript is needed for an effective defense or appeal.26 (Emphasis added).

Thus, if a defendant requests a free transcript, his right to have it is established if the transcript is both available and necessary in these senses. A determination that the transcript is necessary depends on two criteria.

It must be valuable, taking into account and evaluating the various uses it may serve in the context in which it is sought, and there must be no adequate alternative within defendant's means.27

With regard to value the Supreme Court emphasized that defendant need not show in each case what particular uses a transcript would serve, or how the transcript he sought was tailored to the needs of his own case.28 Certain categories or types of transcripts can be safely assumed to be valuable. For example, a transcript of a prior mistrial would be valuable as a discovery device in preparation for trial and as a tool for impeachment of witnesses during the trial. The Court has indicated that these two purposes alone would make a transcript sufficiently valuable to meet this test.29

The second element of the necessity test is the absence of an alternative. If the state can show that an adequate alternative is available within the defendant's means, then the transcript is not considered necessary.30

In Britt v. North Carolina the trial judge, the court reporter, and counsel for the defendant at the first trial were all present in the same capacities at the second trial. The second trial followed the mistrial by one month. The Supreme Court considered three alternatives to a transcript that were available to defendant, and found one of them adequate. Counsel's memory and his notes of the mistrial were held not to be adequate.31 However the court reporter at the mistrial also reported at the

26 Id. at 227.
27 Id.
28 In United States ex. rel. Cadogan v. LaVallee, 428 F.2d 165 (2d Cir. 1970), the indigent defendant was denied a free transcript of a suppression of evidence hearing. The court affirmed the denial since it appeared that the particular transcript in question would be useless to the defendant. The dicta in Britt v. North Carolina, 404 U.S. 226 (1971), throw serious doubt on the validity of a denial grounded in a failure to specify particularized need.
29 404 U.S. at 227-28. See also Draper v. Washington, 372 U.S. 487 (1963), holding that alternate methods of reporting, such as the trial judge's notes, may be permissible when they serve the purpose for which the transcript is sought in substantial equivalence. "[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review." Id. at 496.
30 Counsel's memory or his exhaustive notes had been held adequate alternatives in some Court of Appeals decisions. See Little v. Turner, 402 F.2d 495, 498 (10th Cir. 1968); Forsberg v. United States, 351 F.2d 242, 248 (9th Cir. 1965); Peterson v. United States, 351 F.2d 606, 608 n.3 (9th Cir. 1965). See also Goldberg, J., in Hardy v. United States, 375 U.S. 277, 288-89 (1964). However, the fact situation in United States ex. rel. Wilson v. McMann, 408 F.2d 896
second trial, and since he was a good friend of all the lawyers in this casual, rural North Carolina town, defendant could have approached him between trials and he would have read back the proceedings on request. The Court held that this was an adequate alternative available to defendant at no cost, rendering a typewritten transcript "unnecessary." The conviction was therefore affirmed.32

Justice Douglas, dissenting, argued that the lower court's primary reason for denying defendant Britt's request for a transcript was not the existence of an adequate alternative in the form of the gracious and friendly reporter, but rather Britt's failure to show how and in what particular way the transcript of the mistrial was valuable to him. Pointing out that such a transcript serves as counsel's roadmap of the factual and legal terrain that must be covered in making a defense—33—an aspect of a transcript never susceptible of expression in terms of particularized value or usefulness—Justice Douglas rejected the adequacy of calling the court reporter to testify from his notes. This so-called alternative affords no opportunity for trial preparation, gives contradicted witnesses a chance to mend their own testimony, is clumsy and dilatory, may exhaust the patience of judges and jurors as the notes are searched, and may prejudice defendant if counsel is mistaken in thinking a witness had made a prior inconsistent statement.34 As for counsel's opportunity to have the

(2d Cir. 1969), illustrates the untoward consequences that may flow from denial of a request for a transcript of a prior mistrial based either upon counsel’s memory ("We think," the court said, "constitutional rights should not be implemented in such a niggardly fashion." Id. at 897) or upon limited access to the earlier court reporter at the second trial ("This is not only a case of too little and too late; it is also a breeder of delay and confusion." Id.). Defendant's attorney had thought, in the course of examining a prosecution witness, that he remembered a contradictory statement by that witness at the earlier mistrial. The trial was adjourned and the reporter located. He took the stand but could not find the supposed contradiction in his notes of the mistrial testimony. Both the prosecution and the trial judge pointed out the attorney's mistake to the jury. In reversing, the court said, "This is a perfect illustration of not providing an indigent defendant in a criminal case with the 'instruments needed to vindicate (his) legal rights.' What happened in this case also is an indication that the distinction between cases where the defendant's lawyer was the same on both trials and those where he was different . . . is not based on sound legal principle." Id. at 899. The dicta in Britt v. North Carolina seems to endorse this latter approach.

33 In Gardner v. California, 393 U.S. 367 (1969), Justice Douglas, for the court, had emphasized this aspect of the value of a transcript of a prior unsuccessful petition for habeas corpus sought for use in a de novo application: "Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the unusual and exceptional case." Id. at 369. Dissenting Justice Harlan pointed out that under California procedure all the defendant need do was inform the higher court of the fact that earlier applications for habeas corpus had been made and that the higher court could request a transcript from the court below of its own initiative.
34 See United States ex. rel Wilson v. McMann, 408 F.2d 896 (2d Cir. 1969).
friendly court reporter read the mistrial notes to him between trials in this peculiar situation, Justice Douglas felt that the determination of constitutional issues should not turn on such an anomaly.\textsuperscript{35}

An analysis of the Supreme Judicial Court's decision in \textit{Commonwealth v. Britt} in terms of the constitutional test set out in the above-mentioned Supreme Court decisions must focus on two basic issues: necessity and availability.

\textit{Necessity: Whether a transcript of a probable cause hearing in Massachusetts is needed for an effective defense or appeal.} The Massachusetts district courts have limited subject matter jurisdiction in criminal proceedings. By statute they may not finally adjudicate criminal prosecutions for felonies punishable by more than five years in state prison, save for a few exceptions not relevant to the principal case.\textsuperscript{36} However the district courts do have jurisdiction to conduct preliminary hearings in cases which are not within their final jurisdiction. G.L., c. 218, §30 provides in relevant part:

\[\text{[The district courts] shall bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction. ...}\]

Such hearings to determine appearance of guilt have come to be termed probable cause hearings and it was the transcripts of such hearings that were denied to defendants Britt and Taylor.

Error at the probable cause hearing, in the admission of evidence for example, is not a ground for reversing a subsequent conviction,\textsuperscript{38} because the district court does not determine guilt. All of the defendant's rights


\textsuperscript{36} The subject matter jurisdiction of the district courts includes: (1) Concurrent original jurisdiction with the Superior Courts over all misdemeanors except libel; (2) Original jurisdiction over all local ordinances and by-laws; (3) Concurrent original jurisdiction with Superior Court over all felonies punishable by imprisonment of up to five years in the state prison; and (4) Concurrent original jurisdiction with the Superior Courts over a few felonies punishable by sentence of five years or greater. G.L., c. 218, §26; c. 266, §§17-19, 28. However there are limitations on the jurisdiction of the district courts within the above areas: (1) The district court may not send a defendant to the state prison. G.L., c. 218, §27. (2) The houses of correction, where the district courts may send defendants, may hold prisoners no longer than two and one half years. G.L., c. 279, §23. Hence this combination of limitations results in a maximum allowable sentence in the district courts for any offense of two and one half years.

\textsuperscript{37} When the crime is one over which the district courts do have final jurisdiction, they have an option. They may hear and determine the charge. Under the balance of this section they also "may so commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction." G.L., c. 218, §30.

are preserved at the trial in superior court, and he may freely assert them at that time. Nor does a finding of no probable cause bar further prosecution.\textsuperscript{39} Obviously, a transcript of the proceedings of a probable cause hearing is not needed for an effective appeal, as the Supreme Judicial Court pointed out,\textsuperscript{40} but it is needed for an effective defense. It is valuable, considering the uses to which it may be put, and there is no adequate alternative to the transcript.

A probable cause transcript is valuable for several reasons. Firstly, and most importantly, the transcript furnishes counsel with a record of testimony against his client that he may meticulously search for clues, nuances of testimony and leads, gaining after each careful reading a clearer picture of the case against him. This is a major source of discovery regarding the prosecution's case. Justice Douglas' remarks concerning the mistrial transcript in \textit{Britt v. North Carolina} are equally applicable here:

\begin{quote}
[W]hile counsel is studying mistrial minutes, the precise words used by a witness might trigger mental process resulting in legitimate defense strategies which otherwise might be overlooked. Such spontaneity can hardly be forecast and articulated in advance in terms of special or particularized need.\textsuperscript{41}
\end{quote}

Secondly, the record of testimony can be used to impeach and contradict prosecution witnesses if they are called at trial in the superior court. The practice of hiring a stenographer to record witnesses' testimony at the probable cause hearing is recommended by legal commentators,\textsuperscript{42} and by the New England Law Institute. The written materials of the Institute's 1970 seminar on criminal practice suggest:

\begin{quote}
[The use of a stenographer] helps defense counsel in preparation and fairly commits the government witnesses to a given position. If their testimony is favorable at the hearing, they are less likely to change their testimony at the ultimate trial in Superior Court if they know their testimony was taken down by the stenographer. If they do change, of course, you can use the transcript later for impeachment purposes.\textsuperscript{43}
\end{quote}

\textsuperscript{40} 1972 Mass. Adv. Sh. at 1447, 285 N.E.2d at 783.
\textsuperscript{41} 404 U.S. at 234-35.
\textsuperscript{42} 30 K. SMITH, MASSACHUSETTS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE §689 (1970): "It is of great importance for defense counsel to preserve the testimony of the witness at the probable cause hearing for the trial in Superior Court. The best method of recording the testimony is for counsel to hire a stenographer to take the testimony." The author cites the function of the stenographer as a witness to prior inconsistent statements as an "important role."
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Without going into detail the Court in Commonwealth v. Britt conceded the value of a transcript of a probable cause hearing for these two purposes:

[T]he probable cause hearing is a "critical stage" of the criminal process, partly because of the incidental opportunity for discovery of the Commonwealth's case and for preparation to impeach the Commonwealth's witnesses if their testimony at trial is inconsistent with their testimony at the preliminary hearing. . . . A reliable record of what is discovered is of course an important aspect of that opportunity.44

Thirdly, the transcript may be introduced as direct evidence of the truth of its contents if the witness is unavailable at the superior court trial.45 If no stenographer is present then anyone present at the hearing may testify as to the unavailable witness's testimony there. The pitfalls of being caught without a substantially verbatim account of the unavailable witness's testimony, whether the witness is favorable or hostile to the defendant's interest are obvious. Fourthly, since the district court must hold the probable cause hearing as soon as possible after the filing of a charge46 it is likely that the testimony will be relatively fresh and untainted by the effects of time and cluttered memory. In this respect a transcript of a probable cause hearing is more valuable than that of a prior mistrial which, according to Britt v. North Carolina, must not be denied. Fifthly, since indigents are represented by appointed counsel in Massachusetts the defense attorney at the trial may not have been present at the probable cause hearing.47 Therefore the defendant's attorney in the superior court may be unable to rely on his memory of the district court proceedings and will have no report of them.

There is no adequate alternative to a transcript of the probable cause hearing in Massachusetts. Generally no stenographers are present at the district court hearing,48 and the defense counsel therefore have no one to consult, as they did in Britt v. North Carolina, for an accurate account of the hearing.

Defendant Taylor at his probable cause hearing moved for permission

46 G.L., c. 276, §38.
48 G.L., c. 276, §40 empowers the district court judge to order the testimony to be taken down and signed "if he considers it necessary." G.L., c. 221, §91B authorizes the defendant at any hearing in connection with a criminal case to hire a stenographer. Hence in any case where the judge does not consider it necessary to reduce the testimony to writing and where the defendant is unable to hire a stenographer there will be no recording of testimony. In practice, considering the economies involved, judges are seldom likely to order recordation of testimony.
to record the proceedings electronically.\textsuperscript{49} This motion was denied. The Supreme Judicial Court said that such a denial would be abuse of discretion\textsuperscript{50} in the absence of a valid reason, but since no question regarding the denial of this motion was before it the Court did not pass on the question. If a motion to record electronically could be denied for a valid reason (the Court gave no indication of what would have constituted a valid reason), this alternative would not be adequate because it would not be available as of right.\textsuperscript{51} Even if it were a matter of right, there is some doubt whether this alternative is adequate, given the technical limitations of inaudible recordation and the clumsiness of locating portions for later playback at trial.\textsuperscript{52}

Acknowledging the value of the probable cause hearing transcript, the Court concluded: "If a court appointed stenographer had made such a record there would be no question that it should now be made available to an indigent defendant without cost."\textsuperscript{53} Thus, the denial of free transcripts did not rest on a determination that the transcripts were not "necessary." Rather, the Court concluded that they were not "available" in the sense used by the Supreme Court in Britt v. North Carolina.

\textbf{Availability: Whether a transcript of a probable cause hearing in Massachusetts is available to defendants for a price generally.} Court-employed stenographers generally do not attend the probable cause proceedings in the district court.\textsuperscript{54} The Massachusetts statute merely permits the defendant to bring a stenographer at his own expense.\textsuperscript{55} In Roberts v. LaVallee,\textsuperscript{56} a court-employed stenographer recorded the proceedings as a matter of course\textsuperscript{57} and defendants could obtain transcripts but only for a fee.\textsuperscript{58} The Supreme Judicial Court in Britt further emphasized that in Roberts the state had committed itself to selling transcripts at a state imposed price by appropriating funds to employ stenographers. Massa-

\begin{itemize}
  \item Id. at 1449, 285 N.E.2d at 784.
  \item It has been made a matter of right since the decision in Commonwealth v. Britt. See Addendum infra.
  \item See note 48, supra.
  \item G.L., c. 221, §91B.
  \item 389 U.S. 40 (1967).
  \item N.Y. Code of Cr. Proc. §204 (McKinney 1971) provided: "The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate or under his direction. . . ." §204-a empowered the magistrate to hire a stenographer to take the testimony if there were not one already employed pursuant to law.
  \item N.Y. Code of Cr. Proc. §206 (McKinney 1971) provided that the magistrate "must, on payment of his fees at the rate of five cents for every hundred words, and within two days after demand, furnish to the defendant, or his counsel, a copy" of the testimony so taken.
\end{itemize}
Chussetts had not so committed itself, but merely allowed defendants to go out and hire stenographers. The Court said, "[W]here no such commitment has been made, all defendants are treated alike and there is no denial of equal protection." This is the Court's concept of availability; only when the state is the purveyor of the transcript can transcripts be said to be available in this sense.

This somewhat narrow view of availability is not warranted by a common sense reading of Britt v. North Carolina: "[T]he State must, as a matter of equal protection, provide indigent defendants with the basic tools of an adequate defense when those tools are available for a price to other prisoners." (Emphasis added). The Supreme Court makes no distinction between a situation where tools of defense are actively made available by the concerned state and a situation where those tools simply happen to be available in the general marketplace.

Comparing the New York statute in Roberts and the Massachusetts statute before the Court in Commonwealth v. Britt, dissenting Justice Reardon pointed out that both statutes grant a right by which a defendant may procure a transcript at a price, that this right is an important right, and that under both statutes a defendant could be deprived of a needed transcript by his indigency. "Under both statutes the result is the same." For Justice Reardon the test of availability is the result and not the mechanism. If in the end, by one method or another, defendants with means can purchase transcripts and indigent defendants cannot, it should not matter that the seller is the state.

There exists prior Massachusetts authority for Justice Reardon's concept of availability as "availability at large" contrary to the majority's concept of availability as "availability from the state." In Commonwealth v. Possehl cited by the Court in Commonwealth v. Britt, the Court held that an indigent defendant in a paternity suit had a right to free blood tests, to be performed by a doctor or other qualified person, the results of which might exonerate him. A statute provided that in any proceeding to determine paternity the court shall on motion order the mother, the child, and the defendant to submit to tests administered by outside medical personnel to determine whether defendant could be excluded as the father. The Court termed the right to have the results of these tests "an important right in making a defense against the charge," and said, "Its cost cannot be allowed to deprive defendant of this right." The Court in Possehl cited Roberts as authority for its decision. The Court in Possehl made no reference to the fact that the

60 404 U.S. 226, 227.
64 G.L., c. 273, §12A.
doctor, although designated by the court, was like the stenographer hired by the defendant in a probable cause hearing, not an employee of the court. The Commonwealth had not committed itself to the furnishing of blood-grouping test results by hiring physicians and selling the results to defendants at a fee. Yet this did not prevent the Court from holding that an indigent defendant had a right to such test results free of charge. It seems contrary to the principles set out in Possehl for the Court to deny defendants in Britt transcripts on the sole ground that the Commonwealth similarly had not committed itself to the regular production of transcripts.

Further doubt is cast on the validity of the Court's denial of free transcripts in Britt by the position the Supreme Court has taken concerning indigents' right to counsel on appeal. While Gideon v. Wainwright established the right to counsel at trial as a matter of due process, the Court in Douglas v. California, decided the same day as Gideon, announced the right of an indigent to counsel on appeal as a matter of equal protection. Mr. Justice Douglas, for the Court, reasoned that if California affords everyone the absolute right to appeal a criminal conviction and if the rich are able to retain counsel for representation on appeal, then the state must also provide counsel for indigents at the state's expense. He rejected Justice Harlan's dissenting view that the equal protection clause did not apply because the cost of hiring counsel is a uniform exaction of general applicability falling more harshly upon some than others who wish to hire lawyers, and concluded that a system which results in the enjoyment of counsel on appeal by the rich but not the poor simply because of their poverty is precisely the kind of invidious discrimination condemned in Griffin. Indigents' rights are not confined to those tools of his defense or appeal that are supplied by the state, such as the trial transcript in Griffin. They include a right to tools which happen to be available in the general marketplace instead, such as the assistance of counsel in Douglas. "Availability" as a concept used to describe any of

66 The statute in Possehl differed from the statute in Commonwealth v. Britt in that the court was empowered under the former to designate the medical personnel performing the service, whereas in Commonwealth v. Britt the statute allowed the defendant to hire a stenographer of his own choosing. It would seem that this difference in the statutes arises from the state's interest that the person who will perform medical tests, the result of which may be conclusive of defendant's innocence, should be competent in his profession while the state does not have as compelling an interest in the competency of one who will be taking notes for the defendant's use. The defendant will ensure the competency of the stenographer out of his own self interest in procuring accurate notes and a reliable record. Other than this arguably immaterial distinction, the statute in Possehl, allowing for the hiring of a doctor, and the statute in Commonwealth v. Britt, allowing for the hiring of a stenographer, are parallel to one another.

69 Id. at 361-63.
70 Id. at 355.
these legal tools describes not only those tools which the state "makes available" through some commitment. Rather it is a broader concept, embracing any tools of which a defendant with means may avail himself as a member of the public. So defined, the concept of availability would seem to include transcripts of a probable cause hearing in Massachusetts prepared by a stenographer privately retained.

Addendum: Recent and proposed changes in procedure regarding recording and transcription of testimony in the district courts. In Commonwealth v. Britt, one defendant moved to record the probable cause hearing electronically, but the motion was denied. At that time, there was no rule governing electronic recording in criminal cases. Rule 46 of the District Courts of Massachusetts made the allowance of such motions discretionary with the judge. The Supreme Judicial Court had no occasion to pass upon this denial since that question was not reported in the appeal. Nevertheless, the Court clearly indicated that such a denial would ordinarily be an abuse of discretion.

Since the decision in Britt, Rule 46 has been completely revised. The new rule became effective on June 1, 1972, and it substantially changes this procedure. It provides, in part, that:

(1) A party to a civil or criminal case shall be permitted to record by electronic means any oral proceeding relating thereto which takes place in court, provided that, except in the case of arraignments, said party shall have notified all opposing parties, in writing, of his intention to record the proceeding at least forty-eight hours in advance of the proceeding.

The management and quality of the recording device are the responsibility of counsel making the recording, but the court is directed to cooperate with counsel and to inform all speakers to speak loudly and clearly. The Rule further provides for turning the device on and off, recording part of a proceeding, for the custody of the tape and its erasure, for access of opposing counsel and the court to the tape, for transcription, for implementation of the Rule in the case of an unrepresented party, and for special proceedings involving considerations of confidentiality.

On the same day that the Court decided Commonwealth v. Britt, it ordered the Chief Justices of the District Courts and Boston Municipal

72 Id. at 1449, 285 N.E.2d at 784.
73 Rules of the District Courts of Massachusetts, Rule 46 (2).
74 Id., Rule 46 (3).
75 Id., Rule 46 (4).
76 Id., Rule 46 (5).
77 Id., Rule 46 (6).
78 Id., Rule 46 (7).
79 Id., Rule 46 (9).
80 Id., Rule 46 (10).
Court to supply it with all facts material to the consideration of rules to require the recording of all the district court proceedings.\textsuperscript{81} The Chief Justice of the district courts had already established a special committee to study a comprehensive system of recordation and transcription.\textsuperscript{82} Aided by a grant from the Governor’s Committee on Law Enforcement and Criminal Justice, the special committee has begun to design the specifications for a statewide system that will preserve testimony in the district courts. The revised and amended Rule 46, supra, is an interim measure to clarify the right of a defendant to make a recording at his own expense even before such a statewide system can be implemented.\textsuperscript{83}

Once such a system is implemented it would seem that indigents charged with felonies will be able to procure transcripts of their probable cause hearings free of charge, for then, under the \textit{Commonwealth v. Britt} decision, the Commonwealth will have committed itself to record the proceedings and make them available at a price. It is contemplated that provision may even be made for supplying the indigent prisoner with such a transcript by statute or court rule.\textsuperscript{84} Thus while the Court’s ground for denial of the constitutionally based claim, viz., “unavailability,” is certainly vulnerable in light of United States Supreme Court decisions as well as Massachusetts precedent, the question may become moot in the near future.

\textbf{JOHN M. CONNOLLY}

\section*{Student Comment}

\textbf{§7.7. Grand jury minutes: Disclosure: “Particularized Need” rule.} Proposals for expanded discovery in criminal cases have caused much debate.\textsuperscript{1} The experience of California, which has perhaps the most liberal criminal discovery in the United States, seems to indicate that the dire predictions made by opponents of liberalized discovery will not necessarily be realized.\textsuperscript{2} This comment will discuss one aspect of the question of the proper scope of criminal discovery, namely the need for liberalization of the criminal discovery rules which govern pre-trial and at-trial disclosure of testimony given before a grand jury. Consideration will be given first to the common law rationale for maintaining

\begin{itemize}
  \item \textsuperscript{81} Order, Supreme Judicial Court of the Commonwealth of Massachusetts, July 14, 1972.
  \item \textsuperscript{82} Summary of Progress in the Office of the District Courts Toward Adopting a Comprehensive Public System of Recordation and Transcription 2, (Sept. 12, 1972). Copies of this report and further information on progress of the committee can be obtained from Office of the Chief Justice, District Courts of Massachusetts, Court House, West Newton, Mass. 02165.
  \item \textsuperscript{83} Id. at 3.
  \item \textsuperscript{84} Id. at 9.
  \item \textsuperscript{1} Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960).
  \item \textsuperscript{2} Fletcher, Pre-Trial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293 (1960).
\end{itemize}
secrecy of grand jury proceedings, and then to the evolution of the "particularized need" rule in both federal and Massachusetts courts.

Common Law Rationale for Grand Jury Secrecy. In England, at common law, the proceedings of the grand jury were entirely secret. Secrecy of proceedings was regarded as a significant advance for individual liberty since it prevented intimidation of the grand jurors by the sovereign. In the United States the four reasons generally given for grand jury secrecy are (1) that the grand jurors should be free from apprehension that their opinions or votes will be disclosed, (2) that witnesses should be free from apprehension that their testimony will be disclosed, (3) that a guilty accused should not be given notice of the grand jury proceedings which would either aid his flight or permit him to tamper with witnesses, and (4) that an innocent accused, against whom no indictment was returned, should be spared the embarrassment of disclosure that he was the subject of a grand jury investigation.

The rule of grand jury secrecy has been criticized as unnecessary once an indictment has been returned and the accused has been taken into custody. At that point, it is argued, the reasons given for secrecy no longer apply and continued secrecy unduly hampers the defendant. This argument is, at least in part, persuasive. Only the testimony presented by the witnesses before the grand jury may be revealed by a court's decision to disclose grand jury minutes; the deliberations and votes of the grand jurors still enjoy the absolute privilege against disclosure accorded petit jury proceedings. Further, if an indictment has been returned and the accused is in custody, disclosure of a witness's testimony before the grand jury could neither aid the accused in fleeing prosecution, nor embarrass the accused in the way that disclosure might embarrass a person who was investigated but not indicted.

Nevertheless, the proponents of grand jury secrecy continue to make two arguments with particular force. The first is that secrecy promotes uninhibited testimony by witnesses before grand juries, a point of great importance to a prosecutor. In order to promote uninhibited testimony, witnesses may be offered the promise that their testimony before the grand jury will be kept secret. However, these same witnesses are generally aware that, if an indictment is returned, they will be called to testify again at

6 Calkins, note 4, supra, at 460; Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668, 669 (1962); Pittsburgh Plate Glass Co. v. United States, note 5, supra, at 407 (dissent criticizes rule as exalting secrecy for the sake of secrecy).
7 8 WIGMORE, EVIDENCE §2361 at 735-36 (McNaughton rev. ed. 1961).
If the witness fears reprisal as a result of his testimony, pre-trial disclosure of the grand jury minutes at most moves up the date when the vulnerability to reprisal begins. If disclosure is withheld until the trial is underway, disclosure creates no additional risk. If the witness makes the same statements at trial as he did before the grand jury, disclosure of the prior grand jury testimony, at trial, would not create any additional risk of reprisal. On the other hand if the testimony at trial is inconsistent with testimony given before the grand jury, fundamental fairness seems to require that the defendant be able to point out this inconsistency.\(^8\)

Continuing grand jury secrecy to promote uninhibited testimony should, arguably, be permitted only when a promise of secrecy has been used to induce the testimony and, even then, secrecy should be maintained only until the witness testifies at trial. When a prosecutor obtains testimony by promising secrecy, he might properly be allowed to withhold the grand jury testimony until after direct examination of the witness, provided that he files with the court an affidavit stating that the testimony was obtained on the promise of secrecy and there is reason to believe that disclosure prior to trial would create a substantial threat of reprisal against the witness.

The second argument for grand jury secrecy which remains relevant after return of an indictment and capture of the accused is the prevention of witness tampering. A defendant could use pre-trial disclosure of grand jury testimony to tamper with a witness in either of two ways: the defendant could attempt to persuade (by threat or bribe) a witness to change his testimony when testifying at trial; or, knowing the testimony which the prosecution witnesses gave before the grand jury, and would likely repeat at trial, the defendant could procure other witnesses to offer perjured testimony contradicting the prosecution's case. If disclosure is withheld until after the witness gives his direct testimony at trial, the risks of pre-trial witness tampering are eliminated since at-trial disclosure would not afford the defendant an increased opportunity to influence the witness's direct testimony. Similarly, since the prosecution must present its case-in-chief before the defendant ever calls a witness, disclosure of the grand jury testimony after each witness's direct examination would not offer the defendant any additional aid in procuring false testimony. As in the case of promoting uninhibited testimony, this argument for maintaining the secrecy of grand jury testimony is valid only until the witness testifies at trial.

As the preceding discussion indicates, the validity of the arguments asserted for refusing to disclose testimony given before a grand jury depends to a great extent on whether disclosure was requested in a pre-trial or an at-trial motion. The arguments given for refusal to disclose are not sufficient to justify denial of an at-trial motion to disclose made after the witness has given his testimony for the prosecution. However, the

\(^8\) Id. §2362 at 736-37.
arguments for secrecy might be sufficient to justify denial of a pre-trial motion to disclose if the court is persuaded that pre-trial disclosure would endanger the witness or aid the defendant either in procuring perjured testimony to contradict the witness or in tampering with the witness.

Evolution of the Particularized Need Rule. With a policy against disclosure as a starting point, both the federal and Massachusetts courts have used the particularized need rule to balance the prosecution's interest in maintaining the secrecy of the grand jury proceedings against the defendant's need for disclosure. If the only valid reasons for maintaining secrecy once an indictment has been returned and the defendant is in custody are the danger of reprisal against the witness and the danger of either tampering with the witness or procuring perjured testimony, then, at least in theory, the magnitude of the prosecution's interest in maintaining secrecy should be measured by the likelihood that these dangers might occur. Similarly, the magnitude of the defendant's need for disclosure should be measured by his ability to obtain the information contained in the grand jury testimony from other sources. For example, in Massachusetts, voluntary disclosures by the prosecutor and discretionary orders by the trial judge constitute a large part of the discovery in many criminal cases. Thus, in many cases, discovery depends, in part, on the trust and confidence which these officials have in the defense counsel.9 Two of the most valuable discovery procedures, the show cause hearing prior to the issuance of a complaint10 and the probable cause hearing prior to binding the defendant over to superior court,11 are unavailable to the defendant when his case is presented directly to the grand jury. The defendant has no right to a bill of particulars,12 to inspect the physical evidence,13 to obtain a list of the witnesses who will testify against him,14 or to obtain a copy of any statements he may have made to the police15 or to the grand jury.16 The defendant has a right to interview witnesses, and the prosecution may not properly secrete witnesses, but no witness can be compelled to submit to a defendant's

10 Id. §603.
11 Id. §605.
12 Indictments in statutory form are sufficient. G.L., c. 277, §79. Thus there is no right to a bill of particulars. Smith, note 9, supra, §632. If the indictment fails to fully, plainly, substantially and formally set out the crime charged so as to give the defendant reasonable knowledge of the nature and grounds of the crime then the court shall order a bill of particulars. G.L., c. 277, §40; Smith, note 9, supra, §631.
In a capital case the defendant is granted the additional rights to a copy of the autopsy report and a list of the witnesses who testified before the grand jury. In addition to legal disadvantages, the defendant faces the practical reality that he can seldom match the resources, facilities, time, money or manpower which the state has available to investigate crime. The prosecutor has available the services of state and local police, professional crime laboratories, fingerprint and car registration files, along with specially trained experts such as pathologists, coroners and ballistics specialists.

It should be noted that, the particularized need rule notwithstanding, disclosure may, in certain instances, be required under the Due Process Clause of the Fourteenth Amendment. When the government initiates a criminal prosecution its interest is not solely in winning a conviction, but also in insuring that the truth is found and justice done. In *Brady v. Maryland*, the Supreme Court held that suppression by the prosecutor of evidence favorable to the defendant, after request for its disclosure, denied the defendant due process where such evidence was material, irrespective of the good or bad faith of the prosecutor. In *Barbee v. Warden, Maryland Penitentiary*, the Court of Appeals for the Fourth Circuit said that, where evidence is relevant and exculpatory, the prosecutor has an affirmative duty to disclose, even absent a request by the defendant.

These decisions suggest that the prosecution has an affirmative due process duty to disclose exculpatory information in the grand jury minutes. In *United States v. LaVallee* the Court of Appeals for the Second Circuit, although affirming the denial of a motion to disclose after the trial judge found, in an *in camera* inspection, no substantial inconsistencies in the grand jury minutes, went on to say:

> It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory ... failure to make the Grand Jury testimony available on request is within the principle of decisions holding it to be a denial of due process....

Analysis of the application of the particularized need rule shows a

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18 G.L., c. 38, §7.
19 G.L., c. 277, §9 requires the foreman of the grand jury to file with the clerk of the court a list of all witnesses appearing before each sitting of the grand jury. In a capital case the defendant is entitled to a list of the witnesses appearing against him before the grand jury. Commonwealth v. Salerno, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970).
20 Goldstein, note 1, *supra*, at 1149-1150.
23 331 F.2d 842 (4th Cir. 1964).
24 344 F.2d 313 (2d Cir. 1965).
25 Id. at 315.
marked difference between the results obtained under the rule as applied in federal courts and the results obtained under the rule as applied in Massachusetts courts. The federal courts have evolved a policy of relatively liberal disclosure. In 1957, following the Supreme Court's decision in Jencks v. United States,26 which ordered the government to disclose prior reports by witnesses on the same subject matter as their direct testimony, Congress passed the so-called Jencks Act27 which prohibited pretrial discovery of statements made by potential government witnesses while granting a statutory right to such discovery upon demand after direct examination of the witness. In United States v. Proctor & Gamble28 the Supreme Court reaffirmed the traditional policy of grand jury secrecy, but held that circumstances indicating a "particularized need" warranting discrete and limited disclosure include the need to use grand jury testimony to impeach, to refresh the recollection, or to test the credibility of a witness. In Pittsburgh Plate Glass Co. v. United States,29 the Court held that neither the Jencks case, nor the Jencks Act, confer on the defendant a right to inspect grand jury testimony, but, rather the defendant has the burden of showing a "particularized need" sufficient to outweigh the policy of secrecy. The Court did hold, however, in that case, that a showing of "outright contradiction" between grand jury testimony and trial testimony was not necessary. Four justices, in dissent, argued that the Court was exalting secrecy for secrecy's sake and that, under the rationale of the Jencks case, "no valid considerations" for secrecy exist once the witness has testified at trial.30

Perhaps the most significant decision in federal case law regarding grand jury disclosure was the Supreme Court's 1966 decision in Dennis v. United States.31 Recognizing a "growing realization that disclosure, rather than suppression . . . promotes the proper administration of criminal justice,"32 and that only the "clearest and most compelling considerations" justify the prosecution's exclusive access to the storehouse of relevant fact contained in the grand jury minutes,33 the Court reversed a conspiracy conviction for failure to grant the defendants' motion to disclose grand jury testimony. Among the considerations noted as establishing the requisite "particularized need" were a 15 year delay between the events in question and the trial, the importance of the witnesses to the government's case, the uncorroborated nature of the testimony, the fact that two of the witnesses were accomplices in the alleged conspiracy, and the fact that one witness had been confused as to important dates.

27 18 U.S.C. §3500(a)-(e).
30 Id. at 405.
32 Id. at 870.
33 Id. at 873.
The *Dennis* decision was immediately recognized as debilitating the particularized need rule. The Tenth Circuit said, as to cross examination, that *Dennis* “removed most, if not all, of the substance from the particularized need [rule] although it has retained the term.”

34 The First Circuit said, in light of *Dennis*, that the “particularized need” standard was now “very easily met.”

35 The Second Circuit, in *United States v. Youngblood*, laid down a prospective rule requiring the district courts of that circuit to order the disclosure of all the testimony of a witness at trial who had testified on the same general subject before the grand jury without requiring a showing of “particularized need.” This rule was also adopted by the Seventh and the District of Columbia Circuits. The *Youngblood* rule recognized, in effect, that once a witness had testified in direct examination at trial there was no valid reason to keep secret the witness’s grand jury testimony.

These cases, persuasive as they were on behalf of more liberalized disclosure, were mooted by a 1970 amendment to the *Jencks Act* which expressly included grand jury testimony within the scope of that act. Under the amended statute no grand jury testimony, except for the defendant’s own statement, is discoverable prior to trial, but, once a witness has testified on direct examination, the court is required to order, upon the defendant’s request, disclosure of all the witness’s grand jury testimony relative to the subject matter of the direct examination. The disclosure afforded under the amended statute is not quite as broad as that in *Youngblood*. Under *Youngblood* the government must show a “particularized need,” such as a national security interest, to suppress any portion of the witness’s grand jury testimony regardless of its subject matter. However, under the *Jencks Act* as amended, the court in its discretion may, at the request of the government, excise such portions of the grand jury testimony as it finds are not included in the subject matter of the direct examination.

Federal law, both statutory and decisional, has thus evolved from a position requiring the defendant to show a “particularized need” to obtain disclosure of grand jury testimony to a position making the testimony available upon request after the witness has testified at trial, unless the prosecution can show a valid need for its suppression. It is suggested that this evolution reflects a growing realization that once a witness has testified on direct examination, the prosecution, as a general rule, has no

34 Cargill v. United States, 381 F.2d 849, 851-52 (10th Cir. 1967).
35 Schlinsky v. United States, 379 F.2d 735, 740 (1st Cir. 1967).
36 379 F.2d 365 (2d Cir. 1967).
37 United States v. Amabile, 395 F.2d 47, 53 (7th Cir. 1968).
41 Jencks Act, as amended, note 39, supra.
further valid interest in maintaining secrecy. This evolution in federal law with regard to the disclosure of a witness's grand jury testimony is quite distinct from the corresponding development in Massachusetts law.

In contrast to the federal courts, the Supreme Judicial Court places great emphasis on the policy of secrecy and severely limits disclosure. The general rule in Massachusetts is that a defendant has no right to inspect the grand jury minutes before trial, at trial, or after trial. Disclosure will be granted, within the discretion of the court, only when the defendant shows a "particularized need" sufficient to outweigh the policy of secrecy. Massachusetts does not have a statute similar to the Jencks Act prohibiting pre-trial disclosure of grand jury testimony. It is important, therefore, to distinguish between pre-trial and at-trial motions to disclose: each presents separate and distinct considerations.

Pre-Trial Motions to Disclose. The only situation in which a Massachusetts court has found sufficient "particularized need" to warrant disclosure of grand jury testimony prior to trial has been in a prosecution for perjured testimony given before a grand jury. In Commonwealth v. Giles the Supreme Judicial Court held that, even though prior Massachusetts cases did not require such a result, the trial court's order disclosing all of the defendant's testimony before the Massachusetts Crime Commission was proper and in line with authority in other jurisdictions. However, in discussing its holding, the Court waivered somewhat, stating that "the defendant ordinarily should be furnished in advance of trial a copy of what he himself has said in the testimony alleged to have been false, without the necessity of his showing any 'particularized need.'" (Emphasis added). Two Justices, in dissent, argued that this holding did not go far enough since it did not grant the defendant a copy of his entire testimony before the grand jury as a matter of right. The majority was saying, in effect, that a charge of perjury before the grand jury presents, per se, a "particularized need" sufficient to warrant disclosure of only that portion of the testimony which is alleged to be false. In perjury cases, the defendant has an equally compelling need for dis-

46 353 Mass. 1, 228 N.E.2d 70 (1967).
47 The Massachusetts Crime Commission was created by Chapter 146 of the Resolves of 1962 to investigate corruption in state government. It had subpoena power and was treated as if it were a grand jury by the Court.
49 Id. at 22, 228 N.E.2d at 83-84.
closure of his entire testimony so that he may determine if, by other testimony not alleged to be false, he qualified, limited or withdrew the alleged false testimony so as to eliminate any perjury.

Assuming that the Government's only interest in maintaining grand jury secrecy is in avoiding the dangers of reprisals against the witness and of witness tampering, there appears to be little justification for denial of a pre-trial motion for disclosure of the defendant's grand jury testimony in a prosecution for perjury. Since the defendant's own testimony is at issue, disclosure does not increase the danger of reprisal or of bribery or coercion. It is arguable that pre-trial disclosure of those portions of the testimony not alleged to be false might aid a defendant in falsely explaining the apparent perjury. However, this possibility must be weighed against the defendant's need for an exact transcript of what he said so that he may place the alleged perjury in context. On balance, in perjury prosecutions, the threat of further perjury resulting from pre-trial disclosure of the defendant's entire grand jury testimony is de minimus when compared with the defendant's need for such disclosure.50

In three other pre-trial situations the Supreme Judicial Court has indicated that the defendant's need does not outweigh the policy of secrecy. The first involves motions to inspect the defendant's own testimony before a grand jury. In Commonwealth v. Ries,51 the Court affirmed the denial of defendant's pre-trial motion to inspect a statement, later used at trial, containing at least one admission which the defendant had voluntarily made before the grand jury. The Court held that disclosure of any grand jury testimony, even the defendant's own testimony, was a privilege, not a right, which the trial court, in its discretion, could properly deny the defendant. As noted in the discussion of Giles, supra, the only reason militating against pre-trial disclosure of the defendant's own grand jury testimony is the possibility that disclosure will aid the defendant in offering perjured testimony at trial. If a defendant should offer perjured testimony at trial after having received a copy of his grand jury testimony, the prosecution would not only have a prior inconsistent sworn statement with which to impeach him but could also point to the fact that the defendant had access to this statement in preparing for trial. With such valuable evidence to impeach the defendant in the event of perjury, continued secrecy hardly seems warranted. Significantly, the Federal Rules of Criminal Procedure grant the defendant disclosure of his own grand jury testimony as a matter of right.52

The second pre-trial situation in which the Supreme Judicial Court has said that the defendant's need does not warrant pre-trial disclosure involves motions to inspect grand jury testimony made in conjunction with motions to suppress evidence or to dismiss the indictment. In Commonwealth v. Remington, 191 F.2d 246, 250-51 (2d Cir. 1951).

50 See United States v. Remington, 191 F.2d 246, 250-51 (2d Cir. 1951).
wealth v. Kiernan, the defendant made pre-trial motions to suppress evidence alleged to have been obtained in an illegal search and seizure and for disclosure of the grand jury minutes so that he might know what evidence the state had obtained in the alleged illegal seizure. The motion to suppress was denied, without prejudice to later renewal, because the defendant failed to specifically identify the alleged illegally seized evidence. The motion to disclose was also denied, the Supreme Judicial Court holding that the need to identify evidence alleged to have been illegally seized was not sufficient "particularized need" to warrant disclosure. If the defendant has introduced evidence sufficient to raise a legitimate search and seizure issue, a better rule might be to require the trial court to conduct an in camera inspection to determine if there is further evidence material to the motion in the grand jury minutes. Such a procedure was followed in Silbert v. State, a state gambling prosecution which followed the dismissal of federal charges based upon evidence which was seized under defective search warrants. In Silbert, in an in camera inspection, the trial court determined that none of the evidence presented to the state grand jury was the fruit of an illegal seizure.

Pre-trial motions to inspect grand jury testimony, made for general discovery purposes, are a third category of cases in which the Supreme Judicial Court has refused to order disclosure. In Commonwealth v. Cook, the Court upheld the denial of defendant's pre-trial motion to inspect the entire transcript of the grand jury testimony. The defendant asserted his need was for "'reasonable knowledge of the nature and grounds of the crime and [to] be able to prepare his defense.'" The Court, in affirming the denial of the motion, explained that the function of giving notice of the crime charged was served by the indictment and the bill of particulars. This motion draws into issue the whole question of the defendant's right to pre-trial discovery of the prosecution's case. Proponents of secrecy, in opposition to this type of motion, would argue that pre-trial discovery of the testimony of potential prosecution witnesses could aid the defendant either in procuring false testimony or in intimidating witnesses. In rebuttal it can be observed that the defendant who is aware that prosecution is imminent can obtain much of the same information by requesting a show cause hearing before the complaint is issued or a probable cause hearing before the defendant is bound over to superior court. In five other states the entire grand jury transcript is available to the defendant prior to trial as a matter of right.

54 Id. at 34-35, 201 N.E.2d at 507-508.
56 Id. at 525, 280 A.2d at 61.
58 Id. at 233, 218 N.E.2d at 395.
above, except for a defendant's own testimony, pre-trial discovery of grand jury testimony is prohibited in federal courts under the Jencks Act.

Motions for Disclosure at Trial. Although denial of a pre-trial motion to disclose may be justified on the basis that such disclosure would endanger the witness or aid the defendant in either procuring perjured testimony or tampering with the witness, these problems are not created by disclosure at trial after the witness has testified. Nevertheless, in Massachusetts, at-trial disclosure of grand jury testimony remains within the discretion of the court.\(^{60}\) Two factors which appear to influence the trial court in exercising its discretion in regard to motions made at trial are (1) whether the alleged inconsistency appears in the testimony of a key prosecution witness in regard to a critical factual issue, and (2) whether the alleged inconsistency is between the witness's trial testimony and his grand jury testimony.

*Commonwealth v. Carita*\(^{61}\) and *Commonwealth v. Homer*\(^{62}\) illustrate these two factors. In *Carita* the Court held that a witness's expansion of her story at trial established sufficient "particularized need" so that denial of a motion to inspect the witness's grand jury testimony was prejudicial error. During direct examination the witness had testified, in great detail, about a gun which she claimed to have seen in the defendant's hand. On cross examination she admitted that she had neither disclosed this information to the grand jury nor mentioned it to the police until after the return of the indictment. The Court inferred that her expanded testimony at trial might have resulted from the threat of criminal prosecution for her complicity in the events in question. This inference, the Court said, was sufficient "particularized need" to warrant disclosure of the witness's grand jury testimony. The expanded testimony was a "possible contradiction of important fact of sufficient moment" to make denial of the motion to inspect prejudicial.\(^{63}\) In *Homer*, the prosecutrix charged that the defendant, with whom she was having an illicit affair, assaulted and robbed her, at gun point, in his hotel room. The defendant, claiming that the jewelry in question was taken, with the prosecutrix' consent, in payment of a disputed antecedent debt, offered formal proof that the prosecutrix never mentioned a gun in her testimony before the grand jury. The trial court refused to admit the evidence pertaining to the witness's grand jury testimony. On appeal the Supreme


\(^{62}\) 235 Mass. 526, 127 N.E. 517 (1920). Homer does not deal with a motion to inspect grand jury minutes, but rather with an offer of formal proof of what the grand jury testimony had been. Apparently defendant offered to call one of the grand jurors to testify as to what the witness had said before the grand jury. Cases authorizing this practice were cited by the Court: Commonwealth v. Harris, 231 Mass. 584, 121 N.E. 409 (1919); Commonwealth v. Mead, 78 Mass. (12 Gray) 167 (1858). For the purposes of this comment, the offer of proof will be treated as a motion to disclose.

Judicial Court reversed, holding that the question as to whether the defendant possessed a gun was a critical issue, and that the failure of the prosecutrix to mention a gun in her testimony before the grand jury would so affect her credibility, that the defendant had a right to point out this inconsistency to the jury.

_Carita_ and _Homer_ indicate that a defendant has shown sufficient “particularized need” to warrant disclosure if he has shown that the witness was a key prosecution witness testifying on a factual issue critical to the prosecution’s case, and if he has further shown that the alleged inconsistency was between the witness’s trial testimony and his grand jury testimony. It should be noted, however, that while a defendant would probably be able to prove with little difficulty that the witness in question was a key prosecution witness and that the factual issue in question was critical to the prosecution’s case, he would face great difficulty in showing an inconsistency between the witness’s trial testimony and his grand jury testimony unless the witness admitted an inconsistency. Significantly, in both _Carita_ and _Homer_ the defendants were able to show inconsistency without first seeing the grand jury testimony.

The magnitude of the burden placed on the defendant by the requirement that he show an inconsistency between the witness’s testimony at trial and the witness’s testimony before the grand jury is illustrated by the Court’s recent decision in _Commonwealth v. DeChristoforo._ DeChristoforo and two co-defendants were occupants of an automobile in which the police found the body of a man who had been shot to death. At trial, almost two years after the murder, one of the police officers who had been present at the scene testified that DeChristoforo had given him a false name and stated that the decedent had been in a fight in a bar, and that the defendants had been taking the decedent to a hospital when stopped by the police. During cross examination DeChristoforo attempted to impeach the officer with the officer’s prior testimony at a co-defendant’s probable cause hearing held six months after the murder in which the officer had testified that a co-defendant, and not DeChristoforo had made the false statements, and that there was also an inconsistency between the officer’s trial testimony and his police report. Arguing that these alleged inconsistencies represented a sufficient “particularized need” to warrant disclosure, DeChristoforo renewed his motion to disclose the officer’s grand jury testimony given three weeks after the murder. The trial court denied the motion, and the Supreme Judicial Court affirmed, holding that since the defendant did not show that the “grand jury minutes would cast further light as to either alleged inconsistency . . . or that the grand jury testimony might be in any other way inconsistent with . . . [the officer’s] testimony at trial” the defendant had

65 DeChristoforo had initially made a pre-trial motion for disclosure of the officer’s grand jury testimony. The pre-trial motion was denied without prejudice to later renewal at trial. 1971 Mass. Adv. Sh. at 1709, 277 N.E.2d at 103.
neither established a "particularized need" requiring disclosure, nor demonstrated sufficient need for the trial court to make an in camera inspection.\textsuperscript{66} Recognizing the "difficult burden" which this rule places on the defendant, the Court acknowledged that further consideration of the particularized need rule may be desirable "on an appropriate record."\textsuperscript{67}

On the facts of \textit{DeChristoforo}, the officer was a key prosecution witness testifying on a factual issue which was critical to the prosecution's case. Yet because DeChristoforo could not show any inconsistency in the grand jury testimony, disclosure was denied. Under the holding in \textit{DeChristoforo}, absent an admission of inconsistent testimony, a defendant might never be able to show the requisite inconsistency. In \textit{Jencks v. United States},\textsuperscript{68} the United States Supreme Court stated that "[R]equiring the accused first to show conflict . . . is actually to deny the accused evidence relevant and material to his defense. . . . [U]nless [the witness] admits conflict . . . the accused is helpless to know or discover conflict without [first] inspecting the reports."\textsuperscript{69} As Justice Spiegel and Chief Justice Tauro argued in dissent,\textsuperscript{70} the majority's adherence in \textit{DeChristoforo} to the particularized need rule imposed a "well-nigh intolerable burden" on the defendant, and is "out of touch with the 'growing realization that disclosure, rather than suppression . . . promotes the proper administration of criminal justice.'"\textsuperscript{71}

Even if a defendant can show that the witness is a key prosecution witness critical to the prosecution's case, and that there is an inconsistency between the witness's trial testimony and his grand jury testimony, the defendant may not be able to obtain a transcript of the grand jury testimony. In \textit{Commonwealth v. Doherty}\textsuperscript{72} a key prosecution witness admitted, on cross-examination, that she had committed perjury in her first appearance before the grand jury and that her testimony then was different from her testimony in a second grand jury appearance and different from her testimony at trial. The court denied defendant's mo-

\textsuperscript{67} Id. at 1710 n.2, 277 N.E.2d at 104 n.2. The Court found the record "inappropriate" because the defendant had failed to have the grand jury minutes marked and included as part of the record for appellate review. The dissenters argued that failure to include the grand jury minutes should be irrelevant since it is inappropiate "that a trial judge or an appellate court should conclude that a defendant would not have been able to undermine a witness's credibility by use of the grand jury minutes. This should be the sole privilege of the defendant." Id. at 1728, 277 N.E.2d at 114.
\textsuperscript{68} 353 U.S. 657 (1957).
\textsuperscript{69} Id. at 667-68.
\textsuperscript{70} Chief Justice Tauro concurred in Justice Spiegel's dissenting opinion. The Chief Justice also wrote a separate dissenting opinion, joined by Justice Spiegel, arguing that the cumulative effect of other alleged errors so prejudiced the defendant as to deny him due process and to require a new trial.
\textsuperscript{72} 353 Mass. 197, 229 N.E.2d 267 (1967).
tion to inspect the witness's grand jury testimony. When the defendant excepted to the denial of his motion, the trial judge said to defense counsel: ""[Y]ou can get . . . [this] in evidence . . . by getting the stenographer [who recorded the testimony given before the grand jury]."" After instructing the prosecutor to provide the stenographer's name the judge went on: ""[Y]ou can . . . have him available and the minutes only in relation to . . . this witness."" The Supreme Judicial Court conceded, on appeal, that a sufficient "particularized need" had been shown to warrant disclosure, but held that the trial court's ruling did not deny the defendant access to the grand jury testimony and, therefore, denial of the motion, although error, was not prejudicial. Two Justices, in dissent, argued that the defendant's right to inspect the grand jury testimony was self-evident, that nothing less than a fair opportunity to examine and evaluate the grand jury testimony would suffice in satisfying that right, and that merely permitting the defendant to call the stenographer was not the equivalent of what was requested.

Calling the grand jury stenographer would appear to be less desirable for a defendant than disclosure of a transcript of the grand jury testimony. Under the Rules of the Superior Court, a grand jury stenographer may not disclose grand jury testimony, except to the prosecutor, unless ordered to do so by the court. Thus a defense counsel who must rely on the grand jury stenographer cannot be certain of the witness's exact grand jury testimony until the stenographer reads it in court. If defense counsel has the stenographer read the witness's entire testimony before the grand jury, he runs the risk that the grand jury testimony may either buttress the witness's trial testimony or contain additional evidence injurious to the defendant. If defense counsel chooses to ask only specific questions regarding the grand jury testimony of the witness, he cannot be sure that he will elicit all of the testimony favorable to his client.

Another situation which might create a "particularized need" sufficient to warrant disclosure is the use, by the prosecution at trial, of the grand jury testimony. In Commonwealth v. Abbott Engineering, Inc. the prosecution used the grand jury minutes to refresh the recollection of a prosecution witness at trial. Specific questions and answers in the grand jury minutes were shown to the witness and to defense counsel. The court refused the witness's request that she be allowed to "read the 'whole

73 Id. at 209, 229 N.E.2d at 275.
74 Id. at 210, 229 N.E.2d at 275.
75 Id. at 216, 229 N.E.2d at 279.
76 "Stenographic notes of all testimony given before any grand jury shall be taken by a stenographer, who shall be appointed by a justice of the superior court and who shall be sworn. Unless otherwise ordered by the court, the stenographer shall furnish transcripts of said notes only as required by the prosecutor who introduced the testimony, whether district attorney or attorney general." Rules of the Superior Court, Rule 101D, Stenographers in Grand Jury Proceedings.
During cross-examination the defendant moved to inspect the witness's entire grand jury testimony, arguing that there might have been questions, prior or subsequent to those used by the prosecution, which would be relevant on cross-examination. The need to properly cross-examine the witness, the defendant argued, is a "particularized need" sufficient to warrant disclosure. The Supreme Judicial Court, in affirming the trial court's denial of the motion to disclose, held that the fact that the defendant might find something relevant in the grand jury testimony was not sufficient to require disclosure.

In Abbott Engineering the Supreme Judicial Court cited Pittsburgh Plate Glass Co. v. United States in support of its decision, yet in Pittsburgh Plate Glass the Supreme Court, after holding there was no automatic right to disclosure, said: "[T]here are occasions, see United States v. Proctor & Gamble when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial." Among the occasions warranting disclosure listed in Proctor & Gamble was the use of grand jury testimony to "refresh [a witness's] recollection." Since the defendant in Abbott Engineering was presented with the question of how well the witness's recollection had been refreshed by the prosecution's use of the grand jury minutes, it would seem that the defendant was well within the language of Proctor & Gamble.

While Proctor & Gamble is not binding on the Massachusetts Courts, its logic is persuasive. If the prosecution uses only selected portions of a witness's grand jury testimony to refresh that witness's recollection at trial, the defendant should have an opportunity to inspect the witness's entire grand jury testimony to insure that the witness's recollection was properly refreshed.

Conclusion. Once an indictment has been returned and the defendant is in custody, the problems raised by a motion to disclose grand jury testimony will differ, depending on whether the motion is made prior to trial or at trial. A pre-trial motion to disclose might properly be denied in order to protect witnesses from possible reprisals and to avoid assisting defendants in bribing or threatening witnesses, or otherwise procuring perjured testimony to contradict prosecution witnesses. However, a pretrial motion for the defendant's own testimony before the grand jury should not be denied since a defendant can neither bribe nor threaten himself. Further, since a defendant will usually have at least a general idea of what he said before the grand jury, disclosure of his exact testimony arguably will not appreciably assist a defendant in committing or suborning perjury. In considering the reasons advanced for refusing pretrial disclosure, it is interesting to note that in California, which by statute

78 Id. at 578, 222 N.E.2d at 869.
gives a defendant an absolute right to full pre-trial disclosure of grand jury testimony, experience appears to indicate that few of the dangers which in other states have prompted refusal of pre-trial disclosure actually occur.  

In contrast to a pre-trial motion to disclose, an at-trial motion to disclose should never be denied. Disclosure at that time would neither increase the likelihood of reprisal against witnesses, nor aid defendants in bribing or threatening witnesses or in procuring perjured testimony to contradict prosecution witnesses. Indeed, grand jury minutes may contain exculpatory evidence which may create a due process obligation on the prosecution to disclose the evidence.

The particularized need rule, as stated in DeChristoforo, virtually eliminates the defendant's chances of gaining disclosure unless the witness admits an inconsistency between his trial testimony and his grand jury testimony. That rule is not in line with the "'growing realization that disclosure, rather than suppression . . . promotes the proper administration of criminal justice.'" It is therefore suggested that Massachusetts should adopt, by statute or judicial decision, a rule requiring full disclosure to the defendant of a prosecution witness's grand jury testimony after direct examination of that witness at trial, unless the prosecution can show a "particularized need" for non-disclosure. Such a "particularized need" might be shown by proof that parts of the grand jury testimony were obtained on a promise of secrecy and were not used in direct examination, or that parts not covered on direct examination would, if disclosed, prejudice other prosecutions. Any suppression of grand jury testimony should be granted only to the extent that a "particularized need" is shown by the prosecution. Adoption of such a rule would recognize that once a witness has testified at trial, the purposes served by maintaining the secrecy of grand jury testimony no longer persist.

THE PARTICULARIZED NEED RULE

83 See Sherry, note 6, supra, at 679, 681; and Fletcher, note 2, supra, at 321-322.


§7.8. Criminal discovery: Alibi-notice statutes. In a recent Massachusetts decision, *Gilday v. Commonwealth*, the Supreme Judicial Court reviewed an order of a superior court judge granting prosecutorial discovery against defendants under indictment for murder and armed robbery. The lower court had ordered each defendant to disclose, prior to trial, whether he intended to interpose (1) a defense of not guilty by reason of insanity or (2) a defense of alibi and if so the names, addresses and dates of birth of the witnesses he intended to produce in support of the alibi. Alluding to the "constitutional uncertainties in this area," the Supreme Judicial Court vacated that portion of the lower court order which required disclosure of the defendants' alibi witnesses.

In direct response to this decision, a bill was submitted to the Massachusetts legislature proposing a criminal discovery statute which would be comparable in effect to the discovery order that was vacated in *Gilday*, but the legislature has not acted on the proposal. The reasons for this inaction can only be speculated upon, but it is possible that the same "constitutional uncertainties" which troubled the Supreme Judicial Court troubled the General Court as well. The purpose of this comment will be to study the need for a notice statute which will embody the requirements of the discovery order reviewed in *Gilday*; to examine the constitutional issues involved in prosecutorial discovery of alibi witnesses; and to present the draft of a proposed alibi-notice statute which, it is submitted, will obviate these "constitutional uncertainties."

I. BACKGROUND OF CRIMINAL DISCOVERY

A. Witness Discovery in General

The criminal defendant has for many years been granted the right to discover at least some of the government's witnesses. A defendant on trial for a capital offense in federal courts has a statutory right to a list of witnesses to be called against him. Nearly all states "require the proper officer to deliver to the accused, with or without demand, a list of witnesses, at a specified time before the trial begins." In most of these states this requirement entitles the defendant to a list of witnesses who testified before the grand jury that indicted him. Most states by

2 Id. at 1349, 274 N.E.2d at 590.
3 Id. at 1351-52, 274 N.E.2d at 592.
4 Mass. House Bill No. 3064 (1973). Suffolk County District Attorney Garrett Byrne and State Representative Mario Iumana were co-sponsors of the bill.
5 18 U.S.C. §3432. Apart from capital cases, granting of a defendant's request for a list of adverse witnesses is a matter of judicial discretion, United States v. Hancock, 441 F.2d 1285 (1971), and in any case does not apply to rebuttal witnesses, Turner v. United States, 441 F.2d 736 (1971).
6 6 WIGMORE, EVIDENCE §1851 (3d ed. 1940).
7 See, e.g., G.L., c. 277, §§9, 65, 67. See also 6 WIGMORE, EVIDENCE §1852 (3d ed. 1940).
statute require a prosecutor who proceeds by information to endorse on the information the names of all witnesses known to him at the time of filing. Some states require that the defendant be informed of the identities of all witnesses to be called against him. On the other hand, prosecutorial discovery of defense witnesses may raise serious questions of self-incrimination. Recently, a proposed amendment to Rule 16 of the Federal Rules of Criminal Procedure and statutes in a few states have provided for mutual discovery of witness lists. The draftsmen have attempted to obviate the Fifth Amendment problem by making the prosecutor’s right to discovery under the statute dependent upon compliance with a prior demand for discovery by the defendant. The rationale, seemingly, is that the defendant, by making his demand for discovery, has waived his Fifth Amendment right to refuse reciprocal discovery by the prosecutor. The validity of this approach will be discussed at length below.

9 Mont. Rev. Codes Ann. §95-1803(a) (1969); 6 Wigmore, Evidence §1854 (3d ed. 1940). The California courts have led the way in creating discovery rights for the criminal defendant. See Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 243-46 (1964) and Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C. L. Rev. 437, 449 (1972). In People v. Cooper, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960) the criminal defendant was held to be entitled to discovery of the identities of all prospective state witnesses. Id. at 769-70, 349 P.2d at 973, 3 Cal. Rptr. at 157.
B. Insanity Notice

In addition to the limited witness discovery described above, a number of states require that the defense of insanity be specially pleaded by the defendant\textsuperscript{14} or that he give notice of his intention to claim such defense to the prosecuting attorney.\textsuperscript{15} Many of the states which, by statute or rule of court, require a defendant to give notice of insanity defense to the prosecuting attorney, also require him to list the witnesses he will call in support of this defense.\textsuperscript{16} It is submitted, however, that a notice of insanity defense requirement should be limited to the extent of the discovery order approved in \textit{Gilday} which did not require discovery of insanity witnesses. Disclosure of insanity witnesses raises substantial self-incrimination problems which are still unresolved. If, for example, the defendant were to furnish the prosecutor with the identity of a physician who would testify in support of an insanity defense in a state such as Massachusetts where the physician-patient privilege is not recognized,\textsuperscript{17} the prosecutor would thus obtain access to a witness to whom the defendant may have made damaging admissions during the course of his diagnosis and treatment.\textsuperscript{18} Nor is there any compelling need for insanity witness discovery. The witnesses will undoubtedly be medical men expressing a medical opinion as to which there may be substantial disagreement. The prosecutor and the trial court need only the opportunity to obtain an independent opinion of the defendant's competence to stand trial in order to determine the necessity for a trial in the first place and to avoid the substantial disruption which would occur if the defense were unexpectedly raised at trial.\textsuperscript{19}

C. Alibi Notice

Several states also provide by statute or court rule that if the defendant intends to offer an alibi at trial, he must give pretrial notice to the prosecuting attorney.\textsuperscript{20} Most of these states require that the defendant disclose the names of his alibi-witnesses as well.\textsuperscript{21}

\textsuperscript{19} Under proposed Rule 12.2 of the Federal Rules of Criminal Procedure the defendant is required to give notice of his intention to interpose an insanity defense; however, he is not required to list his supportive witnesses. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 52 F.R.D. 409, 435-38 (1971).
\textsuperscript{20} See note 39, \textit{infra}.
\textsuperscript{21} See note 39, \textit{infra}.
Alibi literally means "elsewhere." It connotes the physical impossibility of being in two places at once. Although alibi is usually referred to as a defense, strictly speaking it is not a defense at all but is merely a fact intended to rebut evidence that the defendant was present at the crime. Significant conceptual difficulties are raised by the tendency of some courts and writers to describe alibi not simply as a defense but an "affirmative defense." While the analogy to an affirmative defense may be conceptually useful in some respects, the application of that label to alibi connotes a burden of proof which should not be imposed on a criminal defendant. The indiscriminate use of this term has caused a more subtle problem with respect to alibi statutes.

It is apparent from the nature of alibi that it lends itself to use in many different situations, and also that it readily lends itself to fabrication. An unscrupulous defendant need only find willing cohorts with no fear of the penalty for perjury. Although the consequent ubiquitousness of this "hip pocket" defense has caused alibis to be viewed with skepticism by the courts, this does not alter the fact that the sudden interjection of a perjured alibi may have a substantial impact on the

23 Harris v. State, 120 Ga. 167, 47 S.E. 520 (1904).
26 50 N.C. L. Rev. at 497-98.
27 In civil procedure the party who must plead an affirmative defense often has the burden of proof with respect to the defense. James, Civil Procedure §7.8 (1965). The use of the term "affirmative defense" in criminal procedure has similarly resulted in such a shift in the burden of proof. The criminal in the past has often been required to prove his alibi by a preponderance of the evidence. See 29 A.L.R. 1139-1212 (1924). By 1940, only the Iowa and Pennsylvania courts persisted in requiring the defendant to prove his alibi by a preponderance of the evidence. See 9 Wigmore, Evidence §2512(c) (3d ed. 1940). The Pennsylvania courts have since recognized that such a shift in the burden of proof is fundamentally at odds with the presumption of innocence. Commonwealth v. Bonomo, 396 Pa. 222, 229-32; 151 A.2d 441, 445-56 (1959). However, the aberration persists in Iowa decisions. See, e.g., State v. Stump, 254 Iowa 1181, 1195-96, 119 N.W.2d 210, 218, (1963). But see also the vigorous and cogent dissent in Stump. Id. at 1203-14, 119 N.W.2d at 223-29 (dissenting opinion).
28 It may be that the use of the term "affirmative defense" has made it easier for the courts to abrogate their statutory grant of discretion in excluding alibi evidence for noncompliance with the statutes. See notes 95, 96 infra.
30 In Massachusetts, when a criminal defendant offers alibi evidence, the jury charge is taken from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850). "This is a defense often attempted by contrivance, subordination, and perjury. The proof, therefore offered to sustain it is to be subjected to a rigid scrutiny. . . ." Id. at 319. See also People v. Wudarski, 253 Mich. 83, 86, 87, 234 N.W. 157, 158 ((1931); 14 A.L.R. 1426-43 (1921); 67 A.L.R. 122-29 (1930).
trial. If a prosecutor is surprised at trial by an alibi defense he may need a continuance to prepare rebuttal evidence. If granted, a continuance may result in expensive delay, particularly in cases where the jury has been sequestered. Moreover, once the trial has begun, a continuance may prove unavailing because it may be too late to gather sufficient rebuttal evidence. However, if the prosecutor receives notice of the place where the defendant claims to have been at the time of the commission of the offense he can investigate the alibi before trial. The effectiveness of this investigation is further enhanced if the prosecutor is supplied the names of the alibi witnesses. Examination of the alibi witnesses concerning the details of the alibi may be necessary if the prosecutor is to adequately investigate the alibi. Only complete disclosure of the alibi defense including alibi witnesses can assure that the prosecutor will not be surprised at trial, and thereby avoid the need for a continuance. Moreover, by enabling the prosecutor to evaluate the credibility of the alibi witnesses and to conduct a complete investigation of the alibi, the need for a trial may be avoided. On the one hand, the prosecutor may be convinced the alibi is true. On the other, the prosecutor can more convincingly inform defense counsel that the alibi is false. The defense counsel, aware of the harm which would result if the alibi were refuted in open court, might then be more willing to plea bargain. Given the substantial backlog existing on most criminal dockets such an economy of judicial resources would represent no small benefit.

Discovery of the names of alibi witnesses confers another benefit aside from enabling the prosecutor to better investigate the truth of the alibi. The prosecutor who obtains the names of the defendant's witnesses before trial can also take their depositions, and if their testimony at trial varies he has the means to impeach them. If the constitutional objections to such additional discovery which concerned the Supreme Judicial Court in

31 The sudden introduction of alibi testimony by defendant Angela Davis caused such a disruption during her trial in a California state court. The prosecutor was caught "flat-footed." Newsweek, June 5, 1972 at 40.
36 399 U.S. at 106 (Burger, G.J., concurring).
38 In Williams Justice White noted that at the trial of that case the prosecutor was able to impeach the defendant's abili witness as a result of his depositing her before trial. 399 U.S. at 81. In Michigan, after passage of an alibi statute, convictions in cases where an alibi was offered greatly increased. Toy, Michigan Law on Alibi and Insanity Defense Reduces Perjury, 9 Panel 52 (1931).
Gilday could be removed, the benefits of alibi-notice to the prosecution and the public would be manifest. In recognition of these benefits at least 22 states and the District of Columbia have adopted alibi statutes, the majority of which require the defendant to disclose his witnesses. The proposed amendments to the Federal Rules of Criminal Procedure also incorporate a notice of alibi rule which requires listing of alibi witnesses. The subsequent discussion will explore the special considerations and problems which relate to alibi witness discovery and its possible conflicts with Constitutional guarantees.


There do not appear to be any states which allow discovery of a defendant's alibi witnesses absent enabling legislation or constitutionally authorized rule of court. The California court in People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963) specifically allowed the discovery of alibi witnesses. But, at present, as a result of Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970) it appears there may be no discovery of alibi witnesses in California. The court in Rodriguez reasoned that since the California legislature had refused to enact an alibi statute the principle of judicial abstention required that the California courts not contravene the expression of legislative intent. Id. at 497, 88 Cal. Rptr. at 156.

Although it was a salutary exercise of restraint in both Gilday and Rodriguez to eschew creating alibi witness discovery in the absence of legislation, the legislative history of the most recently proposed California alibi statute should be noted. Apparently, the proposed statute was rejected because the California State Bar Association believed such a statute "would cause the harassment and intimidation of alibi witnesses by public officers." See Epstein, Advance Notice of Alibi, 55 J. Crim. L.C. & P.S. 29, 31 (1964). Such reasoning, if in fact resulted in rejection of the notice statute, may be dismissed as an expression of prejudice rather than a valid argument against alibi discovery.

II. CONSTITUTIONAL ISSUES

A. Fifth Amendment: Self-incrimination

Since the adoption of the first alibi statute by Michigan in 1927, the principal objection raised by criminal defendants forced to reveal their alibi witnesses has been that they were compelled to give evidence against themselves. People v. Schade, a New York lower court decision, was the first case to actually deal with the issue. The court in Schade held that the witness requirement did not violate the Fifth Amendment because there was no compulsion to rely on alibi. The rationale that the defendant's decision to use an alibi and thereby disclose witnesses is voluntary is found in many of the subsequent cases which have upheld the validity of alibi statutes.

In 1969, in Williams v. Florida, the United States Supreme Court upheld the validity of the Florida alibi statute and destroyed whatever residue of vitality remained in a Fifth Amendment objection to disclosure of alibi witnesses. The Court concluded "as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." Justice White, writing for the majority, conceded that the alibi disclosure was "'incriminating'" and may have been "'testimonial.'" Moreover, he was willing to recognize, as other courts had not, that there was a degree of compulsion in the statute. However, he determined that since the pressures which bear on the pretrial decision to rely on alibi are "of the same nature" as those which "would induce him to call alibi witnesses at the trial ... [the disclosure is] not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments." However, Justice White did admit the utility of alibi notice to prosecutors and its potential to incriminate the defendant to the extent that (1) alibi witnesses will

42 161 Misc. 212, 292 N.Y.S. 612 (Queens County Ct. 1936).
43 Id. at 215-16, 292 N.Y.S. at 615-16.
46 Id. at 83.
47 Id. at 84.
48 Id. Although a subsequent note qualified this concession, (399 U.S. at 86 n.17) it seems clear that the production of a witness list is testimonial or communicative. See 8 WIGMORE, EVIDENCE §2264 (McNaughton rev. ed. 1961); Note, 85 Harv. L. Rev. 994, 1002-04 (1972).
49 The compulsion to disclose alibi evidence in compliance with the Florida alibi statute results from the provision in the statute granting power to the trial court to exclude alibi evidence if due notice is not given. See Fla. R. Crim. P. 3.200 (West 1972).
50 399 U.S. at 85.
be deposed and thereby committed to a specific version of the facts and (2) witnesses will be sought to rebut this version of the facts.

It is submitted that the pressures to reveal alibi witnesses at trial and before trial are not of the same nature. The pressures on the defendant to reveal his alibi witnesses at trial are intrinsic whereas the pressures which cause a defendant to cooperate in pretrial discovery are extrinsic. The state compels compliance with an alibi statute by means of a sanction for noncompliance. However, so long as the potentially incriminating effects are of the same nature whether the prosecutor is able to examine the alibi witnesses before trial or during a continuance at trial, the pressures artificially created by an alibi statute are no greater than those which exist at trial, hence there is no compulsion within the meaning of the Fifth Amendment. If the impeachment of witnesses and the introduction of rebuttal testimony is the extent of the incriminating potential of the alibi statutes, then the right of the defendant to stand silent in the face of a prosecutorial demand for a list of alibi witnesses (which Justice Black espoused in dissent) must be predicated upon a notion of procedural due process rather than any specific language in the Bill of Rights. There may very well be a lesser likelihood of variation between the perjuror's deposition and his testimony at trial the closer they are in time, and a lesser likelihood of locating rebuttal witnesses the farther in time from the res gestae the search is made. Yet, insofar as it may be more incriminating to reveal before trial the alibi which the defendant would otherwise reveal only during the trial, the time differential which makes it more incriminating is not a subject of due process as such. Indeed, any prolonged delay results from the de facto denial of another constitutional right, that of a speedy trial.

The validity of Justice White's rationale would seem to depend upon an equation of "the force of historical fact" concerning the crime with "the strength of the State's case built on these facts." Unfortunately, such an easy equation may not always exist. It is possible, as Justice Black asserts, that the defendant, by revealing "the names of persons who may have some knowledge about the defendant himself or his activities," may enable the prosecutor to "discover new leads or evidence." A defendant who was aware that his alibi witnesses could supply

51 Id. at 112 (Black, J., dissenting).
53 399 U.S. at 85.
54 Id. at 110 (Black, J., dissenting). For a good example of exactly what Justice Black feared see People v. Hudson, 46 Ill. 2d 177, 190-94, 263 N.E.2d 473, 481-82 (1970). See also 50 N.C. L. Rev. a 500.

The other possible objections to prosecutorial discovery on Fifth Amendment grounds do not apply to alibi discovery. Since the defendant reveals what is likely to be but one aspect of his case, disclosure of a weak alibi would not be an incriminating admission that his entire case is weak, see Jones v. Superior Court, 58 Cal. 2d 56, 66, 372 P.2d 919, 925, 22 Cal. Rptr. 879, 885 (1962) (Peters, J., dissenting), and therefore encourage prosecutorial fishing expeditions.
information which might be useful to the prosecutor would naturally not want to expose them until he knew the strength of the state’s case against him. Even if the defendant had ascertained the strength of the state’s case before trial sufficiently to determine that it would be necessary to use these witnesses, the very “timing” of the compelled disclosure of witnesses might make it more incriminating. Once the state has rested it may be too late to introduce the testimony which an alibi witness could add to the prosecutor’s case-in-chief. Under these circumstances, it would seem correct, as Justice Black asserts, that the pressures which would bear on the decision to reveal alibi witnesses are “significantly greater” than those which exist at trial.55

It is understandable, however, that Justice White did not or would not recognize the actual self-incrimination threat which lurks within the alibi notice statute. In the great majority of cases the only information a prosecutor will obtain from an alibi witness will be exculpatory. Even if the witness possesses some incriminating information about the defendant or his activities it is unlikely that he would volunteer it if he sympathizes with the defendant. Only if the prosecutor already knew enough about the crime to draw out that additional information would he learn the true extent of the witness’s knowledge.56 If the prosecutor did have the requisite knowledge, then there is no reason to suppose he could not obtain the evidence independently.

Although it is easy to belittle the danger that the defendant might supply the prosecutor with “new leads or evidence,” the distinction between “real” and “imaginary”57 dangers of self-incrimination has never been recognized in the criminal context. Although the criminal defendant has been compelled to cooperate in the criminal investigation to an extent,58 it has long been the rule that the criminal defendant may never

55 399 U.S. at 110 (Black, J., dissenting).
56 “To be sure, the Government may inquire of witnesses before the grand jury as to the whereabouts of unlocated witnesses; ordinarily the answers to such questions are harmless if not fruitless.” Hoffman v. United States, 341 U.S. 479, 488 (1951).
57 Empsk v. United States, 349 U.S. 190, 205-06 (1955) (Harlan, J., dissenting). Even as this standard has been qualified by such “tests” as enunciated in Arnstein v. McCarthy, 254 U.S. 71, 72 (1920) and Hoffman v. United States, 341 U.S. 479, 486-87 (1950), a judge, within the discretion granted him in Hoffman, supra at 486 and Mason v. United States, 244 U.S. 362, 366 (1917), could conceivably compel a witness before a grand jury to reveal the names of witnesses who might correspond to alibi witnesses.
be *compelled* to give testimonial evidence. Only when an investigation relates to a noncriminal regulatory function may a witness be compelled to cooperate in government inquiries when there is literally no "real" danger of self-incrimination. However, the holding in *Williams*, implicitly depends upon the distinction between "real and imaginary" dangers of self-incrimination. If Justice White had recognized the danger of self-incrimination in alibi notice raised by Justice Black—that the defendant by his notice may supply a source of evidence—he would perforce have been required to recognize a greater degree of compulsion.

However, if a latent danger of self-incrimination is recognized within the alibi statutes it can be obviated. It will be consistent with the values protected by the Fifth Amendment and not inconsistent with the statutory purpose to restrict the prosecutor's use of the alibi notice. He should be forbidden by language engrafted on the statute to introduce as his own any witness whom the defendant names in his notice or to introduce any evidence which is the fruit of the notice. Realistically, it might be difficult to determine whether evidence produced by the prosecutor was causally connected to the defendant's notice. But if the defendant objects, a requirement that the prosecutor prove that his evidence is free of taint should mitigate this difficulty.

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60 See, e.g., Counselman v. Hitchcock, 142 U.S. 547, 554-55 (1892) (grand jury proceeding); Empsak v. United States, 349 U.S. 190 (1955) (legislative inquiries); I.C.C. v. Brimson, 154 U.S. 447, 478-80 (1894) (administrative inquiries). In such proceedings "reasonable bounds have been placed upon the privilege" in deference to the important public interest served by such inquiries. 349 U.S. at 205 (Harlan, J., dissenting).


62 A similar protection was recommended for the proposed California alibi statute, Note, 76 Harv. L. Rev. 833, 841 (1963), citing *California Law Revision Comm'n, Recommendation and Study Relating to Notice of Alibi in Criminal Actions*, J 6-J 7 (1960). It has been held prejudicial error for the prosecutor to refer to the defendant's notice in his preliminary argument. State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943). Nor has the prosecutor been allowed to refer to the defendant's list of alibi witnesses during voir dire. O'Connor v. State, 31 Wis. 2d 684, 143 N.W.2d 489 (1966); Nor should he be permitted to cross-examine a defendant regarding the failure to call alibi witnesses. *People v. Mancini*, 6 N.Y.2d 853, 160 N.E.2d 91, 188 N.Y.S.2d 554 (1959).

63 See Murphy v. Waterfront Commission, 378 U.S. 52, 79 n.18 (1964); Id. at 104-05 (White, J., concurring). Moreover, the effectiveness of an immunity grant need not be without doubt in order to compel incriminating testimony. See, e.g., Brown v. Walker, 161 U.S. 591, 626-27 (1895) (Shiras, J., dissenting).
One of the constitutional uncertainties raised by the discovery order reviewed by the Supreme Judicial Court in Gilday was the suggestion in Williams "that to require a defendant to disclose his alibi witnesses may deny him due process in a State such as Massachusetts which does not by statute or rule of course provide appropriate, compulsory and reciprocal disclosure by the prosecution." The discovery afforded a criminal defendant in Massachusetts is indeed limited. However the degree of reciprocity necessary to satisfy due process could be incorporated in a Massachusetts alibi statute.

In Williams Justice White suggested that the totality of reciprocal discovery afforded a criminal defendant in Florida justified alibi discovery under due process. It is therefore useful to examine the Florida discovery scheme. Under Rule 3.220(d) of the Florida Rules of Criminal Procedure the defendant is entitled as a matter of right to the list of witnesses upon whose testimony the indictment was found. If the defendant wishes more extensive discovery of the prosecutor's case, he must file a written offer to supply the prosecutor with a list of all the witnesses upon whom he will rely. If the defendant supplies the list, Florida Rule 3.220(e) then requires the prosecutor to furnish the names of all witnesses known to him who have any relevant information. It is apparent that the "liberal discovery by the defendant against the state" of which Justice White spoke exists only as the quid pro quo of the defendant's willingness to reveal his own case before trial. The defendant is not, nor should he be, allowed discovery of the state's entire case as a reciprocal privilege for disclosing merely his alibi witnesses.

Insofar as reciprocal discovery is required by due process, the requirement results specifically from the need to maintain "fundamental fairness" in the adversary process. If the defendant is afforded discovery against the state in the same measure as the state is allowed discovery

64 1971 Mass. Adv. Sh. at 1350-51, 274 N.E.2d at 591. "We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' of a 'fair trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant." 399 U.S. at 81.

65 See Commonwealth v. Salerno, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970). However, the situation created by the discovery order in Gilday is not significantly different from that which exists in some of the states which require the criminal defendant to disclose his alibi witnesses. In Iowa, Oregon and Pennsylvania if the prosecutor proceeds by indictment, Iowa Code Ann. §772.3 (1958); Ore. Rev. Stat. §132.580 (1971); Pa. R. Crim. P. 216 (West 1972), it does not appear that the defendant will be allowed discovery of any other prosecution witnesses than those listed on the indictment. At the pre-trial conference under Pa. R. Crim. P. 311 (West 1972), however, more substantial discovery may well be afforded the defendant.

66 399 U.S. at 81.

against the defendant, the requirement of due process is satisfied. Since Massachusetts provides only a constitutional minimum of defense discovery, fundamental fairness would seem to require that the defendant's reciprocal discovery include not only witnesses the prosecutor intends to call in rebuttal but also the witnesses "upon whom the state intends to rely to establish defendant's presence at the scene of the alleged offense."68

If an argument is made against such a provision for defense discovery of the prosecution's witnesses, it will be the one articulated in the oft-quoted opinion of Chief Judge Vanderbilt in State v. Tune that the defendant might bribe or intimidate state witnesses.69 But to the extent there is a possibility of abuse by a particular defendant, there is no reason to deny all defendants such discovery.70 Moreover, since it is the defense counsel who will be apprised of the prosecution's witness list there is a slanderous suggestion implicit in such reasoning that the criminal defense bar cannot be trusted.71

Not only should the defendant be afforded reciprocal discovery of the identities of the prosecution's witnesses, but he should have the same right to depose the prosecutor's witnesses that the prosecutor has to depose defendant's witnesses. An increasing number of the states which have alibi statutes have also provided that the defendant shall have the right to use depositions for discovery purposes.72 The deposition is a fundamental truth-seeking tool and should not be arbitrarily denied the defendant.73 If such a broad scope of reciprocal discovery be objected to on the ground that the prosecutor is giving away too much, the answer must be that such discovery better adjusts the balance of advantage between the prosecutor and the accused.74 However, such broad reciprocal discovery does present an opportunity for abuse which must be guarded against. Therefore, provision should be made in the proposed statute for the restriction or denial of defense discovery if the prosecutor, in an adversary hearing, demonstrates to the court that

69 13 N.J. 203, 98 A.2d 881 (1953). Prospective state witnesses will be reluctant to come forward. Id. at 210, 98 A.2d at 884.
70 6 Wigmore, Evidence §1863 (3d ed. 1940). See also 50 N.C. L. Rev. 437, 444 (1972); Note, 60 Yale L.J. 626, 633-34 (1951).
73 50 N.C. L. Rev. at 449-50; Note, 60 Yale L. J. 626, 639 (1951).
there is probable cause to believe the defendant will abuse his discovery opportunity.\(^\text{75}\)

C. Sixth Amendment: Right to Present Witnesses

In order to insure the defendant's compliance with the notice requirement, the Florida alibi statute provides discretion in the trial court to exclude alibi evidence for noncompliance with the statute.\(^\text{76}\) Because the defendant in Williams had complied with the notice requirement, the issue of whether the state could validly exclude alibi evidence was not before the Supreme Court. The Court was careful to point out, however, that such a penalty might raise Sixth Amendment questions.\(^\text{77}\) The Supreme Judicial Court, speaking of the discovery order in Gilday, stated: "[P]robably the only effective measure to enforce the order in such instance is to exclude at trial the defendant's offer of evidence in these areas of defense."\(^\text{78}\) But the constitutionality of excluding material evidence was the second "uncertainty" which may have troubled the Court. The subsequent discussion will focus on the constitutionality of the exclusionary sanction and suggest an alternative.

Most alibi statutes provide the trial court with discretion to exclude alibi evidence in the event of noncompliance.\(^\text{79}\) Other statutes require the trial court to exclude the evidence if the defendant is unable to show good cause for his noncompliance. Only the Kansas statute makes

\(^{\text{75}}\) The New Jersey alibi-notice rule provides such power in the trial court. See also N.J. R. Crim. Prac. 3:5-9(c) (1968); Fla. R. Crim. P. 3.220(b) (West 1972); Proposed Federal Rule of Criminal Procedure 16 (3), 48 F.R.D. 553, 587-610 (1970); 50 N.C. L. Rev. at 448; Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Cal. L. Rev. 56, 100-01 (1961).


\(^{\text{77}}\) "We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore." 399 U.S. at 83 n.14. Under the holding in Washington v. Texas, 388 U.S. 14 (1967) a criminal defendant has the right under the Sixth Amendment to present as well as obtain witnesses in his own behalf. Id. at 23.


\(^{\text{79}}\) If the defendant's competency as a witness is created by the state constitution, his right to testify to the alibi will be unimpaired by noncompliance. If his right to testify in his own behalf is statutory, there is a split of authority whether his own alibi testimony will be excluded. See 55 J. Crim. L. C. & P. S. at 33. However, in State ex rel. Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968), through a disingenuous rationale, the court excluded the defendant's own testimony although his right to testify derived from the state constitution. Id. at 136-38, 163 N.W.2d at 180-81. Some alibi statutes specifically provide that the defendant may testify regarding his alibi notwithstanding noncompliance. See, e.g., Me. R. Crim. P. 16(b) (1971); Nev. Rev. Stat. §174.087(4) (1971); Pa. R. Crim. P. 312(c) (West 1972).
exclusion mandatory. The Oklahoma statute, by contrast, provides only a continuance if the defendant introduces an alibi at trial without prior notice. Although the Iowa statute is similar in terms to the Oklahoma statute, the Iowa Supreme Court has held that exclusion is mandatory if notice is not given earlier than four days before trial. However, it sometimes seems that the courts have determined not to exercise discretion in that they show an alarming tendency to exclude alibi evidence for minor infractions of the statutes. The courts have demanded rigid adherence to the letter of the statute seemingly because of a belief that the alibi-notice statutes, being in derogation of the common law, must be strictly construed. Some appellate courts, particularly in more recent decisions, have recognized that inflexible exclusion of evidence represents no less an evil than the one which the statutes are intended to erradicate, and seem more willing to consider the facts of the particular case rather than mechanically affirm an exclusion of alibi evidence by a trial court. In a few cases trial courts have been reversed for

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80 A degree of discretion is granted the trial court. Notice is required to be served seven days before trial. However, for good cause, the court may permit notice to be served "at any time before the jury is sworn to the action". Only after that time is exclusion mandatory. Kan. Stat. Ann. §62-1341 (1964).


83 State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).

84 For example, evidence was excluded in the following cases: Cockerham v. State, 246 Ind. 195, 204 N.E.2d 654 (1958). The Indiana statute provides that the defendant "shall . . . file and serve upon the prosecuting attorney . . . " notice of an alibi defense. The defendant gave notice to the prosecutor ten days before trial as required but filed with the court clerk seven days before, apparently because he did not know "file" meant filed with the clerk. Id. at 304-05, 204 N.E.2d at 656; State v. Sharp, 202 Kan. 644, 451 P.2d 137 (1967). Kansas' statute requires ten days notice. Notice was given five days before trial. Id. at 649-50, 451 P.2d at 139; State v. Selback, 268 Wis. 538, 68 N.W.2d 37 (1955). Oral notification was given when written notice was required. Id. at 540, 68 N.W.2d at 39-40; People v. Jones, 118 Ill. App.2d 189, 254 N.E.2d 843. Defendant gave notice two days before trial when the statute required five days in a case which had already been continued seven times. Id. at 194-95, 254 N.E.2d at 845-46; State v. Berry, 170 Kan. 174, 223 P.2d 726 (1950). Witness Marva Bond was excluded when her name was listed as Mary Bond. Id. at 175-77, 223 P.2d at 727-28.


86 See, e.g., Commonwealth v. Shider, 209 Pa. Super. 133, 224 A.2d 802 (1966). "[T]he rules are intended to provide for the just determination of every criminal proceeding. . . . The underlying purpose of the rules is not to create a game but to ensure a fair trial from the standpoint of both the defendant and the Commonwealth." Id. at 136, 224 A.2d at 804; Founts v. State, 483 P.2d 654 (Nev. 1971). "Such strict compliance should not be blindly required if the end result will make the criminal prosecution a game." 483 P.2d at 656.

failure to exercise discretion "where requiring strict compliance with the statute would defeat the ends of justice and fair play which is the policy underlying the statute." It is submitted there may be a more subtle reason for the failure of some courts to exercise discretion in excluding alibi evidence: a tendency to misconstrue the statute. The Supreme Court in Williams separated the statute into constituent parts, a duty on the part of the defendant to make alibi discovery and a sanction to "enforce" it. Other courts, however, have given the statute a unitary construction. For example, it has been said that notice is a "condition precedent" or "prerequisite" to the introduction of alibi evidence at trial. It has also been said that if this "condition" were not satisfied the alibi evidence is "incompetent" or "immaterial . . . because it is not in the case." The difference between these two constructions of the exclusionary sanction is illustrated by analogy to the contrast between Rule 37(b)(2) and Rule 8(b) of the Federal Rules of Civil Procedure. Under Rule 37 a court may exclude evidence as a sanction for failure to cooperate in discovery. Under Rule 8(b) if certain "affirmative defenses" are not specially pleaded they are waived. If the alibi statutes are given a unitary construction, as the above cases suggest, they seem to functionally resemble Rule 8(b). If a waiver rationale is indeed implicit in the reasoning of some courts, the exclusionary penalty would be virtually self-executing. A waiver rationale in the case of an alibi statute is inappropriate, however, in that it obscures the fact that the "functions of discovery prior to trial and of the control of the scope and admissibility of evidence during trial are conceptually separate and distinct." Furthermore it may be constitutionally unsound.

89 399 U.S. at 83.
93 State v. Rourick, 245 Iowa 319, 324, 60 N.W.2d 529, 531 (1953).
94 JAMES, CIVIL Procedure §4.9 (1965).
95 Conversely, use of the term "affirmative defense" in reference to the alibi statutes would seem to make the waiver rationale more likely.
96 State v. Benner, 284 A.2d 91, 98, (Me. 1971). Use of the term "affirmative defense" is especially likely to induce this confusion. The most glaring example is in the case of the Iowa courts. Because the Iowa courts have applied the term "affirmative defense" with all its ramifications from civil procedure, the court, in State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953), was able to say the Iowa notice requirement was "in the nature of a special plea." If an alibi was not specially pleaded four days before trial it could not be raised at trial. This,
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In contrast, the courts of the states having alibi statutes are lenient in admitting the testimony of prosecution witnesses whose names were not furnished to the defendant as required by statute or court order.\(^98\) The burden is on the defendant in such cases to show that he has been prejudiced by the failure of the prosecutor to comply with the statute or discovery order.\(^99\) In the interest of fundamental fairness a similarly liberal attitude should be adopted by the courts with respect to requiring compliance.\(^100\) Before considering the imposition of any sanction the

in spite of the fact the statute provides for only a continuance when there has been noncompliance. Id. at 323-24, 60 N.W.2d at 531.

There has been loose language to the same effect elsewhere. See, e.g., Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960). "[M]ore and more statutes require that the defenses of alibi and insanity be pleaded specially before trial." Id. at 1186; Dean, Advance Specification of Defense in Criminal Cases, 20 A.B.A.J. 435 (1934). "They set up a wholly reasonable rule of pleading." Id. at 440, quoted with approval in Jones v. Superior Court, 58 Cal. 2d 56, 61, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962); State ex rel. Sikora v. District Court, 154 Mont. 241, 462 P.2d 897 (1970). "[I]t sets up a wholly reasonable rule of pleading." Id. at 250, 462 P.2d at 902. See also 55 J. Crim. L. & P. S. at 32 and Note, 60 Yale L.J. 626, 632 (1951). In an interesting reversal the defendant in People v. Nichopoulos, 26 Mich. App. 297, 182 N.W.2d 83 (1970) claimed the notice requirement was a "pleading" which the court denied. Id. at 300, 182 N.W.2d at 86.

\(^{97}\) See Note, 81 Yale L.J. 1342, 1363 n.22 (1972).

\(^{98}\) See, e.g., 69 Yale L. J. 1149 (1960). "If the prosecutor omits entirely a list of witnesses on the indictment, the defense can usually obtain witnesses names by appropriate motion. . . . However, if a list of witnesses is furnished, and the state later attempts to offer a witness not on the list, it is almost invariably successful; most courts construe satutes requiring lists of witnesses as "directory" rather than "mandatory." Id. at 1185 n.118; Moore, Criminal Discovery, 19 Hastings L. J. 865 (1968). "Even if the prosecution proceeds so that the statutes are applicable, deliberate avoidance of the statutes by the prosecution doesn't often lead to exclusion of the testimony of unlisted witnesses." Id. at 875. Often the statutes which require that the prosecutor indorse on the indictment the names of all material witnesses at the time the indictment is found and that the list be kept up-to-date, state that the only effect of failure to indorse the names of witnesses is that no continuance shall be granted the state if they are absent at trial. See, e.g., Ind. Ann. Stat. §9-903 (1956); Kan. Stat. Ann. §62-931 (1964).

\(^{99}\) See, e.g., Ramirez v. State, 241 So. 2d 744, 746-47 (Fla. App. 1970); Holguin v. State, —Ind.—, 269 N.E.2d 159, 164 (1971); State v. Miner, 128 Vt. 55, 71-73, 258 A.2d 815, 825-26 (1969). These cases are especially significant because the defendant's discovery rights with respect to the prosecutor's witnesses correspond exactly to the prosecutor's rights as to the defendant's alibi witnesses. The defendant is entitled to discovery of the prosecutor's witnesses in order that he may not be surprised at trial without adequate opportunity to investigate their stories. Moreover, the defendant in these states has the right to depose the prosecution's witnesses before trial for impeaching and discovery purposes. Yet, in each of these cases a different standard was applied than presumably would have been applied had the defendant failed to make alibi discovery.

\(^{100}\) For a commendable use of discretion see Commonwealth v. Vecchioli, 208
trial court should require the prosecution to show that it has been prejudiced by the defendant's noncompliance with an alibi rule. In any newly drafted statute this requirement should be made explicit.\textsuperscript{101} Increased use of discretion will at least enable the courts to confront less frequently the Sixth Amendment issue. However, the question will remain whether a state is ever justified in depriving the defendant of his right to present witnesses in his own behalf because of noncompliance with an alibi statute.

Assuredly, a state's interest in preventing the perjury and frequent delay that is endemic to the alibi defense is an important one and it has been the traditional approach of the Supreme Court, in the case where constitutional rights are asserted in the face of a sufficiently important governmental regulatory purpose, to weigh the respective interests involved.\textsuperscript{102} Even when it has been ascertained that the governmental purpose is a sufficiently important one in relation to the individual's constitutional right, a search must be made for a "reasonable alternative"\textsuperscript{103} which will effectuate the governmental purpose without confronting the constitutional issue before there can be any interest weighing.

Such a search is especially compelled in the case of an exclusionary sanction within an alibi statute because such a sanction is at odds with the very purpose of the statute. It is anomalous to exclude what might well be "relevant probative evidence" in order to ensure the functionality of a statute intended to enhance the search for truth. If, as Justice Black suggests, a sense of "decency" or "fairness"\textsuperscript{104} is the underlying constitutional justification for the alibi statute it does not find expression in an exclusionary sanction. First, the addition of a perjured defense

\textsuperscript{101} It would appear that Illinois has moved toward adopting such a requirement in that the state's alibi statute provides that it should appear to the court that the prosecutor has been surprised before alibi evidence be excluded. Ill. Ann. Stat. c. 38, §114-14 (Smith-Hurd 1970).

\textsuperscript{102} See, e.g., Konigsberg v. State Bar, 366 U.S. 36 (1960) (First Amendment). "Whenever in such a context, these constitutional protections are asserted against the exercise of valid governmental powers, a reconciliation must be effected, and that performance requires an appropriate weighing of the respective interests involved." Id. at 49-51. See also Byers v. California, 402 U.S. 424, 427 (1970); Id. at 451-52 (Harlan, J., concurring) (Fifth Amendment).

In Byers Justice Harlan set out three successive hurdles which must be cleared whenever a governmental interest is to be balanced against a constitutional right: (1) The importance of the government's interest must be evaluated (2) Is there another means by which this interest may be effectuated which will obviate the necessity for balancing in the first interest? (3) The permissible degree of balancing consistent with the values the constitution is intended to protect must be established. 402 U.S. at 454 (Harlan, J., concurring).

\textsuperscript{103} See Note, 81 Yale L.J. 1342, 1353 (1972).

\textsuperscript{104} 399 U.S. at 115 (Black, J., dissenting).
may be deleterious but it cannot be said to be decisive to the degree that denying the defendant a chance to present evidence will be. If perjured testimony is offered, the jury may still disbelieve it whereas the jury may never consider evidence which is excluded. Second, fundamental fairness, at least, demands that a sanction equate qualitatively with the gravity of the offense to which it applied. Assuredly, the exclusionary sanction does not. The end result of mere inadvertence may be conviction for a crime.

The other extreme from the exclusion sanction would be no sanction at all. Oklahoma’s statute, as has been noted, provides no sanction for noncompliance. A recent Montana decision also illustrates that this result could apparently be achieved in those states which provide an exclusionary penalty. In State ex rel Sikora v. District Court the Montana Supreme Court upheld the constitutionality of the Montana alibi-notice statute in the face of a claim that it violated the Fifth Amendment. However, the Montana statute requires a criminal defendant to give notice of his intention to plead insanity and self-defense as well as alibi and to list his supportive witnesses. The court determined that insofar as they related to insanity and self-defense, the requirements of the statute would be directory only in effect: “[t]he defendant who chooses to remain silent until later than the statute indicates may do so and for good cause may still interpose his defenses. . . . Good cause for a delay in asserting the defenses . . . may be shown as the right against self incrimination.” (Emphasis added). This was apparently the result of a residual doubt, in spite of statements to the contrary, that compelling notice of insanity and self defense was constitutional under the Fifth Amendment, especially under the penalty of excluding evidence. Presumably, any other court troubled by an exclu-

108 Mont. Rev. Codes Ann. §§95-1803(d) provides in relevant part: “For purpose of notice only and to prevent surprise, the defendant shall furnish to the prosecutor and file with the clerk of the court at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may for good cause permit, a statement of intention to interpose the defense of insanity, self-defense or alibi. If the defendant intends to interpose any of these defenses, he shall also furnish to the prosecution and file with the clerk of court, the names and addresses of all witnesses to be called by the defense in support thereof.”
109 An alternative “interpretation” which would be in keeping with the “plain meaning” of the statute which is mandatory [154 Mont. at 254, 462 P.2d at 904 (Haswell, J., dissenting)] and would enable the statute to pass constitutional muster under the Williams reasoning is that the words “[f]or purpose of notice only and to prevent surprise” indicate that the defendant is not to suffer any harm beyond loss of the tactical advantage of surprise and the prosecutor is to gain no benefit beyond forewarning. Therefore it could be implied that this language was intended to be a restriction of the use to which the prosecutor could put the information he received.
sionary sanction could similarly decide that the Constitutional uncertainty of excluding defense evidence is itself good cause for admitting the evidence despite the statutory sanction.

Although it is unlikely that Oklahoma would maintain its statute as presently written if it were a nullity, it does seem likely that a statute which provides no extrinsic motivation to cooperate in discovery will be less than totally effective. It is unlikely a defendant would voluntarily surrender his tactical advantage of surprise without a prod of some kind. Therefore, an attempt should be made to find a middle ground between the polar possibilities of exclusion or no sanction at all.

The obvious alternative would be a resort to the court’s contempt powers. It must be conceded that a contempt sanction may be ineffective against a desperate defendant charged with a felony carrying heavy penalties. Such a defendant might have everything to gain and relatively little to lose by ignoring the notice requirement. A better solution would be to create sanctions applicable, in addition or in the alternative, against the defense attorney. It is he who makes the tactical decisions. Most criminal defendants probably would not be aware of a notice requirement. It would seem more appropriate and fair that, when non-compliance results from the negligence or intransigence of the defense attorney, liability should be borne by him.

The A.B.A. committee which adopted a proposal for a criminal discovery statute recommended this approach in the comments to the proposal.

The Committee’s general view, moreover, was that the court should seek to apply sanctions which will affect the evidence at trial and the merits of the case as little as possible, since these standards are designed to implement, not to impede, fair and speedy determinations of the cases.

With few exceptions . . . the obligations imposed under these standards fall upon attorneys. Accordingly, it would seem appropriate to deal with breaches in the same way as infractions of bar discipline. Future canons of ethics might specifically so provide. Similarly, the courts’ contempt power would seem especially appropriate to willful infractions by lawyers.

110 According to the result of a survey conducted by one writer, the Oklahoma statute is largely ineffective. 55 J. Crim. L. C. & P.S. at 35 n.76, 36.
111 A.B.A., STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL §4.7 at 107-08 (Supp. Oct. 1970). This approach has been suggested by another writer. Note, 81 Yale L.J. 1342, 1359-60 (1972). Obviously, the threat of sanctions against the attorney may result in the very exclusion of evidence it was intended to be in lieu of. However, this possibility in no way affects the validity of the statute. The defendant, whose attorney chose not to offer evidence rather than risk a sanction for his negligence, would have a right to a writ of habeas corpus. The attorney in such a case should be dealt with severely. In State ex rel. Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968), the defendant contended that he had been denied his constitutional rights because his counsel elected not
The efficacy of the use of sanctions against defense counsel has been disputed. However, it is submitted that in very few instances would even the most zealous defense attorney be willing to risk criminal contempt or disciplinary proceedings in order to gain the comparatively small advantages which result from a refusal to give alibi notice.

The availability of a flexible mix of sanctions such as contempt against counsel and defendant or institution of disciplinary proceedings by the bar offers the best prospect of ensuring compliance with an alibi statute while ensuring a verdict based on all the facts. While it may be conceded that an alibi statute which does not exclude alibi evidence for noncompliance with its terms will be less successful in avoiding the disruption of criminal trials than the conventional alibi statute, in most instances the prosecutor will receive notice, and providing that other sanctions are available, such statutes are better suited to serve the ends of criminal justice.

The reciprocity of sanctions is another issue. In 1964, one writer suggested that the reciprocal discovery provided by the New Jersey alibi statute was likely only a "paper solution" to the due process issue in alibi discovery because, evidently, at that time the statute provided no penalty against the prosecutor for noncompliance. The present New Jersey rule, as well as those of Florida and Nevada, and the proposed Federal Rule 12.1 provide for exclusion of the prosecuting attorney's evidence when notice is not given. Similarly, in order that a proposed Massachusetts alibi statute should be effective the sanctions which are applicable against the defendant and defense counsel should also be applicable against the prosecuting attorney where the defendant demonstrates that he has been prejudiced by the negligent or willful failure of the prosecuting attorney to give notice.

III. INITIATING DISCOVERY

Most alibi statutes require the defendant to give notice of his intention to interpose an alibi defense. There is no duty on the part of the prosecutor to request the information or to ascertain whether defense counsel is aware of the requirement. However, the District of Columbia, Florida, Illinois, Maine, Minnesota, New Jersey, New York, and Washington place to give notice of alibi at the time of trial. The court on review held that, on the basis of the record, this "election . . . standing alone, is not sufficient basis for finding that defendant was denied the effective assistance of competent counsel." Id. at 140, 163 N.W.2d at 182. Presumably, awareness that this decision may have been motivated by self-interest might cause a different conclusion.

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the burden on the prosecutor to request notice from the defendant. This would seem to be the better policy. Not so much because it avoids mistake of law\textsuperscript{115} (it is very unlikely that an attorney would not check the discovery requirements of the criminal code), but for reasons of procedural efficiency, the statutory mechanism should be triggered by a request from the prosecutor which includes a specific statement of the time and place of the crime which the district attorney will establish at trial. Such a procedure, by eliminating the need for a defense request for particulars in the event the indictment or information is not specific, expedites the notice procedure.\textsuperscript{116}

The prosecutor's service of notice upon the defendant which states the time and place of the crime should not by itself function as a bill of particulars which will limit the state's proof at trial. It has been suggested that the defendant's compliance causes the demand to become in effect a bill of particulars which will restrict the prosecutor's proof at trial if the defendant suffers prejudice from the variance.\textsuperscript{117} However, in keeping with the aim of the proposed statute not to affect the admissibility of evidence at trial, a variance between the time and place of the crime as stated in the prosecutor's request for notice and that offered to be proved at trial should not result in a restriction of his proof. Correspondingly, however, the defendant should be allowed to offer any alibi evidence which is material to the offer of proof at trial,\textsuperscript{118} and if he has been prejudiced by the variance he should be granted a continuance.

An alternative which should be considered, however, is that the statutory mechanism be capable of being triggered by either party. The defendant, for example, should be entitled to demand notice from his adversary of the witnesses who will rebut the alibi. In a hypothetical situation where the alibi witnesses would be obvious, if the prosecutor were required to give up the names of his rebuttal witnesses in order to demand notice, he might prefer not to make the demand. The defendant, on the other hand, would wish to know the names of the re-

\textsuperscript{115} 55 J. Crim. L. C. & P. S. at 34.

\textsuperscript{116} Id. at 34-35. See, e.g., State v. Nunn, 113 N.J. Super. 161, 273 A.2d 366 (1971). "The omission of the exact time of the offense in the indictment should not bar the applicability of a notice requirement since ample discovery procedures exist through which such information is readily obtainable." Id. at 168, 273 A.2d at 370.

\textsuperscript{117} State v. Benner, 284 A.2d 91, 98-100 (Me. 1971). See also Ind. Ann. Stat. §9-1631 (1956). If the prosecutor fails to file a bill of particulars under the Indiana alibi statute "the court shall in the absence of a showing of good cause . . . exclude evidence offered by the prosecuting attorney to show that the defendant was at a place other than the place stated in the defendant's original notice." Id.

\textsuperscript{118} Ill. Ann. Stat. c. 38, §114-14 provides: "[I]f in the progress of the trial the evidence discloses a time or place of the offense other than previously alleged, the defendant may, without having given the notice required by the section, offer evidence for the purpose of establishing an alibi." Id.
buttal witnesses. This would seem an especially appropriate addition to the alibi statute of a state such as Florida. If a defendant in Florida did not wish to reveal all his witnesses for Fifth Amendment reasons, he would be entitled only to the names of the witnesses who appeared before the Grand Jury.119 However, if the defendant were also able to initiate alibi discovery, he would at least be able to discover the rebuttal witnesses as well. Such a requirement seems to comport with the concept of fairness. It is unlikely that such a provision would be favorably received by prosecutors. They might point out, though the suggestion is slanderous, that defense attorneys might fabricate an alibi which they had no intention of using in order to gain the names of eye-witnesses.

IV. A LEGISLATIVE PROPOSAL

As a conclusion to the foregoing discussion this comment proposes two model criminal discovery statutes which, it is submitted, would secure the benefits of discovery described above without compromising Constitutional guarantees. The first is an insanity notice statute which is intended to avoid conceivable self-incrimination problems, particularly in states such as Massachusetts which do not recognize a doctor patient privilege.120 This model is adapted in part from Proposed Rule 12.2 of the Federal Rules of Criminal Procedure.121 The second is an alibi-notice statute intended to obviate the constitutional problems raised by the alibi-discovery order of Gilday. The proposed statutes are as follows:

A. Model Insanity Notice Statute.

If a defendant intends to rely upon a defense of lack of criminal responsibility by reason of mental disease or defect he or his attorney shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, give written notice to the prosecuting attorney and file such notice with the court. If the defendant or his attorney shall fail to give and file the notice required by this section the court may, in the absence of cause shown, impose such sanction as shall not affect the proof at trial. The filing of notice required by this section shall not constitute a plea.

B. Model Alibi Notice Statute

Not less than fifteen days from the date set for trial, unless the court shall otherwise direct, the prosecuting attorney may serve upon the defendant a written demand for notice of the defendant’s intention to rely in any way on an alibi at trial. The prosecuting attorney’s demand shall specify as particularly as is known to him,

120 See note 18, supra and the discussion in the text.
the place, date and time of the commission of the crime charged.

Within five days of the receipt of the prosecuting attorney’s demand for notice, unless the court shall otherwise direct, the defendant or his attorney shall file with the court and serve upon the prosecuting attorney a notice in writing of his intention to rely on an alibi at trial. The defendant’s notice shall specify as particularly as is known to him the place at which the defendant claims to have been at the date and time set out in the prosecuting attorney’s demand and shall contain as particularly as is known to the defendant or his attorney the names and addresses of the witnesses by whom he intends to establish his alibi.

Within five days after receipt of the defendant’s witness list, unless the court shall otherwise direct, the prosecuting attorney shall file with the court and serve upon the defendant or his attorney notice of the names and addresses of the witnesses by whom the prosecuting attorney intends to prove the defendant’s presence at the scene of the crime charged and by whom the prosecuting attorney intends to discredit the defendant’s alibi at trial.

Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose and file the names and addresses of additional witnesses which come to the attention of either party subsequent to his having given notice.

Each party shall have the same rights with respect to the examination and deposing of the witnesses of whom notice is given by the other party.

The prosecutor shall not introduce as his own any witness whom the defendant names in his notice nor any other witness or evidence which is the fruit of the defendant’s notice. If the defendant objects to any witness or evidence introduced by the prosecuting attorney as a violation of this prohibition it shall be incumbent upon the prosecuting attorney to demonstrate to the satisfaction of the court that the disputed evidence is not causally connected to the defendant’s notice.

The prosecuting attorney’s demand for notice shall not be construed as a bill of particulars which shall limit the prosecution’s proof at trial. If at trial the time at which the crime charged shall prove to be different from the time specified in the prosecuting attorney’s notice both parties may present evidence or witnesses to prove the defendant’s absence from or presence at the scene of the crime charged without giving the required notice.

If at trial a party presents witnesses or evidence to prove the defendant’s absence from or presence at the scene of the crime charged without having given the required notice the court may grant a continuance not to exceed three days if the other party has been prejudiced thereby. If either party shall fail to give and file the notice required by this section the court shall, in the absence of
good cause shown, impose such sanction as shall not affect the proof at trial.

The court shall have the power upon motion of either party to make such orders limiting discovery by either party as required by the ends of justice.

JAMES E. O'CONNOR

STUDENT COMMENT

§7.9. The defense of diminished capacity. Diminished capacity is a defense which is intended to introduce the subjective factor of mental incapacity into the determination of a criminal defendant's guilt. In jurisdictions which recognize the defense, evidence of mental incapacity may be admitted to show that the accused did not possess the mental state required by the criminal law to concur with the unlawful act.\(^1\) The defense is based upon the traditional criminal law premises that an "evil" state of mind and an unlawful act must concur in order to subject a defendant to criminal liability;\(^2\) and that the prosecution must prove the accused's guilt on each essential element of the criminal charge.\(^3\) It differs from the insanity defense, which seeks to relieve an accused of all criminal responsibility by virtue of his mental disease or defect.\(^4\) The diminished capacity defense seeks only to relieve an accused of criminal responsibility for the crime charged, but does not preclude conviction for a lesser offense.\(^5\) It is the purpose of this comment to examine the arguments relating to the admission of evidence to show a criminal defendant's psychological abnormality for the purpose of determining whether the defendant was capable of possessing the requisite state of mind for conviction of a criminal offense. After a survey of the Massachusetts decisions which have rejected the diminished capacity defense, an inquiry will be made as to the feasibility of integrating the defense with traditional \textit{mens rea} doctrine. This general inquiry will be followed by a comparison of the conflicting judicial determinations of diminished

\(^1\) People \textit{v}. Conley, 64 Cal. 2d 310, 316, 411 P.2d 911, 914, 49 Cal. Rptr. 815, 818 (1966).

\(^2\) Morisette \textit{v}. United States, 342 U.S. 246, 251-52 (1952); Commonwealth \textit{v}. Mixer, 207 Mass. 141, 142, 93 N.E. 249 (1910). In certain statutory offenses the performance of a specified act, itself, may constitute the crime, regardless of the actor's state of mind at the time of the act. Id.


\(^4\) Commonwealth \textit{v}. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967). The Supreme Judicial Court adopted the Model Penal Code's insanity provision [§4.01 (1) 1962 Proposed Official Draft], to wit: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

\(^5\) W. LAFAVE & A. SCOTT, \textit{HANDBOOK ON CRIMINAL LAW} §42 (1972).
capacity issues. Finally, assuming that a jurisdiction has adopted the defense, certain practical difficulties involved in implementing that decision will be explored.

**Massachusetts’s Decisions.** Three decisions of the Massachusetts Supreme Judicial Court have established the rule that evidence of mental abnormality short of legal insanity will not be admissible in criminal trials to negate the required mental elements of a statutory offense. This rule was originally formulated in *Commonwealth v. Cooper.* There the accused admitted killing the decedent, but argued that a mental disorder so diminished his degree of responsibility for the homicide that he should not be convicted of murder in the first degree. The *Cooper* Court decided that if the defendant was legally insane under the test of *Commonwealth v. Rogers,* then he was entitled to a verdict of not guilty by reason of insanity, but if insanity could not be established, no evidence of his mental incompetency would be admissible to reduce the degree of the crime. The principle established by *Cooper* was modified subsequently in cases of first degree murder by the rule which permits the accused’s voluntary intoxication to be considered in determining whether he was capable of deliberately premeditating murder. If the defendant’s intoxication is determined to have rendered him incapable of deliberate premeditation, he will not be guilty of murder in the first degree, but may be found guilty of second degree murder.

The diminished capacity issue was again brought before the Supreme Judicial Court in 1971 by two appeals from first degree murder convictions. In the first of these cases, *Commonwealth v. Costa,* the defendant had been convicted of two counts of first degree murder for the shooting and subsequent mutilation, without apparent motive, of two female school teachers. Defendant argued on appeal that psychiatric testimony, which classified him as a borderline schizophrenic whose mental capabilities had been reduced through his use of harmful drugs, should have been admitted on the issue of his capacity to harbor malice, despite the fact that such evidence would have been insufficient to constitute legal insanity. This evidence, if admissible, would have permitted the jury to find the defendant guilty of manslaughter. Relying upon *Cooper,* the Court held that evidence of impaired mental capacity short of legal

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6 219 Mass. 1, 106 N.E. 545 (1914).
7 Id. at 4, 106 N.E. at 547.
8 48 Mass. (7 Met.) 500, 501 (1844). This test has been replaced by the McHoul test. See note 4, *supra.*
9 219 Mass. at 5, 106 N.E. at 547.
11 Note 10, *supra.*
13 Id. at 1359-60, 274 N.E.2d at 805.
insanity could not be submitted to the jury for that purpose. One week after *Costa*, the Court in *Commonwealth v. Fleming* held that evidence of mental abnormality not amounting to legal insanity would not be admitted to reduce an indictment for first degree murder to second degree murder on the grounds that defendant was incapable of deliberate premeditation. The reaffirmation of *Cooper* by the Supreme Judicial Court in *Costa* and *Fleming* firmly establishes Massachusetts as a jurisdiction which does not permit a diminished capacity defense to any criminal charge.

**Application of the Diminished Capacity Defense to Criminal Offenses.** The diminished capacity defense attempts to integrate evidence of subjective mental incapacity with the elements of traditional *mens rea* doctrine. The feasibility of applying the defense to each state-of-mind element varies in relation to the interpretation placed upon each element by the courts. An analysis of the compatibility of the diminished capacity defense with *mens rea* doctrine should begin with the crime of murder, since it is there that the defense is used most extensively. In Massachusetts the statutory definition of first-degree murder includes (1) murder "with deliberately premeditated malice aforethought," (2) felony-murder, and (3) murder "with extreme atrocity or cruelty." The courts have interpreted the statute primarily according to objective criteria which do not leave wide latitude for the introduction of subjective evidence of defendant's mental state, short of insanity. In cases of deliberately premeditated murder, however, the courts have been receptive to mitigating, subjective evidence, since the admission of such evidence is compatible with the criminal law's inquiry as to whether the accused did subjectively premeditate and deliberate the homicide. Admission of diminished capacity evidence in cases of first degree murder would be in harmony with this position, since it would function to demonstrate that the accused was mentally incapable of premeditation and deliberation.

The diminished capacity defense would also be of value to an individual indicted for felony-murder. The felony-murder rule operates by imputing the requisite mental elements of murder to a felon when a homicide is

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14 Id. at 1364-65, 274 N.E.2d at 808.
17 G.L., c. 265, §1.
18 "... A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts." Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 305 (1850).
19 W. LaFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §42 (1972).
committed while a felony is being committed. A diminished capacity defense would allow the introduction of evidence of a criminal defendant's inability to possess the requisite specific intent for the lesser felony, and thereby prohibit any constructive implication of the malice required for a murder conviction. In the final type of first degree murder, atrocity murder, Massachusetts holds that the malice required for second-degree murder is sufficient, and no further mental element need be proved, if the court determines by objective standards that the murder was committed with extreme atrocity or cruelty. A diminished capacity defense to an atrocity murder charge, therefore, would operate by negating the existence of malice.

The diminished capacity defense cannot be introduced into the determination of whether a homicide charged as murder is actually heat-of-passion voluntary manslaughter. Manslaughter is not defined by statute in Massachusetts, but is defined in Commonwealth v. Webster as a homicide committed without malice. The absence of malice in cases of heat-of-passion voluntary manslaughter is measured by an objective provocation test. This test necessarily presupposes an average man of ordinary self-control without serious mental and emotional defects, and thus forecloses jury consideration of subjective mental factors.

The application of the diminished capacity defense to voluntary manslaughter would thus result in a doctrinal conflict which would necessitate the exclusion of diminished capacity evidence. Outside of the homicide area there are many lesser crimes which require the accused to possess a certain state of mind at the time of his unlawful act. As with homicide crimes, the applicability of the diminished capacity defense to these lesser offenses turns on the extent to which the criminal law will allow subjective evidence to be introduced on the issue of the accused's state of mind.

The Diminished Capacity Controversy. There is considerable divergence of judicial opinion on the issue of whether evidence of diminished capacity should be admitted at trial. Massachusetts holds that evidence of mental incapacity is relevant only to the determination of insanity. This position apparently assumes that if the person charged is not in-
responsible as adjudged by the jurisdiction’s insanity test then he must be capable of achieving the specific state of mind requisite for conviction of the criminal offense. This all-or-nothing approach has been criticized by numerous authorities as being incompatible with the realities of human psychology. Criticism of that position has been strongest in the premeditated murder area where the courts have been willing to accept subjective evidence of voluntary intoxication on the state of mind issue. One court has questioned why there “should be a different rule and perhaps a more lenient one with respect to the user of alcohol or drugs than in the case of one who may be afflicted with a mental disease not of his own making.” One court has responded that the prostration required for the voluntary intoxication defense is so complete that a mind similarly prostrated by mental disease would be considered legally insane. It has also been argued that intoxication is an objective phenomenon while mental deficiency is purely subjective, difficult to prove, and likely to give rise to confusing expert testimony.

The rationale which underlies the diminished capacity defense was stated by Weihofen in his leading article:

If insanity is a defense because it negatives the state of mind requisite to the crime charged, there is no logical escape from the proposition that if the defendant, because of mental disorders short of insanity, was incapable of premeditating and deliberating the killing and in fact did not deliberate or premeditate, he cannot be guilty of a crime which by definition requires these mental elements.

The Model Penal Code has also adopted the view that evidence of diminished capacity is relevant in determining defendant’s state of mind, and it would admit such evidence at trial. Many state courts have held


31 Fox v. State, 73 Nev. 241, 244, 316 P.2d 924, 926 (1957).


33 Weihofen, note 29, supra at 964.

that evidence of diminished mental capacity is admissible for the purpose of determining whether a defendant, indicted for first degree murder, possessed the capacity to deliberate and to premeditate the homicide with which he is charged. These decisions are often unsatisfactory, however, in that they fail to fully analyze the difficulties of integrating this evidence with existing criminal law doctrine.

On the other hand the courts rejecting the diminished capacity doctrine have often expressed specific objections to its adoption. In 1946, the United States Supreme Court in Fisher v. United States declined to accept the diminished capacity doctrine, stating that the evidence of its wisdom was insufficient to permit a definite decision. Abstaining from a final constitutional determination, the Supreme Court based its jurisdiction on its supervisory powers over the courts of the District of Columbia, whence the appeal originated, and allowed those courts to determine for themselves whether they would accept the diminished capacity defense. By limiting the scope of the decision in this manner, and by expressly deferring a final decision as to the merits of the doctrine, the court impliedly left each state free to make its own determination of the issue.

Many jurisdictions have rejected the defense and will not admit evidence of mental defects or deficiency in determining the existence of deliberation and premeditation of a homicidal design. One state court balked at admitting evidence of diminished capacity to negate the existence of premeditation, stating that there was no real difference between the mental ability required for first and second-degree murder. This position results from the tendency of the courts to emasculate the distinction between first and second-degree murder. It may be criticized in that it tends to frustrate the legislative purpose in dividing common law murder into two degrees.

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37 328 U.S. at 476.

38 Id. at 475-76.


41 People v. Wolff, 61 Cal. 2d 795, 819-21, 394 P.2d 959, 974-75, 40 Cal. Rptr. 271 286-87 (1964); Weihofen, note 29, supra at 974.
The Maryland court suggested in *Armstead v. State*\(^{42}\) that adoption of the diminished capacity doctrine would require a broadening of the jurisdiction's insanity defense. Massachusetts has impliedly adopted a similar position in *Fleming*. In rejecting the defendant's diminished capacity argument, the Supreme Judicial Court stated that once the jury found the defendant criminally responsible, the "only question remaining . . . was whether the murder was 'committed with deliberately premised malice aforethought.'"\(^{43}\) It is in the determination of deliberation and premeditation, however, that the diminished capacity of the accused is most relevant. The *Fleming* decision seems to equate evidence of mental incapacity with evidence of insanity. If this view were accepted, then any use of mental incapacity outside of the insanity defense would indeed appear to expand the insanity defense. It is submitted, however, that diminished capacity is conceptually different from insanity: evidence of mental abnormality is not submitted as an affirmative defense requiring acquittal, but as a *partial defense* negating the state of mind required of a particular offense, in order to lower the degree of that offense.\(^{44}\) If voluntary intoxication is admissible to show defendant's mental incapacity to form a requisite state of mind, and performs this function without disturbing the insanity defense, then evidence of mental incapacity can achieve the same result, despite the fact that the defense would introduce evidence of the same general type as would be utilized in the insanity defense.\(^{45}\)

It can be argued that the *Fleming* opinion attempts to distinguish evidence of incapacity to possess *mens rea* from evidence of a lack of *mens rea* for purposes of admissibility. The former was not admitted, but the latter evidence, if competent, could probably not be excluded.\(^{46}\) However, the distinction is not entirely valid. Evidence that the defendant was incapable of achieving a specific state of mind would certainly tend to prove that he did not in fact possess the requisite state of mind at the time he committed the unlawful act.\(^{47}\)

Courts which have accepted the diminished capacity defense have not been as receptive to the defenses in cases of felony-murder as they have been in cases of premeditated murder.\(^{48}\) This distinction exists primarily because of the ease with which the courts allow the underlying felony to be proved by objective evidence, in contrast to the more subjective

\(^{42}\) 227 Md. 73, 175 A.2d 24 (1961).


\(^{48}\) People v. Ireland, 70 Cal. 2d 522, 539 n.13, 450 P.2d 580, 590 n.13, 75 Cal. Rptr. 188, 198 n.13 (1969).
inquiry required in regards to premeditated murder. This dichotomy would appear to similarly exist in Massachusetts where the Court has allowed voluntary intoxication to negate premeditation, but has indicated that evidence of voluntary intoxication will not negate the specific intent required for the underlying felony in a felony-murder prosecution unless it renders the accused legally insane. The anomaly of this position is that the defendant may be found guilty of first-degree murder despite the fact that premeditation is disproved, because he cannot submit the high quantum of evidence required to negate the intent prescribed by the lesser felony.

The traditional mental elements requisite for conviction of manslaughter have been defined in such a way as to bar the introduction of diminished capacity evidence. Common law manslaughter, unlike premeditated murder, requires the state-of-mind issue to be approached from a strictly objective viewpoint. Not all courts, however, have agreed with this position. Some jurisdictions have allowed a diminished capacity argument to reduce murder to manslaughter without expressly determining the effects of this position on the reasonable man standard. A minority of jurisdictions allow voluntary intoxication to disprove the existence of malice, and one court has argued that if voluntary intoxication can disprove the existence of malice, evidence of mental incapacity should be admissible for the same purpose. Massachusetts, however, does not allow evidence of voluntary intoxication to reduce murder to manslaughter. Presumably, if it would not be reasonable for the accused to be provoked if sober, his intoxication will not be allowed to show it was reasonable for him in his inebriated state.

The diminished capacity defense as applied by the California courts, under the so-called Wells-Gorschen doctrine, circumvents these difficulties.

49 Felony-Murder, note 22, supra at 807.
51 This result has been criticized and a solution suggested in Felony-Murder, note 22, supra at 807-08.
52 See text at notes 24-27, supra.
53 State v. McAllister, 41 N.J. 342, 353, 196 A.2d 786, 792 (1964) quoting Weihofen, note 29, supra at 969-70. The diminished capacity defense has been disallowed in cases of manslaughter for other reasons. State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964).
55 State v. Green, 78 Utah 580, 6 P.2d 177 (1931).
57 State v. Green, 78 Utah 580, 6 P.2d 177 (1931). Evidence of an accused's diminished capacity, which was caused by his voluntary intoxication, was admitted in order to reduce a murder charge to manslaughter in People v. Conley, 64 Cal. 2d 310, 411 P.2d 1911, 49 Cal. Rptr. 815 (1966).
Under the doctrine, evidence of psychological abnormality is admissible to disprove the state of mind necessary for any crime which requires specific intent.\textsuperscript{59} It was first enunciated in 1949 in \textit{People v. Wells}.\textsuperscript{60} California had then, as now, operated under a bifurcated trial system in which all evidence, exclusive of that tending to prove insanity, was heard at the first stage of the trial to determine if the accused was guilty. Upon a finding of guilt, a determination was made at the second stage of the trial as to whether the defendant could be found not guilty by reason of insanity.\textsuperscript{61} The court stated that evidence of mental abnormality short of insanity would be allowed at the first stage in order to determine if defendant possessed the requisite state of mind for the crime charged, while evidence of insanity would not be admissible until the second stage.\textsuperscript{62}

In \textit{People v. Gorshen}\textsuperscript{63} the California court cited the \textit{Wells} decision and held that evidence of mental incapacity could reduce a murder charge to voluntary manslaughter by negating malice. The \textit{Gorshen} decision would permit the jury to consider evidence of mitigating factors other than the traditional objective provocation test, and it thereby overruled cases holding that this latter test was the only means by which malice could be negated in relation to voluntary manslaughter.\textsuperscript{64} It circumvented the objective provocation problem by adding diminished capacity as a second mitigating factor to the definition of voluntary manslaughter. A similar resolution of the problem would be possible in Massachusetts, where malice has been defined as “any unlawful and unjustifiable motive.”\textsuperscript{65} This definition could be expanded to include mitigating factors other than the objective provocation test, but the Supreme Judicial Court has consistently followed the common law position of allowing only the latter factor as grounds for a finding of voluntary manslaughter.\textsuperscript{66}

Some jurisdictions, primarily California, have allowed the \textit{Wells-Gorshen} concept of diminished capacity to negate the specific intent required by felonies outside of the homicide area. Evidence of diminished capacity has been held admissible in cases of robbery,\textsuperscript{67} burglary,\textsuperscript{68} larceny,\textsuperscript{69} and violation of federal law.\textsuperscript{70} The lack of decisions admitting

\begin{itemize}
\item \textsuperscript{59} People v. Wilson, 261 Cal. App. 2d 12, 17, 67 Cal. Rptr. 678, 681 (1968).
\item \textsuperscript{60} 33 Cal. 2d 330, 202 P.2d 53 (1949).
\item \textsuperscript{61} Id. at 349-50, 202 P.2d at 64-65.
\item \textsuperscript{62} Id. at 350-51, 202 P.2d at 66.
\item \textsuperscript{63} 51 Cal. 2d 716, 336 P.2d 492 (1959).
\item \textsuperscript{64} Id. at 733, 336 P.2d at 502-03.
\item \textsuperscript{65} Commonwealth v. Beaulieu, 333 Mass. 640, 643, 133 N.E.2d 226, 229 (1956).
\item \textsuperscript{66} Commonwealth v. Campbell, 352 Mass. 387, 397, 226 N.E.2d 211, 218 (1967), and cases cited therein.
\item \textsuperscript{67} People v. Wilson, 261 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963).
\item \textsuperscript{68} People v. Taylor, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963).
\item \textsuperscript{69} People v. Colavecchio, 11 App. Div. 2d 161, 202 N.Y.S.2d 119 (1960).
\item \textsuperscript{70} Rhodes v. United States, 282 F.2d 59 (4th Cir. 1960). (Violation of 18 U.S.C. §1014).
\end{itemize}
evidence of diminished capacity in cases of non-homicide felonies indicates that the courts are more reluctant to apply the doctrine to these lesser crimes than they are to crimes of homicide. The danger which the courts foresee in allowing a diminished capacity defense in relation to lesser crimes is that a successful defense might result in a complete acquittal of the defendant.71 Such a result is possible if there are no lesser grades of offenses below the crime originally charged, and, conceivably, might even occur in a murder prosecution.72 The problems associated with acquittal or early release will be examined later.73

A minority of jurisdictions do not allow evidence of mental abnormality short of legal insanity to be introduced on the state-of-mind issue, but do hold it admissible for the purpose of determining the punishment to be imposed upon a finding of guilt.74 Massachusetts does not follow this position to the extent of allowing such evidence to reduce the term of a defendant's sentence, but a jury which has convicted the accused of first-degree murder is statutorily authorized to consider mitigating evidence in order to make its recommendation as to whether the death sentence should be imposed.75

The existing state-of-mind framework of the traditional criminal law may not be a suitable vehicle for allowing evidence of mental incapacity short of insanity to influence the degree of a crime.76 Frequently the courts will be faced with expert psychiatric testimony which bears little relationship to the state-of-mind elements required for conviction of the crime charged.77 The New Jersey decision in State v. Sikora78 is illustrative of this difficulty. The defendant in that case attempted to introduce expert testimony of his diminished capacity to premeditate the murder with which he was charged, but the evidence was excluded by the trial court.79 The excluded evidence, in substance, stated that, while the defendant had consciously functioned on a mental level consonant with criminal premeditation, his conscious mental processes had been influenced by unconscious stresses to such an extent that, from a

71 Fox. v. State, 73 Nev. 241, 244, 316 P.2d 924, 926 (1957).
72 In People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959), the defendant contended that if the trial judge accepted the position advanced by the defendant's expert testimony, it would lead to a full acquittal. Id. at 725-26, 336 P.2d at 497-98. It is possible that the accused in these circumstances would be found guilty of involuntary manslaughter, especially if his incapacity was the result of his voluntary intoxication. People v. Conley, 64 Cal. 2d 310, 324 n.4, 411 P.2d 911, 920 n.4, 49 Cal. Rptr. 815, 824 n.4 (1966).
73 See text at notes 102-04, infra.
75 G.L., c. 265, §2; Commonwealth v. McHoul, 352 Mass. 544, 550 n.6, 226 N.E.2d 556, 560 n.6 (1967).
76 Dix, note 36, supra at 325-26.
77 Id. at 326.
79 Id. at 464, 210 A.2d at 199.
psychiatric viewpoint, the accused should not be found guilty of first-degree murder.\textsuperscript{80} The Supreme Court of New Jersey upheld the exclusion of this testimony on the grounds that it was too speculative "when tested by concepts established at law for determining criminal responsibility."\textsuperscript{81} In so doing, the court suggests that \textit{mens rea} doctrine provides only a limited investigation of the accused's mental state at the time of the unlawful act, and that psychiatric testimony which explores psychological dimensions not recognized by the substantive criminal law will not be admissible in the determination of guilt.\textsuperscript{82} Thus, in cases where the psychiatric testimony is not relevant to \textit{mens rea} issues, a diminished capacity defense is not possible, since the defense by definition operates by introducing evidence of mental incapacity through the established state-of-mind doctrine. As a result the only method of introducing evidence of mental incapacity short of insanity would be to admit it after conviction for the purpose of influencing the sentencing process.\textsuperscript{83}

Most jurisdictions which admit evidence of diminished capacity have not commented on the frequent lack of relevancy between proffered evidence of mental incapacity and the \textit{mens rea} elements. They tend simply to admit all such testimony. This approach may have the disadvantage of confusing the jury as to the relevancy of the evidence in determining the defendant's guilt, and may compel expert witnesses to testify artificially in terms of established \textit{mens rea} doctrine, while they are, in fact, presenting psychiatric theories extending beyond the scope of that doctrine.\textsuperscript{84} Furthermore, if psychiatric testimony which is irreconcilable with established state-of-mind doctrine is consistently admitted under the diminished capacity defense, it may tend eventually to undermine \textit{mens rea} doctrine,\textsuperscript{85} and require the courts increasingly to rely upon psychiatry to determine criminal responsibility. Such a modification of existing \textit{mens rea} doctrine, however, might prove to be a beneficial development: it would require the criminal law to adapt to modern developments in psychiatry. However, to avoid the problems of jury confusion and restricted expert testimony alluded to previously, such a change in the criminal law doctrine would have to come as part of conscious, structured effort by the courts or the legislatures to adopt modern psychiatric knowledge. California, in response to its experience with psychiatric testimony under the \textit{Wells-Gorshen} doctrine, has begun moving in that direction. In attempting to bring criminal law doctrine into line with current psychiatric theory, the California courts have experimented with modifications of traditional state-of-mind elements.\textsuperscript{86}

\textsuperscript{80} Id. at 461-70, 210 A.2d at 197-202.
\textsuperscript{81} Id. at 469-70, 210 A.2d at 202.
\textsuperscript{82} Id. at 469-73, 210 A.2d at 202-04.
\textsuperscript{83} Id. at 472, 210 A.2d at 203.
\textsuperscript{84} Dix, note 36, supra at 326-27.
\textsuperscript{85} N.J. at 471, 210 A.2d at 203.
\textsuperscript{86} The California experiment has been criticized because the modifications of
In *People v. Gorshen* the scope of voluntary manslaughter was expanded when the court included evidence of diminished capacity, as well as objective evidence of provocation, within the definition of that crime. Subsequently, California reinterpreted the statutory definition of premeditation to require "mature and meaningful reflection." Similarly, the concept of malice was expanded to require an awareness by the defendant that his acts violated social prohibitions. This approach offers the advantages of being logically consistent with the criminal law's requirement of concurrence of act and mind, and of encouraging needed interaction between criminal law doctrine and psychiatric theory. By embarking the courts upon increasingly subjective analyses of the psychological causes for the anti-social acts of criminal defendants, however, the California approach presents the courts with the difficult tasks of formulating and maintaining a uniform standard upon which to judge the culpability of all criminal defendants. Many jurisdictions, as a result, will be hesitant to follow California's lead because the logical extension of this approach will cut the courts adrift from established *mens rea* doctrine, and necessitate increasingly heavy reliance upon psychiatric testimony.

**Problems in Admitting Evidence of Diminished Capacity.** Even if a jurisdiction determined that it would accept evidence of diminished capacity, there would still remain numerous difficulties in implementing that decision. It has been suggested that admission of diminished capacity evidence would lead to compromise verdicts by juries unable to find a defendant innocent, but equally resistant to finding him legally insane. In rebuttal it has been advanced that such an argument should not be allowed to outweigh the compelling logic of the diminished capacity position, and that, since the jury already possesses wide power to lower the degree of the crime, this additional opportunity would not be of great consequence. In fact, the ability of the jury to implement its decision as to diminished capacity would appear to be more conducive to fairness and accuracy since a jury which felt that mental abnormality

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*mens rea* doctrine have been restricted to cognitive elements. Dix, note 36, supra at 331.


89 People v. Conley, 64 Cal. 2d 310, 322, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966).


91 Note, 43 Cornell L.Q. 283, 286 (1957).

92 Weihofen, note 29, supra at 977.
played some part in an accused's act would not feel compelled to find him legally insane.93

Another problem in accepting evidence of diminished mental capacity is that the issues presented might prove to be too complex for the average jury to comprehend.94 While acknowledging this difficulty, Justice Murphy, dissenting in Fisher v. United States,95 argued that if the jury has the responsibility to ascertain whether the accused acted with premeditation, it is illogical to prohibit them from considering expert psychiatric testimony on that issue. Such testimony, although subject to the inaccuracies and conflicting viewpoints of any behavioral science, would be of material assistance to the jury in their determination of the defendant's state of mind at the time of the unlawful act.96 In order for the defense to be effective, the proffered expert testimony would have to be based upon reliable evidence, and would have to be clearly presented. A few jurisdictions have voiced grave doubts as to the reliability of expert psychiatric testimony in light of the many conflicting opinions advanced by psychiatrists in the courtroom.97 Also, such testimony is often based upon uncorroborated and self-serving statements of the defendant.98 The argument that psychiatric testimony is unreliable conflicts, however, with the universal acceptance of such evidence on the larger issue of criminal responsibility.99 The Massachusetts Supreme Judicial Court in Commonwealth v. McHoul100 demonstrated that it recognized the importance of psychiatric testimony in stating: "Perhaps the greatest point for the [Model Penal Code definition of insanity] is that under it experts will be unrestricted in stating all that is relevant to defendant's mental illness." In any event, the experienced guidance of the trial judge would be an important factor in increasing the effectiveness of the expert psychiatric testimony. If evidence of diminished capacity is to be admitted at trial, an instruction should be given that expert testimony pertaining to the accused's mental or psychological incapacity may be considered by the jury in determining whether the defendant entertained the state of mind requisite for the crime charged.101

The question of alternative correctional or therapeutical post-conviction procedures also presents a difficult problem. Courts which have opposed the introduction of the diminished capacity defense have voiced appre-
hension over the prospect that demonstratedly dangerous individuals will be granted their freedom earlier than would have been the case without the defense.\footnote{102} A procedure whereby the jury specified that its verdict had been based upon defendant's diminished capacity would be of benefit here, especially if the defense is raised to a non-homicide crime where acquittal is foreseeable.\footnote{103} By requiring the jury to so specify, commitment procedures could be instituted in the event of an acquittal. Further protection for the public might be afforded by a procedure which would allow correctional authorities to refer individuals believed to require hospitalization to state mental health facilities for the purpose of determining whether commitment should be required during or even after the defendant's prison sentence.\footnote{104} Serious due process questions, as well as administrative problems are necessarily implied here which are outside the scope of this article.

Conclusion. The criminal law requires that the evil state of mind of the accused must concur with the unlawful act. Evidence tending to show that the criminal defendant was incapable of possessing the requisite state of mind for the offense charged is in keeping with this requirement of concurrence. It also rationalizes the allocation of punishment by affixing only that degree of punishment that corresponds with the culpability of the defendant. Thus the diminished capacity defense would appear to be a necessary element of the criminal justice system. There are, however, serious problems in implementing the doctrine. It is possible that the traditional state of mind requirements of the criminal law may not be satisfactory vehicles for the introduction of evidence of mental abnormality. The relationship between psychiatry and the legal system will be further tested as the courts are required to analyze a defendant's criminal liability from an increasingly subjective viewpoint. Finally the question of disposition after conviction will present new problems as to the relationship between the need for penal correction and medical therapeutic treatment. On balance these difficulties, though serious, can be overcome and the acceptance of the diminished capacity defense presents an opportunity for increasing innovation by the criminal justice system as a result of the interaction between the courts and modern psychology.

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\footnote{103} Weikofen, note 29, \textit{supra} at 980.
\footnote{104} G.L., c. 123, §18 states that a prisoner in a correctional institution may be transferred to a state mental health facility if it is determined that he is mentally ill. If it be subsequently determined by the district court having jurisdiction over the facility that the prisoner's release, upon completion of his sentence, would be harmful because of his continued mental illness, his commitment to the state mental health facility may be ordered.

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