Introduction

If "information is the currency of democracy,"[1] nowhere in our system of governance is that coin more valuable than in federal criminal cases. In nearly every criminal case, information is at a premium for both sides. The defense is eager to understand what the government's case at trial will look like so that it can seek to impeach the government's witnesses and present the best defense to the charges. The government, for its part, wants to know the theory of the defense so that it can tailor its case-in-chief to anticipate that theory.

The rare value of information in a criminal case lies partly in its inaccessibility, as the parties' right to discovery is relatively narrow, particularly when compared to the quantity of information available as a matter of right to litigants in civil cases. Because discovery rights in charged criminal cases are limited, the parties often litigate vigorously—and sometimes creatively—to obtain significant information.

For purposes of this book, we define "federal criminal discovery" to be any method by which the government or the defense may demand production of materials or information in a charged federal criminal case. Our definition of federal criminal discovery includes *materials* such as recordings, documents, electronic data, or tangible objects. It also includes *unwritten information* such as witness statements that have not been recorded or memorialized. In addition to what the government

1. This quotation is commonly attributed to Thomas Jefferson but, according to the Thomas Jefferson Foundation (https://tjrs.monticello.org/letter/1531), he never said it. We are indebted to its author, whomever that may be.

and the defense may obtain from each other, our definition of federal criminal discovery includes materials and information that either party may obtain from a nonparty after a case has been charged. We do *not* include in our definition of federal criminal discovery what the government may obtain by search warrant or grand jury subpoena *before* charging a case. The government's preindictment investigative power is immense and, while we may allude to it on occasion, a full discussion is beyond the scope of this book.

This is the second edition of *Federal Criminal Discovery*, which, ten years after publication of the first edition, remains the only book devoted to its subject matter. By contrast, many books are devoted to federal *civil* discovery. That may be because there is, and long has been, much more discovery in civil cases than in criminal cases. In fact, a criminal defendant had no right to any discovery at all from the federal government until 1946, when a modest version of Rule 16 of the Federal Rules of Criminal Procedure was first adopted.

On one level, the notion that far more discovery is available in federal civil cases than in federal criminal cases makes little sense. A report of the American College of Trial Lawyers observed: "It is anomalous that in civil cases, where generally only money is at stake, access to information is assured; while, on the contrary, in criminal cases, where liberty is at issue, the defense is provided far less information."[2]

On another level, criminal cases implicate other principles that may press against broad discovery. For one, the defendant has constitutional rights such as the Fifth Amendment privilege not to be a witness against oneself. For another, the public has a particular interest in seeing that the guilty are held accountable for criminal conduct. Many influential citizens, including judges, have spoken forcefully over the years *against* making discovery available to criminal defendants. Judge Learned Hand wrote this in 1923:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, [the

2. Am. Coll. of Trial Law., *Proposed Codification of Disclosure of Favorable Information under Federal Rules of Criminal Procedure 11 and 16*, 41 Am. Crim. L. Rev. 93, 104 (2004).

> accused] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[3]

Judge Hand remains one of the most venerated jurists in American history, and rightly so. But it cannot reasonably be denied today that Judge Hand's "unreal dream" of "the innocent man convicted" was in fact quite real. DNA testing has proved as much. Led by the Innocence Project at Cardozo Law School, DNA evidence has exonerated nearly 200 wrongly convicted defendants,[4] many of whom were awaiting execution on death row.[5] In one case, *Arizona v. Youngblood*, an innocent defendant's conviction was affirmed by the U.S. Supreme Court before DNA evidence exonerated him.[6]

DNA's illumination of wrongful convictions has engendered support for expanded pretrial disclosures to criminal defendants. But long before the arrival of DNA evidence, the law was moving towards greater

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3. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

4. *See Explore the Numbers: Innocence Project's Impact*, Innocence Project, https://innocenceproject.org/exonerations-data/ (last visited June 1, 2021).

5. Best-selling author John Grisham wrote a nonfiction book, *The Innocent Man*, about one such defendant, Ron Williamson, who was convicted in Oklahoma of a murder he did not commit. DNA evidence exonerated Williamson and identified the real killer, but not until Williamson had served 11 years in prison. *See* John Grisham, The Innocent Man (2006). *See also* Dennis Fritz, Journey toward Justice (2006), written by Williamson's codefendant, Dennis Fritz, who was also wrongfully convicted for the same murder before being exonerated.

6. *Compare* 488 U.S. 51 (1988) (affirming Youngblood's conviction) *with* the profile of his case on the Innocence Project website, https://innocenceproject.org/cases/larry-youngblood/ (last visited May 7, 2021).

criminal discovery. In an influential 1963 speech,[7] Justice William J. Brennan, Jr., argued that greater disclosure of evidence to the defense would serve the ends of justice. Justice Brennan organized his speech to respond to arguments against discovery that had been articulated by Chief Justice Vanderbilt of the New Jersey Supreme Court, with whom Justice Brennan had served before being appointed to the U.S. Supreme Court. The arguments Justice Brennan describes—on both sides—resonate to this day.

Chief Justice Vanderbilt argued that providing discovery to criminal defendants would facilitate perjury and falsification of evidence. Not so, countered Justice Brennan, who argued that "[this] fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication."[8]

Chief Justice Vanderbilt also feared that criminal defendants would inappropriately interfere with and harm government witnesses if discovery were provided. Justice Brennan's response: "Dangers and other abuses of this kind are clearly a matter of legitimate concern—they argue however not for wholesale prohibition of criminal discovery but only for circumspection and for appropriate sanctions tailored to dealing with apprehended abuses in the particular case."[9]

Echoing Judge Hand, Chief Justice Vanderbilt argued that providing discovery to a criminal defendant was not appropriate, because the defendant was already given great advantages in our system of justice, including the requirement that the government convince a unanimous jury beyond a reasonable doubt of the defendant's guilt. Chief Justice Vanderbilt argued in particular that the defendant's Fifth Amendment privilege not to be a witness against himself would make criminal discovery a one-way street: That is, the government would have to produce

7. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L.Q. 279 (1963).

8. *Id.* at 289, 291.

9. *Id.* at 289, 292.

information to the defense, but the defense would not have to produce information to the government.[10]

While it is true that the government cannot compel a criminal defendant to testify against herself, the government has ample resources to obtain materials and information. Before indictment, the government may serve grand jury subpoenas for testimony and materials; a potential criminal defendant has no corresponding right. The government may obtain and execute warrants to search for and seize evidence; a criminal defendant may not. The federal government has the greatest investigative agency in history—the Federal Bureau of Investigation—with an enormous budget; a criminal defendant does not. The government may deceive witnesses to convince them to cooperate; defense counsel is not allowed to do so. The government may provide benefits to witnesses, including cash rewards and freedom to felons facing prison; a defense lawyer would be guilty of a criminal act if she provided such incentives to witnesses. Justice Brennan simply stated, "[I]t overstates the fact to say that we don't need to extend criminal discovery procedures to the accused because the scales are already distorted in his favor. . . ."[11]

Finally, Chief Justice Vanderbilt argued that the problem of criminal conduct was worse in the United States than in countries such as Canada that provided more criminal discovery. Justice Brennan suggested, on the contrary, that given Canada's satisfaction with discovery in criminal cases and its lower crime rate, what worked in Canada might also work in the United States.[12]

Justice Brennan's view prevailed, at least in part, as the last 55 years have seen an expansion of criminal discovery rights—though nowhere near at the level of civil discovery. In 1970, Justice White wrote for a majority of the Supreme Court approving a Florida system of reciprocal discovery regarding alibi witnesses. He explained that such discovery 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."[13] Three

10. *Id.* at 289.
11. *Id.* at 293.
12. *Id.*
13. Williams v. Florida, 399 U.S. 78, 82 (1970).

years later, Justice Marshall wrote for an eight-justice majority 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."[14] The growth of liberal "discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system."[15]

Thus, while there is "no general constitutional right to discovery in a criminal case,"[16] Congress and the courts have developed more specific, limited rights, sometimes mandated by the Constitution but far more often as a matter of policy. Over the years, numerous proposals for expanded discovery have been advanced, often accompanied by vigorous debate. Many such proposals were accepted; others were not. Here are some of the most significant milestones:

- In 1946, the Supreme Court amended the Federal Rules of Criminal Procedure to provide for limited discovery by court order. This was the first formal discovery rule in the federal system. The original Rule 16 authorized the district court to order the government to allow the defendant to inspect the documents obtained by the government from the defendant, or obtained from others by seizure or process.
- In 1957, the Supreme Court held in *Jencks v. United States*[17] that the government must give witness statements to the defense. That same year, Congress reacted by passing the so-called Jencks Act,[18] which provides that the government need not turn over such statements until after the witness has testified.
- Also in 1957, the Supreme Court held in *Roviaro v. United States* that the government must disclose information about confidential informants "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful

14. Wardius v. Oregon, 412 U.S. 470, 473 (1973).
15. *Id*. at 474.
16. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
17. 353 U.S. 657 (1957).
18. 18 U.S.C. § 3500.

to the defense of an accused, or is essential to a fair determination of a cause."[19]

- In 1963, the same year as Justice Brennan's speech, the Supreme Court in *Brady v. Maryland*[20] held for the first time that due process requires the government to disclose to the accused evidence that is exculpatory and material to guilt or punishment.
- In 1966, and again in 1975, Rule 16 of the Federal Rules of Criminal Procedure was greatly expanded. By 1975, the new Rule 16 made discovery automatic and reciprocal. A defendant now was entitled, upon request and without a court order, to obtain his own statement; his own grand jury testimony; results or reports of examinations, tests, or experiments; and documents and tangible objects material to the defense. Government work product was exempt from discovery, and witness statements remained subject to disclosure only as provided in the Jencks Act. The amended Rule 16 also called for reciprocal discovery from the defense, once the government had met its discovery obligations, of documents and tangible objects, and results or reports of examinations, tests, or experiments, that the defendant intended to introduce at trial.
- In 1993, Rule 16 was amended to require the government to provide a summary of its expected experts' testimony upon the defendant's request. If the defendant made such a request and the government complied, the defendant was then required to provide a summary of his expected experts' testimony upon the government's request.

In the debate over expanded criminal discovery, many controversial issues have arisen, some of which are unresolved to this day. One such issue is whether a defendant should be entitled to know before trial the identity of the witnesses against him. In 1974, the Supreme Court proposed a rule that would have required the government and the defense

19. 353 U.S. 53, 60–61 (1957).

20. 373 U.S. 83 (1963). The *Brady* decision was authored by Justice Douglas and announced by Justice Brennan.

to identify its witnesses in advance of trial. Congress vetoed it.[21] Recent cases have addressed whether a trial judge nonetheless has discretion to order the government to disclose its witnesses. We will attempt to address that issue and other criminal discovery controversies throughout this book.

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In the chapters that follow, we describe and discuss each of the different methods of discovery available to the parties in federal criminal cases. In this second edition, we have updated the text to address several significant developments in the law, we have included significant cases and other authorities that have appeared in the ten years since the first edition, and we have divided the longest chapter of the first edition into two chapters to make it easier for readers to access the material.

We begin, in chapter 1, with the defendant's constitutional right to obtain exculpatory evidence under *Brady v. Maryland*.[22] *Brady* held that a criminal defendant is entitled upon request to "evidence favorable to an accused . . . where the evidence is material either to guilt or punishment. . . ."[23] While the elements of a *Brady* violation are the same as ten years ago, this is the area of federal criminal discovery that has generated the most reported cases. We address many of those cases in chapter 1. We also discuss the Due Process Act of 2020, which for the first time requires trial courts to issue orders governing *Brady* disclosure.

After examining the constitutional rule of *Brady*, we turn in chapters 2 and 3 to the cornerstone of federal criminal discovery, Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 requires the government to make substantial disclosures to the defendant, if the defendant requests them, and by so requesting the defendant in most instances obligates himself to provide reciprocal discovery to the government. Rule 16 is nuanced and its requirements are often litigated. In this second edition, it takes up two chapters: chapter 2 for the government's obligations; chapter 3 for the defendant's reciprocal obligations, the parties'

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21. *See* Fed. R. Crim. P. 16, advisory committee's notes, 1975 enactment; *see also id.*, 1974 amend.

22. 373 U.S. 83 (1963).

23. *Id.* at 87.

continuing duties, and court oversight. This second edition is updated to account for intervening amendments to the Rule and significant case developments.

We then consider, in chapter 4, the discoverability of witness statements under the Supreme Court's *Jencks* decision, the Jencks Act, and the corresponding Federal Rule of Criminal Procedure, Rule 26.2. Witness statements, defined as substantially verbatim statements made or adopted by a witness, must be disclosed by the party offering the witness's testimony at trial—but no disclosure is required until after the witness has testified on direct examination. As this procedure raises obvious inefficiencies, we discuss possible alternatives.

In chapter 5, we address the availability of subpoenas to obtain evidence before trial in criminal cases. Under Federal Rule of Criminal Procedure 17(c), either party may serve a subpoena on the other party or, more commonly, on a third party, to obtain evidence for trial. The utility of this procedure is limited, however, as the weight of authority following *United States v. Nixon*[24] holds that subpoenas are not for discovery and may seek only specific relevant and evidentiary documents. The law has not changed materially since the first edition, but chapter 5 is updated to reflect recent case law.

While these rules and requirements are perhaps the most fundamental and widely used means of obtaining information by right in criminal cases, many other federal rules and statutes also contain discovery rights and obligations. To our knowledge, these have never been discussed in one place before this book. Chapter 6 attempts that task. It includes a discussion of Criminal Procedure Rules 12.1, 12.2, and 12.3, which require reciprocal disclosure of information concerning certain defenses; Rule 12(b)(4), which requires the government to disclose upon request whether it intends to offer certain evidence at trial; Rule 6(e), which governs disclosure of grand jury information; the Freedom of Information Act as it relates to criminal cases; certain disclosure provisions of Title III, the wiretapping statute; and various Evidence Rules that contain disclosure requirements attendant to particular types of evidence at trial. Some of these rules and statutes have been amended since the

24. 418 U.S. 683 (1974).

first edition of this book; chapter 6 now reflects those amendments and recent case law.

Having exhausted the statutory and constitutional bases for discovery, we turn in chapter 7 to the court's inherent power to order discovery in criminal cases. While the scope of inherent authority is not clearly defined or understood, the thrust of the case law suggests that a court at least sometimes can order discovery that the Rules do not otherwise require—assuming that the Rules do not *forbid* the discovery. We will attempt to make sense of the rather vague standards available in this area.

In chapters 8 and 9, respectively, we discuss ethics rules and Justice Department policies that impact the federal prosecutor's disclosure obligations. There are differences between ethics rules and Department of Justice policies, on the one hand, and the rules, statutes, and cases addressing federal criminal discovery, on the other hand. We compare and contrast these different sources of discovery duties. There have been a number of new reported cases interpreting the ethics rules that govern discovery obligations in federal cases; by contrast, there have been no significant developments in the Department of Justice's discovery policies since the first edition.

In chapter 10, we discuss certain considerations that may merit restricting criminal discovery in appropriate cases: specifically, witness safety, and national security as embodied in the Classified Information Procedures Act,[25] or CIPA. We suggest solutions to these potential problems.

We address some remedies for discovery violations in substantive chapters, but chapter 11 is devoted entirely to the remedies a court may (or must) order in the event of a discovery violation. The court has at its disposal many potential sanctions, both remedial and punitive. The appropriate remedy will depend on the nature and severity of the violation and its effect on the underlying criminal case.

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25. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3, §§ 1–16).

We are defense lawyers, and we acknowledge that we write from that perspective. With that knowledge, however, we have made a conscious effort to describe existing law fairly and to see both sides of any issues on which we may offer an opinion.

Our hope is that this book will be a helpful tool for judges, academics, prosecutors, and defense lawyers. We also hope it may provide a useful framework for policy makers considering changes to the law of federal criminal discovery.

We are very proud to call Williams & Connolly our professional home. Our colleagues have set the finest professional examples we could imagine, and they have taught us what we know. That said, the views we express in this book are entirely our own.