SUPREME COURT OF THE UNITED STATES

MONDAY, FEBRUARY 28, 1966

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 17.1 and 26.1 and amendments to Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, 21, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 37, 38, 40, 44, 45, 46, 49, 54, 55 and 56, and to Form 26, as hereinafter set forth:

[See *infra*, pp. 1095–1116.]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of Title 18, U. S. C., section 3771.

4. That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this Court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective July 1, 1966.

[For dissenting statement of MR. JUSTICE BLACK, see *ante*, p. 1032.]

MR. JUSTICE DOUGLAS, dissenting in part.

I reiterate today what I stated on an earlier occasion (374 U. S. 865, 869–870) (statement of BLACK and DOUGLAS, JJ.), that the responsibility for promulgating Rules of the kind we send to Congress today should rest with the Judicial Conference and not the Court. It is the

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Judicial Conference, not the Court, which appoints the Advisory Committee on Criminal Rules which makes the actual recommendations.[1] Members of the Judicial Conference, being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.

But since under the statute [2] the Rules go to Congress only on the initiative of the Court, I cannot be only a conduit. I think that placing our imprimatur on the amendments to the Rules entails a large degree of responsibility of judgment concerning them. Some of the criminal Rules which we forward to Congress today are very bothersome—not in the sense that they may be unwieldy or unworkable—but in the sense that they may entrench on important constitutional rights of defendants.

In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a "game." [3] But the proposed changes in the

[1] 28 U. S. C. § 331 (1964 ed.), which establishes the Judicial Conference of the United States, provides that the Conference shall "carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court . . . ." The Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that, in addition, five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. See Annual Report of the Proceedings of the Judicial Conference of the United States 6–7 (1958).

[2] 18 U. S. C. § 3771 (1964 ed.).

[3] See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279; Louisell, Criminal Discovery: Dilemma Real or Apparent? 49 Calif. L. Rev. 56 (1961); Traynor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 228 (1964).

Rule go further. Rule 16 (c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover "scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof" which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case.[4]

The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense.[5] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the oppor-

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[4] The proposed rule explicitly provides that the prosecution may not discover nonmedical documents or reports "made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

[5] *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919. See Comment, 51 Calif. L. Rev. 135; Note, 76 Harv. L. Rev. 838 (1963). The case is more extensively treated in Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965).

tunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e. g., Sherbert* v. *Verner,* 374 U. S. 398, 403–406. To deny a defendant the opportunity for discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery.

The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. This rule would establish a pretrial conference procedure. The language of the rule and the Advisory Committee's comments suggest that under some circumstances, the conference might even take place in the absence of the defendant! Cf. *Lewis* v. *United States,* 146 U. S. 370; Fed. Rules Crim. Proc. Rule 43.

The proposed amendment to Rule 32 (c)(2) states that the trial judge "may" disclose to the defendant or his counsel the contents of a presentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted of crime. Trial judges need presentence reports so that they may have at their disposal the fullest possible information. See *Williams* v. *New York,* 337 U. S. 241. But while the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—

on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. *Townsend* v. *Burke,* 334 U. S. 736. It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. See Tappan, Crime, Justice, and Correction 556 (1960). There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.

Some States require full disclosure of the report to the defense.[6] The proposed Model Penal Code takes the middle ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply.[7] Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

I do not think we should approve Rules 16, 17.1, and 32 (c)(2). Instead, we should refer them back to the Judicial Conference and the Advisory Committee for further consideration and reflection, where I believe they were approved only by the narrowest majority.

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[6] *E. g.,* Calif. Penal Code § 1203.

[7] Model Penal Code § 7.07 (5) (Proposed Official Draft, 1962). The Code provides that the sources of confidential information need not be disclosed. "Less disclosure than this hardly comports with elementary fairness." Comment to § 7.07 (Tent. Draft No. 2, 1954), at 55. A discarded draft of the amendment to Fed. Rules Crim. Proc. Rule 32 would have allowed disclosure to defense counsel of the report, from which the confidential sources would be removed. A defendant not represented by counsel would be told of the "essential facts" in the report. See 8 Moore's Federal Practice—Cipes, Criminal Rules ¶¶ 32.03 [4], 32.09 (1965).