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The Effect of Due Process on Criminal Defense Discovery

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In a recent article dealing with the constitutional issues raised by discovery in criminal cases,¹ I wrote that “[i]t is constitutionally as important that a defendant be informed of the evidence as it is that he be informed of his rights.”² The Supreme Court has been signalling that it might prefer to develop within the criminal process doctrines that focus on fairness in ascertaining the guilt or innocence of the accused³ rather than rules that utilize the criminal process to control police conduct but which admittedly impede the search for truth to protect other values. Since criminal defense discovery, like civil discovery, is designed to improve the fact-finding process at trial,⁴ it is a prime candidate for increasingly favorable attention from the Court. In a series of decisions culminating last term in Wardius v. Oregon⁵ and Gagnon v. Scarpelli,⁶ the Court announced embryonic due process⁷ principles for establishing the two critical devices of defense discovery—file disclosure and depositions.⁸

FILE DISCLOSURE

The Supreme Court has long favored defense discovery in

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¹ Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C.L. Rev. 437 (1972) [hereinafter cited as Nakell].
² Id. at 450.
⁴ See Nakell 437, 472.
⁵ 93 S.Ct. 2208 (1973).
⁷ In addition to general due process, the specific provisions of the sixth amendment, giving a defendant the rights “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;” all “speak to an underlying constitutional policy of broad discovery.” Nakell 462-69.
⁸ See id. at 450, 469, 471, 472-74.
criminal cases. Until its decision in *Wardius v. Oregon*, however, the Court had established only two narrow constitutional principles for implementing such discovery. The first principle is:

> it constitutes a violation of due process of law for law enforcement agencies, police or prosecutor, knowingly to present or let stand uncontradicted false evidence or to withhold from the defendant, intentionally or not, material exculpatory evidence of any kind, including evidence useful only for impeachment of the credibility of government witnesses."  

The duty of disclosure imposed by this principle has never been held necessarily to require disclosure before trial. Moreover, disclosure is required only of material evidence that is exculpatory or favorable to the defendant, and the prosecutor makes the initial and often the only decision as to which evidence thus qualifies for disclosure. The second discovery principle previously established by the Supreme Court is that "the fundamental requirements of fairness" provide a defendant with a right to pre-trial disclosure of the name and address of, and perhaps also any statements given to the police by, an informer who might have information relevant to the defendant's guilt or innocence. The potential for expanding this second principle to include all material witnesses has not yet been developed.

**The Due Process Reciprocity Decision**

The issue in *Wardius* dealt with prosecutorial rather than defense discovery. In that anomalous setting, the Supreme Court established a new principle of defense discovery, a principle un-

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9 Id. at 451-52. In *Wardius v. Oregon*, 93 S.Ct. 2208 (1973), the Court referred to "the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . . The growth of such discovery devices is a salutary development, which by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Id.* at 2211.

10 Nakell 452. The most recent Supreme Court cases discussing this principle are *Moore v. Illinois*, 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963). The principle is referred to in the text as the *Giles-Brady* principle.

11 Nakell 452-53.

12 *Id.* at 453.


14 See Nakell 462.
likely to remain confined within the context of its promulgation. The case arose in Oregon, which has a statute that requires a defendant who proposes to rely on an alibi defense to advise the prosecuting attorney in advance of trial of the places where he claims to have been at the time of the crime and the names and addresses of all his alibi witnesses. The Court had already upheld a Florida notice-of-alibi provision against fifth amendment challenge in *Williams v. Florida.* Florida law, however, provided criminal defendants with broad discovery rights, and specifically provided a defendant who had complied with the notice-of-alibi rule reciprocal discovery of the prosecutor's rebuttal witnesses to the alibi defense. By contrast, Oregon limits defense discovery to written statements given to the police by the defendant and by prosecution witnesses, and no reciprocal alibi discovery is provided. Because of this deficiency, the Supreme Court unanimously struck down enforcement of this Oregon notice-of-alibi statute against the petitioner as violative of due process.

The Court opened its opinion with the statement that "[t]he case involves important questions concerning the right of a defendant forced to comply with a 'notice-of-alibi rule' to reciprocal discovery." The Court did not, however, order that the

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15 ORE. REV. STAT. § 135.875 (Replacement Part 1971).
17 FLA. R. CRIM. P. 1.220.
20 *Id.* at 2211.
21 *Wardius v. Oregon*, 93 S.Ct. 2208, 2210 (1973). In *Williams* the Court held:

We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or 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." *Williams v. Florida*, 399 U.S. 78, 81 (1972).

The Court also observed in a footnote that it was not deciding whether notice-of-alibi rules other than Florida's are "necessarily valid in..."
defendant be given discovery, but rather held that it was constitutional error to enforce the sanctions\(^2\) of the rule against the defendant in the absence of reciprocal discovery.\(^2\) Nevertheless, given the increasing popularity of notice-of-alibi statutes and other kinds of prosecutorial discovery, formal and informal,\(^2\) the decision should prove to be a significant constitutional impetus to defense discovery.\(^2\)

The heart of the Court's decision was expressed in the following language:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.\(^2\)

\(^{22}\) The Oregon statute provided that "If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise." ORE. REV. STAT. § 135.875(1) (Replacement Part 1971). The defendant in Wardius called one other witness and himself to support his alibi defense, and the trial court refused to allow the testimony of either because the defendant had failed to file the required notice of alibi. This sanction itself raises important constitutional questions. See Nakell 494 n.303; Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 YALE L.J. 1342 (1972). The Court in Wardius declined to reach that question. Wardius v. Oregon, 93 S.Ct. 2208, 2211, n.4 (1973). The Court in Williams held that it did not arise in that case since the defendant made the required disclosure and thus no sanctions had been applied. Williams v. Florida, 399 U.S. 78, 83, n.14 (1970).


\(^{24}\) Id. at 2211; FED. R. CRIM. P. 16(c); ABA ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIALS 3-6 (Supp. Oct. 1970).

\(^{25}\) The evidence subject to disclosure under Wardius would not likely be evidence that the prosecutor must disclose to the defendant under any other due process principle. Because the evidence subject to disclosure is the prosecutor's alibi rebuttal evidence, the prosecutor would surely not consider it exculpatory or favorable to the defendant. Thus it would not be subject to disclosure under the Brady-Giles principle. See note 10 supra and accompanying text.

Also, the evidence would not ordinarily be the testimony of an informer, otherwise his cover and with it his usefulness to law enforcement would be destroyed. Unless Roviaro is interpreted to apply to all material witnesses, therefore, its principle of fundamental fairness would not generally compel disclosure in the Wardius circumstances. See text at notes 13 and 14 supra.

\(^{26}\) Wardius v. Oregon, 93 S.Ct. 2208, 2212-13 (1973). In Williams, the Court (Continued on next page)
What is the scope of discovery a state must afford a criminal defendant under *Wardius* in order to enforce a notice-of-alibi rule? The Court acknowledged in both *Williams* and *Wardius* that Florida provided liberal discovery independently of the notice-of-alibi rule as well as reciprocal discovery in the notice-of-alibi rule itself. Would a state have to provide the full scope of Florida's liberal discovery before it could demand that the defendant disclose the names of his alibi witnesses? *Wardius* does not clearly answer that question, but the language of the opinion suggests that it might be sufficient for a state to reciprocate with discovery relating solely to the alibi defense since the Court regularly characterized the discovery that must be provided as "reciprocal discovery." Also, in describing the unfairness giving rise to the due process violation, the Court said that it consisted of the state's compelling a defendant to disclose some of his evidence "while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." Finally, in comparing the discovery laws of Florida and Oregon, the Court observed: "Oregon grants no discovery rights to criminal defendants . . . . *More significantly, Oregon . . . has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.*"

If these quotations are clues that only narrow "tit-for-tat" alibi discovery is needed to meet the demands of due process, the scope of the required discovery is still uncertain since there are two categories of evidence that a prosecutor might use to defeat an alibi defense. One category of evidence directly contradicts the alibi. Such evidence would include testimony by witnesses that they were at the place the defendant claimed to be at the

(Footnote continued from preceding page)
said: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 82 (1972).

29 *Id.* at 2210, 2211, 2213, 2214.
30 *Id.* at 2213 (emphasis added).
31 *Id.* at 2212 (emphasis added).
time he claimed to be there and that he was not there. It would also include records ordinarily kept of persons visiting the place of the alibi which fail to reflect the presence of the defendant at the time of the crime. The prosecutor might also challenge the credibility of the defendant's alibi witnesses by any of the usual impeachment methods, including the use of prior inconsistent statements, prior felony convictions, or evidence of strong friendship between the witness and the defendant. Wardius would certainly require the prosecution to disclose all such evidence—or at least the names and addresses of all witnesses through whom it intends to produce such evidence—to a defendant who has, under compulsion of state law, notified the prosecution of an alibi defense he intends to raise. The scope of Wardius is less certain, however, as it relates to the second category of alibi rebuttal evidence.

The second and more common category indirectly attacks the alibi by showing that at the time of the crime the defendant was present at the scene of the crime, thus precluding the defendant's presence elsewhere. Even if the prosecutor has no evidence directly contradicting or impeaching the testimony of the defendant's alibi witnesses, he could refute their testimony by presenting eyewitnesses who identify the defendant as attending and perhaps even committing the crime, or who identify his car as having been in the neighborhood of the crime at the time of its commission. The prosecution could also introduce evidence that the defendant's fingerprints or footprints or an item of his clothing or a weapon registered in his name had been found at the scene of the crime. The weight of this latter evidence, less conclusive in rebuttal to an alibi because not time-oriented, would depend on how persuasively the defendant could justify having left such trails of his presence during some legitimate earlier visit.

Thus, any evidence tending to establish the defendant as the perpetrator of the crime would also tend to rebut his alibi. Even though all of the evidence in this second category might form part of the prosecution's case-in-chief, it also must be considered alibi rebuttal evidence. After all, an alibi is only a defense designed to negative the identification portion of the prosecution's evidence. That legal taxonomy has identified this
defense with a name of its own does not detract from its basic character as a denial of a critical aspect of the case against the defendant. Thus, it can be argued that any evidence regarding the identity of the perpetrator is subject to defense discovery whenever Wardius is properly invoked.

Support for the position that the second category of rebuttal evidence must be disclosed is derived from the facts in Wardius itself. The defendant was convicted of unlawful sale of narcotics. He tried to show in defense that at the time the alleged transaction took place he was at a drive-in movie with a female companion. The trial court rejected all testimony in support of that defense because of the defendant's failure to give advance notice to the prosecution. The Oregon Court of Appeals held that the validity of the notice-of-alibi statute, in view of its lack of any provision for reciprocal defense discovery, was not properly raised because the prosecution presented no rebuttal evidence. The Supreme Court did not respond directly to this basis for the Oregon court's decision, but it did hold that the defendant was entitled to raise the issue even though he had not made disclosure and thus was not eligible for reciprocal discovery from the state. The Court evidently reasoned that the trial court's refusal of the alibi evidence as a sanction for noncompliance with the notice-of-alibi rule was a sufficient harm to the defendant to enable him to complain of its non-reciprocal character since the prosecution might have offered rebuttal evidence if the alibi testimony had been allowed. Yet the Court might have reasoned that the prosecution's evidence identifying the defendant as a participant in the illegal transaction was the kind of alibi rebuttal evidence that due process requires to be disclosed to the defendant.

33 It is not, however, necessary for us to decide that question. No witness was here called nor evidence offered by the state relating to the question of alibi. Thus, no prejudice is shown. . . . Thus, we do not find it necessary to decide whether under ORS 135.875 the defendant is entitled to reciprocal discovery rights from the state. . . . There has been no denial thereof here. State v. Wardius, 487 P.2d 1380, 1383 (Ore. 1971).
34 The defendant in Wardius did not claim that his failure to comply with the notice-of-alibi rule was due to the lack of reciprocal features in the rule. Instead, he attempted to excuse his noncompliance by showing that until two days before the trial he was mistaken as to the date on which the relevant transaction was alleged to have occurred. State v. Wardius, 487 P.2d 1380, 1382 (Ore. 1971).
Certainly the fundamental fairness rationale that formed the basis for the Supreme Court's holding in *Wardius* supports a disclosure requirement for both the direct and indirect categories of alibi rebuttal evidence. If the defendant is relying on an alibi, it is equally unfair for the prosecution to surprise him with rebuttal evidence establishing his presence at the crime scene as with rebuttal evidence establishing his absence from the alibi scene or impeaching the credibility of his proffered evidence. This unfairness is particularly apparent if the prosecution has no direct rebuttal evidence but, as is often the case, relies solely on the strength of its crime-scene evidence, whether used for its case-in-chief or at a rebuttal stage in the proceedings. In such a case, the defendant will have to open his defense while the prosecution discloses nothing: it has no direct rebuttal evidence and need not disclose its indirect rebuttal evidence. Would it be fair to require the defendant to disclose his evidence on the issue of identity (alibi), yet permit the prosecutor to make no disclosure even though he plans to introduce considerable evidence placing the defendant at the crime scene? Allowing the defendant thus to be "ambushed" by a prosecutor to whom he tipped his hand under compulsion of state law could not be squared with the notions of fairness that governed *Wardius*.

On the other hand, if due process compels a prosecutor to provide reciprocal alibi discovery of his indirect as well as his direct rebuttal evidence, a defendant may gain a tactical discovery opportunity. Merely by serving notice of an alibi defense, a defendant may be able to discover part of the prosecution's case-in-chief identifying the defendant as the culprit. Policing bad faith triggering of the reciprocal discovery obligations of the prosecutor would be difficult. Because a defendant with even a weak alibi risks having it denied to him if he fails to give notice in advance of trial of the possibility of his raising it, every defendant contemplating such a defense will protect its availability to him by making pre-trial disclosure, and thus entitle himself to reciprocal discovery. Ultimately, a defendant might be discouraged from relying on his alibi by the strength of the prosecution's reciprocally revealed rebuttal, by anticipation of

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35 See text at notes 55-60 infra.
acquittal without it, by lack of witnesses due to faulty memories or other reasons beyond the control of the defendant, or by a cautious concern that the defense might backfire because of its tenuous or ambivalent nature. The line between bona fide invocation of the notice-of-alibi rule and manipulation of the rule for discovery purposes only may be too fine for detection. To complicate matters, the pressures on a defendant to disclose any kind of alibi before trial in order to preserve his right to raise it at trial would be such as to foreclose, as unreasonable and oppressive, a requirement that any alibi defense raised before trial be presented to the judge or jury; and likewise to foreclose, as unreasonable and oppressive and also violative of the defendant's privilege against compulsory self-incrimination any sanction in the form of comment to the trier of fact that a defendant who did not present an alibi defense had earlier pleaded one.

In the final analysis, however, the exploitation potential need not be of concern. The only tactical advantage obtainable would be the early discovery of adverse evidence—not an unfair technical escape from the processes of justice. A due process directive arising from the commands of fundamental fairness should prefer, where some slippage one way or the other is necessary, to provide for more than the minimum discovery rather than less, especially where no substantial interest of the state in the secrecy of its evidence, such as that reflected in a work product, grand jury, or informer privilege, is thereby compromised. The wisest jurisdictions will eliminate even this mild corruption by expanding their defense discovery and thereby removing a temptation stemming only from the defendant's legitimate concern for seeking out the evidence needed to defend himself.

Reciprocity and the Prosecutor's Formal Discovery

The prosecutorial discovery involved in Wardius was narrowly limited to the single defense of alibi. Examples of other special defenses that would presumably be subject to similar

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38 See Nakell 489-70.
39 See id. at 477-78.
reciprocal disclosure obligations include self-defense,\textsuperscript{40} insanity,\textsuperscript{41} and impotency\textsuperscript{42} defenses. In addition, forms of prosecutorial discovery not confined to any particular defense are achieving widespread popularity. Rule 16(c) of the Federal Rules of Criminal Procedure has served as a model for such provisions.\textsuperscript{43} Rule 16(c) has a reverse reciprocity requirement in that it conditions prosecutorial discovery on the granting of discovery to a defendant, rather than vice-versa as in the Florida notice-of-alibi rule. Rules 16(a) and (b) provide for defense discovery of the defendant's own statements, the results or reports of physical or mental examinations or scientific tests or experiments made in connection with the case, and other material, books, papers, documents, and tangible objects, buildings or places, without regard to whether the prosecution intends to introduce them into evidence. On a reciprocity basis Rule 16(c) entitles the prosecution, ostensibly in the discretion of the trial court, to discover certain evidence that the defendant intends to produce at the trial, including scientific or medical reports, books, papers, documents, and tangible objects. The rule does not provide for the discovery of the names of witnesses, and it specifically excludes from discovery the statements of witnesses and the work product of the defense attorney.\textsuperscript{44}

Two interesting features of Rule 16 should be noted. First, it can be invoked only at the pleasure of the defendant. Unless the defendant requests discovery the prosecution is not entitled to any. Presumably this characteristic of the rule was adopted as a protection against fifth amendment challenge.\textsuperscript{45} It certainly is not necessary for \textit{Wardius} due process purposes. Undoubtedly, \textit{Wardius} would be satisfied as long as the defendant is given discovery regardless of whether it is given independently of the

\textsuperscript{40} E.g., \textit{Mont. Rev. Codes Ann.} § 95-1803(d).
\textsuperscript{42} E.g., \textit{Jones v. Superior Court}, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
\textsuperscript{43} See \textit{Nakell} 495, & nn.305-06.
\textsuperscript{44} Because its subject matter scope is broader than the notice-of-alibi rule, rule 16(c) may raise fifth amendment problems beyond those resolved in \textit{Williams v. Florida}. See \textit{Nakell} 494-516. Although the Supreme Court transmitted rule 16(c), with dissenting votes on fifth amendment grounds by Justices Black and Douglas, \textit{Amendments to the Rules of Criminal Procedure}, 39 F.R.D. 69, 272, 276, 278 (1966), it has never passed on its constitutionality in a judicial framework. In fact, \textit{Wardius} and \textit{Williams} represent the state of the law on prosecutorial discovery as far as the Supreme Court is concerned.
\textsuperscript{45} See \textit{Nakell} 502-10.
prosecutor's discovery or packaged with it on a reciprocal basis. A proposed amendment to Rule 16 would eliminate the reciprocal character of prosecutorial discovery and provide a right to such discovery independent of any request for discovery by the defendant.\textsuperscript{46} Such an amendment would make the rule parallel with notice-of-alibi statutes in terms of initiating the discovery process with disclosures by the defendant. Whatever fifth amendment concerns that might provoke, as long as the rule continues to provide equivalent discovery to the defendant it would continue to meet the due process requirements of \textit{Wardius}.

The second interesting feature of Rule 16 is that it limits prosecutorial discovery to evidence "which the defendant intends to produce at the trial," while not imposing the same limitation on defense discovery. The limitation on prosecutorial discovery avoids violation of the defendant's fifth amendment and perhaps also fourth amendment rights;\textsuperscript{47} yet wisely, the rule imposes the limitation only to the extent constitutionally necessary and does not impose it on defense discovery just because constitutional considerations require it for prosecutorial discovery. This does, however, suggest a question: if a defendant, on fifth amendment grounds, blocks prosecutorial discovery of evidence the defendant does not intend to use at trial—presumably because it is incriminating or ambiguous—could the state satisfy \textit{Wardius} if it similarly limits defense discovery? For example, could Oregon satisfy \textit{Wardius} by providing for defense discovery of all the alibi rebuttal evidence the prosecutor intends to introduce at trial, but not of evidence he plans not to use, assuming he can tell the difference in advance of trial?

The question may be academic. If the prosecutor has evidence relevant to the case that he does not intend to use, presumably it is either helpful to the defense or useless to both parties. To the extent the evidence is exculpatory, it would be subject to mandatory disclosure under the \textit{Giles-Brady} principle of due process.\textsuperscript{48} To the extent the evidence is useless, it is difficult to conceive how any principle of fairness would be violated by its nondisclosure.

\textsuperscript{47} See Nakell 500-02.
\textsuperscript{48} See note 10 \textit{supra} and accompanying text.
On the other hand, giving a broad dimension to the *Wardius* rule would serve defendant's discovery interests considerably. It would mean that the defendant could require the prosecutor to divulge all relevant non-privileged\(^49\) evidence in his possession, at least if it relates to the same subject matter as prosecutorial discovery.\(^60\) Thus, the defendant would no longer be dependent upon the prosecutor's determination of whether evidence in his possession would be useful to the defendant. Because the prosecutor is not privy to the nuances of the defendant's case and is generally too busy with the preparation of his and other cases to evaluate evidence from the defendant's perspective,\(^61\) requiring disclosure of all relevant evidence in the prosecutor's possession would yield fruitful information for many defendants. The reports are replete with cases in which prosecutors were unable to recognize the defense potential of evidence coming to their attention.\(^52\) Even inadmissible evidence may lead to admissible evidence or provide background for cross-examination of prosecution witnesses. At the same time, the prosecution would seem to have no legitimate objection to delivering to the defendant information it considers useless, as long as the prosecution is protected against being required to turn over evidence seriously subject to abuse. For the most part, it is unlikely that evidence judged useless by the prosecution would lead to intimidation, bribery or harassment of witnesses by the defendant.

If the *Wardius* reciprocal discovery rule is merely a tit-for-tat exchange policy, mutual limitations of discovery to evidence proposed by either side for use at trial would meet the due process standard. The Court's "poker game" simile suggests

\(^{49}\) The prosecutor's work product should certainly be privileged. See Nakell 469-70. In addition, the prosecutor should have a privilege against disclosure of the identity of a witness if he establishes "at an adversary hearing that there is probable cause to believe that a defendant should not be trusted with such evidence because of the danger of intimidation, bribery, or harassment of witnesses," and no protective order less drastic than complete withholding of discovery would protect against the danger. Nakell 448-49. Presumably, the Supreme Court had this in mind when it wrote in *Wardius*: "[W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Wardius* v. Oregon, 93 S.Ct. 2208, 2212 (1973) (emphasis added). Of course, in some cases the prosecution may be able to resist discovery "only by dismissing the charges against the defendant, since it may thereby be precluding him from effective preparation of a defense." Nakell 471. See Jencks v. United States, 353 U.S. 657, 671 (1957); Roviaro v. United States, 353 U.S. 53, 61 (1957).

\(^{50}\) See text at notes 57-60 infra.

\(^{51}\) See Nakell 457-59.

\(^{52}\) See id. at 453-57, 459-60.
just such an approach: each player is entitled to see only the number of cards in the other player's hand as he himself shows. Yet, taking Wardius in conjunction with the Giles-Brady disclosure requirement, due process would not seem to be limited to strictly tit-for-tat discovery because the limitations on prosecutorial discovery are founded in part on constitutional policies not applicable to the prosecution. Otherwise, the privilege against compulsory self-incrimination would become "an excuse for a diminution of the defendant's chances to get evidence to clear himself."53

Reciprocity and the Prosecutor's Investigative Discovery

Beyond formal discovery, a prosecutor has a wealth of investigative discovery devices that enable him to gather evidence in a criminal case.54 These devices range from informal citizen cooperation with police investigations to compulsory processes, many of which may be directed against the defendant:

After conforming to appropriate constitutional standards, the prosecution may search the person or property of the accused and seize oral, documentary, or other physical evidence to use in its prosecution against him. Under appropriate constitutional safeguards and with the consent of the accused, the prosecution may interrogate him before a grand jury or in the police station. The prosecution may gather evidence from within the private enclave of the defendant by electronic eavesdropping and wiretapping or by insinuating an undercover agent into his confidence. The accused may be compelled to exhibit his body, assume poses, and put on or take off clothes for identification in a fairly conducted lineup; to provide exemplars of his handwriting for identification; to

53 Id. at 444.
55 Nakell 441-42. In Cupp v. Murphy, 93 S.Ct. 2000 (1973), the Supreme Court last term upheld police action in taking fingernail scrapings without a warrant from the estranged husband of a recent strangulation victim after noticing a dark spot on one of his fingers and after he appeared to be surreptitiously cleaning his nails.

In United States v. Dionisio, 410 U.S. 1 (1973), and United States v. Mara, 410 U.S. 19 (1973), the Court validated the authority of grand juries without any preliminary showing of reasonableness to command criminal suspects to speak for voice exemplars and to write for handwriting exemplars.
provide fingerprints for identification; and to speak for voice identification. The prosecution may obtain samples of his blood, breath, or urine for scientific analysis.\textsuperscript{56}

What rights does the due process rationale of \textit{Wardius} give to a defendant subjected to the prosecutor's investigative discovery?

In analyzing the fairness demands for reciprocity, compulsory prosecutorial discovery through police investigative powers differs in one respect from compulsory prosecutorial discovery through formal or non-police procedures such as a notice-of-alibi rule. The difference is that investigative discovery is not limited to evidence that the defendant intends to introduce. In a superficial sense, this difference serves to distinguish \textit{Wardius} and would seem to eliminate the need for the reciprocity rule in relation to investigative discovery. The prosecutor is not exploiting the defendant's compelled cooperation to fortify his attack on the defendant's case. Instead, he is merely developing his case-in-chief with the discovered information. Thus, the "poker game" analogy of \textit{Wardius} is not appropriate; only the prosecutor is holding undisclosed cards. Furthermore, the prosecutor is not going to "surprise" the defendant with evidence obtained from him. The police necessarily disclose to a defendant most—but not all—of the evidence they obtain from him. Thus, if there is a duty of disclosure, it is met by the defendant's knowledge that his statement has been taken, that his person or his property has been searched, that he has been viewed in a lineup, or that he has provided exemplars of his speech or handwriting.

The shallowness of this view should be evident. The prosecutor is gaining greater advantage, not less, by acquiring evidence that he can use affirmatively against the defendant rather than evidence that only sends him scurrying for rebuttal information. To the extent that the prosecutor obtains the details of his case from the defendant, the same considerations of fairness that triumphed in \textit{Wardius} should demand reciprocal disclosures from the prosecutor. Perhaps with this general concept in mind, the Court in \textit{Wardius} acknowledged the prosecutor's investigative discovery\textsuperscript{56} and declared more broadly than required for resolution of the issue before it: "[W]e do hold that in the absence of

\textsuperscript{56} \textit{Wardius} v. Oregon, 93 S.Ct. 2208, 2212-13 n.9 (1973).
a strong showing of state interests to the contrary, discovery must be a two-way street."

57 Id. at 2212. The Court preceded the quoted language by saying, "we do not suggest that the Due Process Clause of its own force requires Oregon to adopt such [reciprocal discovery] provisions. Cf. United States v. Augenblick, 393 U.S. 348 (1969); Cicenia v. Lagay, 357 U.S. 504 (1958)." Id. at 2212. By the same approach, the argument in the text proceeds not from the due process clause decreeing disclosure in a vacuum but rather as a reciprocal matter.

The Court at the same time did not suggest that due process does not or could not require defense discovery independently of prosecutorial discovery. The two cases cited by the Court with a "Cf." signal would be weak support for any such proposition. See Nakell 451-52 nn.84 & 88. Augenblick was a suit for back pay by a dishonorably discharged soldier who had been convicted in a court-martial of an indecent act. His complaint that the court-martial was unfair was based on his failure to obtain a copy of handwritten notes and tape recordings of an early police interview with the plaintiff's partner in the indecent act, who became a government witness. The law officer granted a motion for production of the tape recordings and denied a motion for production of the notes. However, the defendant never got the tape recordings because the officers testified they did not know what happened to them. The plaintiff thought the officer who took the notes should have been called as a witness on the question of what happened to the tape recordings, but he had been transferred and was not called.

The principal issue in the case was whether the civilian courts could entertain such a claim. On the secondary discovery issue, the Court observed that it did not know enough to be able to determine whether the Jencks Act, 18 U.S.C. § 3500 (1970), required disclosure of them, and that the only question regarding the tapes was whether one more witness should have been called in the inquiry into their disappearance. The Court then held in an opinion written by Justice Douglas:

But questions of that character do not rise to a constitutional level. Indeed our Jencks decision [Jencks v. United States, 353 U.S. 657 (1967)] and the Jencks Act were not cast in constitutional terms. Palermo v. United States, 360 U.S. 343 (1959). They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. . . . But certain it is that this case is not a worthy candidate for consideration at the constitutional level.


Cicenia v. Lagay was a case in which the principal issue was whether the defendant's constitutional rights had been violated by the taking of his confession while both he and his attorney were asking the police officers to allow them to meet. The Court's holding on this issue was specifically overruled in Miranda v. Arizona, 384 U.S. 436, 479 n.48 (1966), and Escobedo v. Illinois, 378 U.S. 478, 492 & n.15 (1964).

The secondary discovery issue in the case was the trial court's denial of the defendant's request for pretrial disclosure of the confessions he and two friends had given the police. After losing that request, the defendant entered a plea of non vult contendere. In the circumstances of his conviction upon that plea, the Supreme Court held that the defendant had suffered no violation of due process.

The facts in Cicenia v. Lagay arguably come within the reciprocity rule in Wardius as discussed in the text, at least as far as the defendant's own confession is concerned. The procedural status of the defendant's discovery claim confounded its opportunity for a fair hearing on the merits in the Supreme Court. See Tollett v. Henderson, 93 S.Ct. 1602 (1973); North Carolina v. Alford, 400 U.S. 25 (1971); Brady v. United States, 397 U.S. 742 (1970). Had the defendant been able to perfect an interlocutory appeal from the denial of his motion, the case might have
Toward Full File Disclosure: Reciprocity or Fundamental Fairness?

There are at least three contexts in which due process might require expanded disclosure by the prosecution. First, although the defendant may know that he signed a written statement or that the police seized physical evidence from his home, he may need to obtain the statement or physical evidence to evaluate it himself. Second, the defendant needs information about the prosecution’s development of the evidence retrieved by its investigation. Some of the raw evidence may be obtained in a form ready for trial use; much of the raw evidence may have to be evaluated or analyzed before it has significance as proof against the defendant; much of it may serve also as leads to uncover further evidence. For example, the prosecution might have scientifically analyzed suspected narcotics seized from the defendant, or fingernail scrapings taken from him, or blood found in his car. The prosecutor might have pursued clues in a statement given to the police by the defendant and found witnesses, documents, or objects to support or refute his story. The prosecutor might have had expert comparisons of a defendant’s handwriting, voice exemplar, or gun, with a forged note, an intercepted telephone conversation, or a fatal bullet. The prosecution might have learned whether a witness could identify the defendant in a lineup or identify items of clothing taken from his house. Does the reciprocity principle of due process require the prosecution to disclose evidence developed from information supplied by the defendant? Does it require the prosecution to share with the defendant the use of evidence it has taken from him, for his development of leads or for his independent expert to analyze?

These two contexts deal with exchange of evidence problems: through its investigative discovery devices, the prosecution has taken evidence from the defendant, and the defendant is asking for a fair exchange through discovery of whatever evidence the prosecution has obtained and developed

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We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Id. at 795.
from the defendant. The third context goes beyond mutual exchange and raises questions stemming from the state's inherent advantage in gathering information. Will due process afford the defendant broader discovery than tit-for-tat and place the state's evidence at the disposal of the defendant regardless of the source of the evidence? Is it fundamentally fair to counter-balance the state's greater evidence gathering powers by giving the defense discovery rights to the prosecution's files?

However phrased, the question is how much the due process right established in *Wardius* depends upon the matching of discovery, category for category, issue for issue. If reciprocity is the theory of the right, a defendant may be denied discovery if the prosecution makes no investigative discovery from the defendant, possibly because it has a sufficient case from other sources. Since neither party is exploiting the other, denying defense discovery may not seem unfair in reciprocity terms even though the defendant may be unprepared at trial to meet the undisclosed case against him.

The prosecutor's investigative discovery might deal with factual aspects of the case the defendant does not propose to contest. With regard to the issue on which the defendant is positing his defense, however, the prosecutor may have independently acquired information. If the reciprocity theory is limited to subject matter tit-for-tat, the defendant may be denied access to the information bearing on his defense on the ground that it is unrelated to the subject matter of the evidence obtained through the investigative discovery.

For example, the prosecutor might have obtained a gun belonging to the defendant during a search of his home. Ballistics tests may establish that gun as the one that fired a bullet found in the victim. The defendant may not dispute that his gun killed the victim, but instead may argue that he did not wield the gun at the time of the killing, or that the killing was accidental or in self-defense. In such a situation, the defendant might have no use for discovery of the gun or the ballistics test. He might, however, have a critical need for the names of any eyewitnesses to the event or reports of the condition of the body. Should the prosecutor be permitted to withhold such information while
gathering ballistics evidence from the defendant to use against him?

For another example, in one rape case the prosecutor might have obtained all of his evidence from the victim, from her physician, and from her home. In another rape case, the prosecutor might also have required the defendant to participate in a lineup and might have found items belonging to the victim in a search of the defendant’s home.

Should there be any difference in the discovery rights of the defendant in those two cases? In either case, should the defendant be entitled to discovery of the doctor’s report or of physical evidence, found in the victim’s home? A tit-for-tat limitation enforced on a case-by-case basis would deny all discovery to the first rape defendant, and require discovery in favor of the second rape defendant only of the items taken from his home and the results of the lineup. A defendant’s due process discovery rights would thus vary, not according to his needs or according to the danger of his misuse of evidence, but according to the accident of how much information was obtained—or attempted to be obtained—from him or his property in the particular case. Often, as in the murder and second rape examples above, the disclosures will only tease the defendant, but this limitation, however illogical from the defendant’s perspective, will be faithful to the principle of reciprocity on which it depends.

These last considerations go only to the scope of the defendant’s discovery rights as responsive to the subject matter of the investigative discovery. By not limiting defense discovery to the subject matter of the investigative discovery, the reciprocity principle of Wardius can form the basis for full file disclosure if any information is given to the prosecution by the defendant. If discovery rights are not to be determined by the fortuitousness of how strong a case the prosecution can make from outside sources, fundamental fairness, the heart of the Wardius decision, may eventually require full file disclosure for all relevant non-privileged information in the files of the police and prosecutor.68 Obviously, this analysis proceeds beyond the narrow hold-

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68 A formal reciprocal requirement on the defendant could be established by
ing in *Wardius*. Taking note of the prosecutor’s investigative discovery, however, the Court observed in *Wardius*: “Indeed, the State’s inherent information gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.” The Court then hinted at the potential for developing a general constitutional right to defense discovery in the form of file disclosure when it wrote that due process “does speak to the balance of forces between the accused and his accuser.”

**Depositions**

The preliminary or probable cause hearing, when provided, is the stage of the criminal process that supplies a defendant with his only pre-trial opportunity for compulsory process to interrogate witnesses unwilling to talk to him voluntarily, that is, for depositions. The Supreme Court held in *Coleman v. Alabama* that the preliminary hearing is a critical stage of the criminal process at which an indigent defendant is entitled to appointed counsel. In reaching that holding, the Court emphasized the discovery potential of the preliminary hearing. The Court also held in *Roberts v. LaVallee* that an indigent de-

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state law, but it might more often be defeated by privilege, especially the privilege against compulsory self-incrimination, than would the prosecutor’s obligation.

When the Court in *Wardius* said that “discovery must be a two-way street,” presumably it did not mean that due process might itself impose disclosure obligations on a defendant. The fourteenth amendment applies only to the states and not of its own force to private persons.


60 Id. at 2212.

61 Four states provide criminal defendants with a right to discovery depositions.


63 Two of the four functions the Court found that counsel could perform at a preliminary hearing related to discovery. The Court described them as follows:

[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. [Also], trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.


64 389 U.S. 40 (1967).
defendant has a right to a free transcript of his preliminary hearing. Obviously the transcript enables the defendant to take full advantage of any discovery obtained at the preliminary hearing.\textsuperscript{65} The court may therefore terminate the preliminary hearing once probable cause is established.\textsuperscript{67} Also, the preliminary hearing may be held at a time when the prosecution has not fully gathered its evidence and when the defendant has not yet learned enough about the case to know which witnesses to subpoena.\textsuperscript{68} But by far the most important interference with this discovery opportunity comes from the prosecutor's exercise of an option available to him in most jurisdictions to substitute a secret grand jury inquiry for the adversary preliminary hearing.\textsuperscript{69} Many lower federal court cases have upheld this practice.\textsuperscript{70}

\textsuperscript{66} See Nakell 466-67.
\textsuperscript{67} See Adams v. Illinois, 405 U.S. 278, 282 (1972).
\textsuperscript{68} See id.
\textsuperscript{69} See Nakell 467-68.
\textsuperscript{70} United States v. Anderson, 481 F.2d 685, 691-92 (4th Cir. 1973); See Nakell 467 n.154.

In dictum in Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), Justice Douglas wrote the following for the Court:

The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. [Citations] The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. \textit{Id.} at 599.

See also Jaben v. United States, 381 U.S. 214, 220 (1965). (Under the federal rules, a preliminary hearing is required "unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment.")

But see Kent v. United States, 383 U.S. 541, 545 n.3 (1966): "In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental. Cf. \textit{Fed. Rules Crim. Proc.} 5(a), (b); Mallory v. United States, 354 U.S. 449 (1957)." \textit{See also} Kent v. United States, 383 U.S. 541, 551 (1966); Petitioner contends that he "was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, supra . . . ."
Gagnon v. Scarpelli,71 decided last term, which built on Morrissey v. Brewer,72 decided the previous term, and a host of related cases, however, hold out promise that the preliminary hearing may be constitutionally required at least as a screening procedure for probable cause.

In Gagnon and Morrissey the Supreme Court held that due process requires that a person whose probation or parole is revoked be provided "a preliminary hearing at the time of his arrest and detention"73 and "a somewhat more comprehensive hearing prior to the making of the final revocation decision."74 The due process requirement of a preliminary hearing is the interesting aspect of these cases for present purposes, and the critical question for study is the nature of the preliminary hearing required by due process.

For purposes of parole revocation, Morrissey held that the preliminary hearing must have the following minimum features as a constitutional imperative:

With respect to the preliminary hearing before this [independent] officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. . . . At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what transpires at the hearing. . . . [He] "should state the reasons for his determination and indicate the evidence he relied on. . . ."75

72 408 U.S. 471 (1972).
74 Id.
In *Gagnon*, the Court held that the preliminary hearing procedural protections mandated in *Morrissey* for parolees must likewise be provided in the preliminary hearing given a previously sentenced probationer. Further, it held that in some cases of both probation and parole revocation determined on a flexible case-by-case basis, the right of an indigent to appointed counsel must be provided.

The preliminary hearing in the criminal process itself contains all of these procedures, except possibly the requirement that the decisionmaker "state the reasons for his determination and indicate the evidence relied on." The Supreme Court in *Coleman* observed that in the preliminary hearing of a criminal case, "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." Screening for probable cause was one function counsel could perform at a preliminary hearing that established the character of the hearing as a critical stage of the criminal process for which the "guiding hand of counsel . . . is essential." Yet without a preliminary hearing, the procedural safeguards required by *Gagnon* and *Morrissey* for probation and parole revocation are not

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78 At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. *Gagnon v. Scarpelli*, 93 S.Ct. 1758, 1761 (1973).

77 In *Mempa v. Rhay*, 389 U.S. 128 (1967), the Court had already held that a probation revocation proceeding at which sentencing was also to take place was a critical stage of a criminal proceeding to which the right to counsel attached. The Court in *Gagnon* distinguished *Mempa* on the ground that in *Gagnon* the probationer had already been sentenced at the time of trial. *Gagnon v. Scarpelli*, 93 S.Ct. 1758, 1759 (1973).

78 Although the Court in *Gagnon* was presented only with a case of probation revocation, it wrote its opinion on the right to counsel issue for parole revocation as well. For example, the Court stated that the second "question posed by this case is whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings." *Gagnon v. Scarpelli*, 93 S.Ct. 1758, 1760 (1973) (emphasis added). The Court explained: "Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." *Id.* at 1759, n.3.

72 *Id.* at 1760-64.

provided a criminal defendant. Instead, the screening responsibility devolves upon a grand jury, which does not give the defendant a hearing in any real sense.

Grand jury proceedings are conducted in secret.\(^3\) Only the grand jurors, the witness being examined, and, in most jurisdictions, the prosecuting attorney are allowed to attend. The defendant need not be given notice of the proceedings or of their purpose. He has no right to appear before the grand jury except as a witness at its request. Even then, he is not entitled to have counsel—appointed or retained—with him in the jury room.\(^4\) He has no right to present witnesses of his own or to confront and cross-examine the witnesses against him. Moreover, the Supreme Court has recently suggested that because of the control or influence exercised by the prosecutor, the grand jury might not even meet the requirement of an independent decision-maker.\(^5\)

\(^3\) E.g., Fed. R. Crim. P. 6(d), (e).
\(^4\) Steele, Right to Counsel at the Grand Jury Stage of Criminal Proceedings, 36 Mo. L. Rev. 193, 194 (1971).
\(^5\) In United States v. Dionisio, 401 U.S. 1 (1973), Justice Stewart writing for the majority said: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor..." Id. at 17. Justice Marshall was more explicit in his dissenting opinion:

Whatever the present day validity of the historical assumption of neutrality that underlies the grand jury process, it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of excessive and unreasonable official interference with personal liberty are exactly those that the Fourth Amendment was intended to prevent.

Id. at 46.

Justice Douglas also addressed this point:

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury:

"This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

Id. at 23. See also Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

The applicability of these comments to any particular grand jury may vary from jurisdiction to jurisdiction, and some grand juries may exercise more independence than others. For example, some states may not even permit the prosecutor to attend grand jury proceedings, Watts, Grand Jury: Sleeping Watchdog or Expensive Antiquity, 37 N.C.L. Rev. 290, 305 (1959), although he may still exercise control over the grand jury by regulating the cases that are brought before it and the evidence that is presented to it.

Even in a jurisdiction where the grand jury is neutral and independent of the prosecutor, its proceedings still do not provide the defendant with the procedural
Thus, the grand jury is primarily an investigation and charging institution. In performing these functions, the grand jury may operate as a buffer or bulwark between the government and the citizens, protecting against harassment and unfounded prosecution. Yet because it does not afford the defendant the procedural rights to notice, to be heard, to present witnesses, to confront and cross-examine witnesses, to counsel, and to a statement of reasons for any determination against him, the grand jury proceeding does not qualify as the criminal trial equivalent of the due process preliminary hearing the Constitution requires before a person may have his parole or probation revoked. Though the grand jury theoretically may be expected to, and at times actually may, block careless, overzealous, or malicious prosecutions, institutionally it lacks every fundamental due process procedure by which it might be expected to determine probable cause on any reliable basis. The grand jury’s investigating and charging functions probably preclude its being tailored to due process hearing standards. The grand jury may not know who, as a defendant, should be provided the procedural rights until “the end of the investigation when all the evidence has been received.” Thus, the grand jury’s investigative responsibilities usually render it unsuited for satisfying the commands of procedural due process in determining probable cause.

Recognizing the constitutional deficiencies of the grand jury proceeding in terms of the minimal attributes of a due process hearing does not detract from the grand jury’s historical bulwark or buffer purpose. It also does not interfere with the investigative usefulness of the grand jury. Because of its institutional short-
comings however, the grand jury alone is not a sufficient protection for the citizen against deprivation of his liberty pending a full trial, and a preliminary hearing with the full trappings of due process must be provided in addition to—or instead of, at the option of the state—the grand jury proceeding.

_Gagnon_ and _Morrissey_ were decided amidst a number of recent cases that extended due process protections to deprivations of governmental benefits, and summary processes in aid of judgment, on the well-established and fundamental principle that before the state may deprive a person of liberty or property, he must be given notice and an opportunity to be heard. Until recently, due process required a hearing only when the deprivation of a right was involved, and not when a privilege or a gratuity was taken. The recent cases, however, abolished only the right-privilege distinction, the concept of procedural due process that was applied was "in the mainstream of past cases."

In the main, the recent due process cases involved situations in which the state did provide a hearing at some stage of the case to determine the legality of a taking from a party. The Supreme Court held, however, that due process was not satisfied unless there was a hearing _before_ the taking. In _Sniadach v. Family_ 89

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89 The fifth amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..." This provision applies to the federal government only, and not to the states. _Alexander v. Louisiana_, 405 U.S. 625 (1972); _Lem Woon v. Oregon_, 229 U.S. 566, 590 (1913); _Hurtado v. California_, 110 U.S. 516 (1884).

90 Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. _Mullane v. Central Hanover Bank & Trust Co._, 339 U.S. 306, 313 (1950). See also _Boddie v. Connecticut_, 401 U.S. 371, 371-78 (1971); _Armstrong v. Manzo_, 380 U.S. 545, 550 (1965).

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94 In _Boddie v. Connecticut_, 401 U.S. 371 (1971), the Supreme Court said that the root requirement [of due process is] that an individual be given an opportunity for a hearing _before_ he is deprived of any significant property interest. _..." Id. at 379._

95 _In Armstrong v. Manzo_, 380 U.S. 545 (1965), the Court held that the divorced father of a young girl was entitled to notice and an opportunity to be heard before his parental rights could be terminated by adoption of the girl by (Continued on next page)
Finance Corp. of Bay View, the Court held that summary pre-judgment garnishment procedures violated due process where the garnishment was accomplished simply by application of an alleged creditor. Although a subsequent hearing on the merits of the claim would settle entitlement to the garnisheed funds the Court held that due process was violated because the "sole opportunity to be heard comes after the taking." In Fuentes v. Shevin, the Court expanded the Sniadach rule by invalidating most summary pre-judgment seizures, attachments, or replevin actions against personal property where hearings were available only after seizure. The Court said: "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." On the same basis in Goldberg v. Kelly, the Court struck down welfare termination procedures that included a hearing only after the termination of benefits. In Bell v. Burson, the Court held unconstitutional a state provision for suspending the driver's license of an uninsured motorist who is involved in an accident and fails to post security for damages. The Court ruled that without an inquiry to determine the reasonable possibility that judgment in the amount of damages claimed would be rendered against the uninsured motorist, his license could not be suspended.

Wisconsin v. Constantineau and Perry v. Sinderman were

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her stepfather. The Court held that a hearing on the father's petition to set aside the adoption decree was not an adequate due process substitute because the decree had already been entered. The Court said:

A fundamental requirement of due process is the 'opportunity to be heard.' [Citation.] It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

Id. at 552. See also Freedman v. Maryland, 380 U.S. 51 (1965).
98 Id. at 81.
102 408 U.S. 593 (1972).
cases in which no hearing was provided. In Constantineau, a police chief, pursuant to state law and without notice to the plaintiff, posted a notice in all retail liquor outlets that sales or gifts of liquor to the plaintiff were forbidden for one year. The Court held: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."\(^{103}\) In Sinderman, the Court held that a junior college teacher employed on a one-year contract basis could, depending on the facts, acquire a "property interest in reemployment" entitling him to a due process hearing before he could be discharged.\(^{104}\)

Following these decisions, Gagnon and Morrissey announced that a probationer or a parolee faced with threatened revocation of his conditional liberty is entitled not only to a hearing on the question of his violating the conditions of his release, but also to a preliminary hearing to determine whether there is probable cause to believe he violated one of those conditions.\(^{105}\) The "arrest and detention" of the probationer or parolee creates the need for a preliminary hearing\(^{106}\) since, as the Court assumed, there would be a time lag between this event and the final determination of whether probation or parole should be revoked,\(^{107}\) the Court noting that a lapse of two months before the final hearing "would not appear to be unreasonable."\(^{108}\) Without discussion, the Court understandably departed from the due process cases on which it relied: it did not require a hearing before the probationer or parolee was arrested. That is, the Court did not insist upon the requirement that a hearing precede any deprivation of liberty. Instead, it held that due process would be satisfied by a hearing "conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."\(^{109}\) The Court thus indicated that a hearing must

\(^{108}\) Id. at 488.
\(^{109}\) Id. at 485.
be held before any significant transfer of the alleged violator, and the fact that it required a preliminary hearing when a delay of only two months was expected between arrest and final hearing perhaps indicates the Court’s conception of a very short time between the arrest and the required preliminary hearing.

The Court’s relaxation of the prior hearing stricture is consistent with a longstanding “emergency exception” that justifies a brief delay before holding a hearing if only property rights are concerned. The exception does not remove the hearing requirement; it only postpones the time within which it must be met. In Fuentes v. Shevin the Court described the “emergency exception” as follows:

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110 Justice Brandeis in 1931 summarized the emergency cases that had been decided up until that time as follows:

The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. [Citations.] Property rights must yield provisionally to governmental need.

... Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. [Citations.] Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a state may order the summary destruction of property by administrative authorities without antecedent notice or hearing. [Citations.] Because of the public necessity, the property of citizens may be summarily seized in war-time. [Citations.] And at any time, the United States may acquire property by eminent domain, without paying or determining the amount of the compensation before the taking.


In Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), the Court upheld multiple seizures of harmless drugs marketed under exaggerated and misleading advertising, under the emergency authority for “summary destruction of property without prior notice or hearing for the protection of public health.” Id. at 599-600. Speaking for the Court, Justice Douglas said: “It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.” Id. at 599.

In Fahey v. Mallonee, 332 U.S. 245 (1947), the Court upheld action by the Federal Home Loan Bank Commission in taking over a savings and loan association on the ground that its management was injurious to members, creditors, and the public. The Court said:

It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner.

Id. at 253.

111 That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where
There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. . . . These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, . . . the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.\textsuperscript{112}

Arrest of a probationer or parolee suspected of violating the conditions of his release involves not property, but liberty. Otherwise, the arrest meets all three "extraordinary situation" requirements listed in \textit{Fuentes}. The fourth amendment specifically addresses the prerequisites for constitutional arrest and contains no requirement for a prior adversary hearing.\textsuperscript{3} Thus, \textit{Gagnon} and \textit{Morrissey} contemplated that arrest might be effected without a


\textsuperscript{113}The fourth amendment does apply to arrests of persons as well as to searches of property. Terry v. Ohio, 392 U.S. 1, 16 (1967). In Coolidge v. New Hampshire, 403 U.S. 443, 460-83, 510-11, 511-12 n.1, 524 (1971), Justice Stewart for the plurality and Justice White for the dissenters debated without resolving Justice White's proposition that an arrest upon probable cause may always be effected without a warrant—that is, without a prior \textit{ex parte} hearing before a magistrate.

In \textit{Fuentes} v. \textit{Shevin} the Court noted:

The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued.


Of course, some form of prior hearing, though \textit{ex parte}, is ordinarily required for a search and seizure of property:

(Continued on next page)
hearing, but commanded that the ensuing detention be subject to a hearing "as promptly as convenient."

The implications for the criminal process stand out clearly. At an early stage of a criminal case the defendant is typically arrested and detained pending trial, unless he can post bail or meet some other condition for pretrial release. Obviously the defendant who must await trial in jail has been deprived of his liberty by summary and not due process unless he is given a preliminary hearing on the issue of probable cause. A state could not take a person’s household goods or furniture, his driver’s

(Footnote continued from preceding page)

[T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and carefully delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be a showing by those who seek exemption ... that the exigencies of the situation made that course imperative. "[T]he burden is on those seeking the exemption to show the need for it."


After the search is conducted, if property is seized the defendant will have an opportunity for a hearing on the lawfulness of that seizure. United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Steele v. United States, 267 U.S. 498 (1925); United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967); cf. People v. Mitchell, 258 N.E.2d 345, cert. denied, 400 U.S. 882 (1970); People v. Bak, 258 N.E.2d 341, cert. denied, 400 U.S. 882 (1970). We are dealing with the seizure of a person rather than of property when we deal with an arrest. As discussed in the text, the form of the procedures required by due process may be more stringent when liberty rather than property is being deprived.

In any event, Gagnon and Morrissey explicitly held that a probationer or parolee has a right to a hearing promptly after his arrest and detention for possible revocation of his liberty status. Those cases would seem to settle the proposition that after arrest in the criminal process as well a defendant is entitled to a preliminary hearing.

In Kent v. United States, 383 U.S. 541, 553-54, 561-62 (1966), the Supreme Court held that it was unlawful for a District of Columbia juvenile court to waive its jurisdiction over a minor and refer him to be tried in an adult court without a hearing and a statement of reasons. For this result, the Court relied on interpretation of a statute, id. at 556, by ruling that the statute "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness." Id. at 558. See also id. at 557: "We believe this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." This decision has been applied to state juvenile proceedings. E.g., Kemppl v. Maryland, 428 F.2d 169 (4th Cir. 1970).

In Kent the Court held:

We do not decide whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. Kent v. United States, 383 U.S. 541, 554 (1966).

license, his good name and reputation, the use of his salary, or his public employment without giving him a preliminary hearing. Yet the defendant can be kept in jail as long as it takes to complete his trial—often months, sometimes years—on the sole basis of a secret proceeding by a grand jury, who may not hear his evidence, whose witnesses and other evidence he may not confront, who give no reasons and cite no evidence for their decision, and who are generally controlled by the officer charged with the prosecution. In the process, the defendant can lose his family, his property, his job, and his good name. But because of the mystique of the grand jury, he is denied the fundamental elements of due process.

It is cruelly ironic that the criminal justice process, which threatens the accused's right to liberty, is wanting in the basic procedural features that jealously safeguard the right to hold property. Extending the protection of a preliminary hearing to arrested probationers and parolees certainly presages an extension as well to the presumptively innocent prisoner languishing in jail only because he has been charged with crime and who has never been given a hearing on even the probability of his guilt or innocence. Indeed, in *Morrissey* the Court intimated that the protections it was ordering for parole revocations were less than those required for a criminal prosecution.

Since the event triggering the right to a hearing is the arrest and detention of the accused, a plausible argument can be advanced that the right to hearing does not apply to a defendant released pre-trial on bail or on nonmonetary conditions. Since *Gagnon* and *Morrissey* permitted the due process hearing in the revocation context to take place promptly after, and not necessarily before, arrest, the pre-trial release of a defendant would obviate any need for a preliminary hearing. This argument

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121 "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. . . . Parole arises after the end of the criminal prosecution, including imposition of sentence." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). See also *Gagnon v. Scarpelli*, 93 S.Ct. 1756, 1759 (1973).
would advance discrimination against the poor and friend-
less. Strategically, it might encourage defendants to delay posting
bail until after they have been provided a preliminary hearing.
Doctrinally, the due process cases have already rejected such a
distinction. The summary garnishment, replevin, and license sus-
pension procedures in Snidach, Fuentes, and Bell v. Burson, al-
lowed the defendant to retrieve his property by posting a bond.
Nevertheless, the Court held that the taking could not be accom-
plished without a prior hearing. In a criminal case, pre-trial
release generally encompasses restrictions on liberty not imposed
on the ordinary citizen, such as geographical restraints. Such
restrictions may be as burdensome on the individual as the
suspension of a driver’s license in Bell v. Burson or the loss of
sometimes unessential property described in the other due process
cases. Moreover, the mere fact of arrest adversely affects reputa-
tion in a manner similar to that involved in the no-liquor posting
in Wisconsin v. Constantineau. Thus, irrational results could be
avoided by holding that any arrest, even if the defendant is
released pending trial, constitutes a sufficient deprivation to in-
voke the right to a due process hearing.

The hearing required by due process before a state may
deprive a person of liberty or property need not necessarily ap-
proach the character of a trial. “[D]ue process is flexible and calls
for such procedural protections as the particular situation de-
mands. “[C]onsideration of what procedures due process may
require under any given set of circumstances must begin with
a determination of the precise nature of the governmental function
involved as well as of the private interest that has been affected
by governmental action.”125 In Gagnon and Morrissey the Court
described the features of the preliminary hearing required by
due process for the revocation of probation and parole. In Goldberg v. Kelly the Court specified similar safeguards, except the
right to counsel, for the pre-termination hearing in a welfare case.
Certainly the preliminary hearing in the criminal context should

125 Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See also Bell v. Burson,
weighing process has long been a part of any determination of the form of hearing
required in particular situations by procedural due process.” Board of Regents v.
Roth, 408 U.S. 564, 570 (1972).
conform, at minimum, to the requirements imposed in those cases. The parole revocation and welfare termination procedures are completely administrative in character, and an administrative decisionmaker at the preliminary hearing was held acceptable to due process.\textsuperscript{123} Thus, since the criminal trial is wholly judicial, the preliminary hearing should be before a judicial officer. It is not clear from the cases, however, that the pre-seizure hearings required by \textit{Sniadach} and \textit{Fuentes}, and the preliminary hearing called for by \textit{Gagnon}, are to be held before a judge. In the criminal case, the private interest affected by the governmental action is so serious that as long as the proceedings are in a judicial forum, the balance would seem to weigh heavily in favor of a non-administrative preliminary hearing in the criminal process. The question of whether an absolute right to counsel applies at a preliminary hearing in a criminal case has already been resolved in favor of the right.\textsuperscript{124}

**Conclusion**

The preliminary hearing is provided by the states and required by due process for screening purposes and not for discovery. Discovery is, however, a necessary incidental benefit of the preliminary hearing, and the Supreme Court in \textit{Coleman} sanctioned its use for that purpose, within the framework and inherent limitations of the preliminary hearing. By holding out promise for deposition procedures and expanded reciprocal discovery, the due process clause provides the cornerstone for criminal defense discovery equivalent to what is routinely available to all litigants in civil trials. When the promise is implemented, the course of justice will run more smoothly, efficiently, fairly and reliably.

\textsuperscript{123} Morrissey v. Brewer, 408 U.S. 471, 486 (1972).