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PRE-TRIAL DISCOVERY OF WITNESS LISTS: A MODEST PROPOSAL TO IMPROVE THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Cary Clennon*

I. INTRODUCTION

Criminal adjudications are increasing in the District of Columbia Superior Court at an unprecedented rate. While the court has embraced innovative litigation reduction techniques in the Civil Division, no comparative movement is being made in the Criminal Division. In fact, one recommended innovation, implementation of sentencing guidelines by the superior court, may exacerbate crowded criminal dockets.

The superior court is empowered by virtue of its independence and enabling authority to promulgate rules of criminal procedure which depart from the Federal Rules. To address the swiftly rising caseload, adopting rules that would permit pretrial discovery of witness lists would improve the administration of criminal justice.

Congress rejected mandatory discovery of witness lists when it amended the Federal Rules of Criminal Procedure in 1975. Many states, however, have found the practice beneficial, because it improves the efficiency and fairness of criminal justice administration. The superior court adjudicates common law crimes, and more closely resembles a state court than a federal court. The District of Columbia courts should therefore depart from the federal model and join the mainstream of American criminal practice by broadening pre-trial discovery.

Jurisdictions using broad discovery report higher rates of pleas, higher rates of conviction after trial, reduced case disposition times, and reduced

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appeals. Experience over the decades has shown that witness tampering and perjury, often advanced as reasons for denying broad criminal discovery, are not prevalent problems and, in any event, do not present insurmountable obstacles.

Pre-plea discovery, like pre-trial discovery, enhances fundamental fairness by equalizing bargaining positions. This Article proposes that pre-plea discovery will enhance the prevailing standards of competence of defense counsel, lead to more pleas and fewer trials, and improve the administration of criminal justice in the District of Columbia.

II. THE CRIMINAL CASELOAD EXPLOSION

The District of Columbia courts now face the most explosive criminal caseload growth since court reorganization in 1970.1 Popularity tied to the vast increases in felony drug prosecutions resulting from "Operation Clean Sweep,"2 a comprehensive street-level drug law enforcement effort begun in 1986, criminal caseloads have been rising dramatically since 1980. From 1980 to 1985, total criminal case filings jumped 42%.3 Felony indictments in the same period skyrocketed 96%, from 3,138 to 6,160.4 Operation Clean Sweep only magnified an already pervasive problem. From 1982 to 1988, criminal filings rose 32%, approximately the same number as those filed in the five years preceding Operation Clean Sweep.5 The felony filing figures, however, graphically illustrate how increased drug prosecutions have contributed to the overall problem of court congestion. From 1982 to 1988, felony charges (pre-indictment filings) increased 111%, while actual indictments rose 147% (from 3,934 in 1982 to 9,709 in 1988).6 Misdemeanors prosecuted by the United States, traditionally more than twice the total felonies annually, fell to only 53% of the criminal volume in 1988.7

Other divisions of the court system have not witnessed the same caseload explosion. In the same period (1982-1988), total civil case filings actually

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4. Id.
6. Id.
7. Id.
declined by 8%, and Family Division case filings rose only 8%. The increased case filing figures of the last seven years illustrate that the criminal caseload, particularly felony cases, has primarily contributed to the overall caseload increase in the superior court. A comparison of caseload growth since 1980 and prior to the inception of Operation Clean Sweep in 1986 indicates that felony filings have been growing significantly even without the recently emphasized enforcement efforts.

These pressures, of course, affect the operation of the entire court system, not just the Criminal Division. Similarly, increased responsibilities in non-criminal divisions necessarily affect the ability of the Criminal Division to operate efficiently. For example, court officers pointed out in May 1986, shortly after the inception of Operation Clean Sweep, that increased child support enforcement efforts mandated by Congress for the states would “require substantial reallocation of our resources which, inevitably, will result in additional pressures upon our Criminal Justice operations.” The court, in fact, realizes that docket congestion and its related pressures are mainly caused by the increasingly unmanageable criminal caseload. In support of increased resources, the Joint Committee on Judicial Administration, the internal governing authority of the courts, recently told Congress, “[i]t appears that a substantial part of the problem with the District’s justice system is what has been recently labeled ‘The Drug Epidemic.’”

The expanding criminal docket and shrinking civil docket are likely the result of determined efforts and not mere happenstance. While the Metropolitan Police and the United States Attorney’s Office embarked on an ambitious prosecutorial effort, the court system was likewise embarking on ambitious and innovative programs designed to reduce the civil case backlog. For example, the “Multi-Door Dispute Resolution Program” is a

8. Id.
9. Id. Caseload growth in the District of Columbia Court of Appeals has not risen as dramatically. From 1980 to 1985, criminal appeal filings jumped 24% and total filings were up 31%. 1987 ANNUAL REPORT, supra note 3, at 23. From 1982 to 1987, however, criminal appeals remained steady and civil filings actually dropped by 3%. 1988 ANNUAL REPORT, supra note 5, at 23. Large increases in 1985 and 1986 in criminal filings (29% and 36%, respectively, over 1982), and modest increases in civil filings in the same periods (13% and 11% over 1982), however, did contribute to a 25% increase in case disposition times in 1988 (from 544 days in 1982 to 679 days in 1988). Id. at 24.
10. 1987 ANNUAL REPORT, supra note 3, at 53.
12. Id. at 88.
multi-faceted attempt to address rising court congestion and delay.13 From small claims to domestic relations, civil actions of all kinds are now subject to mandatory as well as voluntary arbitration. A short-term, high-volume negotiation session, called "Settlement Week," has taken hundreds of cases off the docket in a matter of days.14 Countless others have been forestalled from filing as a result of alternative dispute resolution strategies. Initially a limited pilot project of the American Bar Association, local courts seem to have firmly embraced and enhanced Multi-Door Dispute Resolution.

Special attention has also benefited the civil appellate caseload. According to recently retired Appeals Court Chief Judge William C. Pryor, in 1986 the Court of Appeals undertook to emulate the settlement efforts of the trial court. Some 44% of all civil appeals referred for settlement attempts were taken off the docket after successful resolution.15 The legal community has supported a proposal to create an intermediate appellate court to address appellate docket congestion and reduce decision delay which Judge Pryor advocated before a congressional subcommittee in April 1988.16

In the criminal sphere, the Superior Court Sentencing Guidelines Commission issued an initial report in 1987 for public comment.17 Modeled after recent federal efforts to reduce sentencing disparity and designed to correlate sentences with "offender history and criminal behavior,"18 the proposed guidelines set out minimum sentencing standards for each offense. The Minority Report issued with the guidelines, however, contends that overall sentences will increase and prison overcrowding will worsen.19 Such a development, if accurate, could foreseeably lead to increased jury trial demands, longer case disposition times, and increased court backlog. The guidelines have not yet been formally adopted, but are undergoing further study in light of the Minority Report contentions.

The criminal justice system is obviously not amenable to settlement negotiations and arbitration sessions. But even the casual observer can see that

15. 1987 ANNUAL REPORT, supra note 3, at 18 (statement of Chief Judge Pryor).
16. 1988 ANNUAL REPORT, supra note 5, at 18.
18. 1987 ANNUAL REPORT, supra note 3, at 18 (statement of Chief Judge Ugast).
unchecked growth in the criminal docket under present conditions will surely strain the court system beyond its capabilities. The Joint Committee on Judicial Administration recently recognized this and told Congress:

The bottom line is that the District of Columbia's courts and its entire justice system face an urgent need for both legislative improvements and the necessary resources to expand operations in order to address the rising case loads and provide greatly needed services to our community. We stand ready to work with the Mayor, the Council and the Congress to respond to these needs.20

The court must also consider innovative approaches to criminal justice administration. The proposal advanced in this Article, to permit broader pre-trial discovery in criminal cases, has reportedly improved the administration of justice in jurisdictions that have adopted it.21 Reducing the number of jury trials, case disposition times, and appeals, as well as more efficiently utilizing judicial, prosecutorial and law enforcement resources, can positively address the concerns outlined by court administrators.

It should not be forgotten that, in 1970, a substantial motive behind court reorganization was to create a unified court system that would more effectively and efficiently address the growing crime problem in the District through swift and sure adjudication of criminal cases. While perhaps not subscribed to by all its supporters, the reorganization bill was reported out of committee22 as an "anti-crime" bill.23

III. RULEMAKING AUTHORITY OF THE DISTRICT OF COLUMBIA COURTS

The courts, the Council, and the Mayor of the District of Columbia coexist in a political arrangement unique in the United States. A product of

20. See Federal Role in D.C. Criminal Justice System, supra note 11, at 89.
23. Rep. John McMillen (D-S.C.), as Chairman of the House Committee of the District of Columbia, reported:

Your Committee is not aware of any period in the Capital's history when crime was so rampant as now, when . . . courts because of unrealistic philosophies, and failure to go full speed ahead, have contributed to a major breakdown of law enforcement, and there has been such shocking failure in large part of the machinery of justice to bring to punishment admitted murderers, rapists and others guilty of aggravated assaults and robberies. This is a crime infested city; let there be no ignoring that fact!

Id. at 3.
congressional action, under its constitutional authority\textsuperscript{24} to legislate all matters in the nation's capital, the government of the District of Columbia was designed to relieve Congress of its responsibility to legislate "essentially local matters."\textsuperscript{25} Nonetheless, a substantial question exists as to whether the District of Columbia is legally empowered to effect a substantive change in the court rules of procedure that depart from federal rules without specific congressional action.

Although "self-government" implies more, it is clear that such a rule change cannot be wrought by the District of Columbia Council, the legislative body created by Congress to administer the local affairs of the District and to act as a municipal government. Congressional enabling legislation specifically prohibits the Council from altering the structure or operation of the local courts.\textsuperscript{26} Although initially limited in its power to alter title 23,\textsuperscript{27} the Council is now permitted to legislate criminal procedure changes, albeit subject to a more lengthy review period by Congress.\textsuperscript{28} It may be argued, however, that Congress' specific language allowing variance from the federal

\begin{itemize}
\item \textsuperscript{24} U.S. \textsc{const.} art. I, § 8, cl. 17, provides in pertinent part: "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States."
\item \textsuperscript{25} By virtue of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, tit. I, § 102, 87 Stat. 777 (1973), the D.C. Code provides in pertinent part: "Subject to the retention by Congress of the ultimate legislative authority over the nation's capital . . . the intent of Congress is . . . to the greatest extent possible, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters." D.C. \textsc{code ann.} § 1-201(a) (1981). The self-government legislation must be considered in tandem with Congress' passage three years earlier of the Court Reform and Criminal Procedure Act of 1970. This bill established local courts and their jurisdiction and consolidated local federal jurisdiction in the United States Courts. \textit{See House Court Reform Report, supra note 22.}
\item \textsuperscript{26} D.C. \textsc{code ann.} § 1-233(a) (1981) provides:
\begin{quote}
The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to:
\begin{itemize}
\item (4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia Courts); [or]
\item (8) Enact any act or regulation . . . relating to the duties or powers of the United States Attorney . . . for the District of Columbia . . .
\end{itemize}
\end{quote}
\textit{Id.}
\item \textsuperscript{27} \textit{Id.} § 1-233(a)(9). This section prohibited the Council from enacting any legislation affecting titles 22 (crimes), 23 (criminal procedure), or 24 (treatment of prisoners) during the first 48 months of the life of the elected Council. \textit{Id.}
\item \textsuperscript{28} Because all legislative authority is ultimately vested in the United States Congress, all legislation adopted by the District of Columbia Council must pass a 30-day congressional review period before becoming law. In the case of titles 22, 23, and 24, the review period is 60 days. \textit{Id.} § 1-233(c)(2).\end{itemize}
procedural rules\textsuperscript{29} to accommodate local court procedures enacted in title 23 (criminal procedure) of the D.C. Code, would indeed allow the Council to effect changes legislatively by revising title 23. This argument, however, attracts few adherents. Most observers agree that if local power to change the rules exists, it resides in the local courts.

The clear language of the enabling legislation contemplates that rule changes would occur in both the trial court and the appellate court. Both courts were granted specific statutory authority to adopt new rules, and to modify the federal rules put in place by the reorganization legislation.\textsuperscript{30} Congress provided specifically in the court reorganization bill that the local courts created thereby were constitutional creatures.\textsuperscript{31} Concededly, \textit{any} rule change by the court, while not demanding affirmative congressional approval, or even review (unlike acts of the Council), could be rescinded or modified by Congress.\textsuperscript{32} This reality, however, should have no bearing on whether the court is in fact empowered to promulgate rules that would modify the federal rules. Language in the conference committee report on the reorganization legislation clearly contemplated that the court of appeals, not Congress, would fulfill any such review function: “Section 11-946 requires the Superior Court to conduct its business according to the Federal rules unless the court affirmatively prescribes modifications thereof. All modifications are to be approved before taking effect by the District of Columbia Court of Appeals.”\textsuperscript{33}

Opponents of this interpretation point to House report language on sec-

\textsuperscript{29} D.C. Code Ann. § 11-946 (1981) provides in pertinent part: “The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules.” \textit{Id.}

\textsuperscript{30} See infra notes 33-43 and accompanying text.

\textsuperscript{31} D.C. Code Ann. § 11-101 (1981). The District of Columbia Code makes it clear that the trial court and appellate court are courts established pursuant to Article I of the Constitution (to be distinguished from Article III courts). \textit{Id.} This was the first clear expression, statutory or otherwise, indicating exactly where D.C. courts fit in the overall constitutional scheme. \textit{House Court Reform Report, supra} note 22, at 44.

\textsuperscript{32} D.C. Code Ann. § 1-206 (1981) provides:

Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council. \textit{Id.}

tions 11-743 and 11-946 of the legislation which raises the implication that rule changes could only be adopted if "promulgation of [such rules would] not be derogatory to the intent of the Federal Rules." A strict reading of this language would prohibit any liberalization of discovery contrary to Federal Rule of Criminal Procedure 16. The language in question, however, clearly seems to apply to rule adoptions in "areas where the Federal rules are either silent or not practical for use by the local courts," and not to all rule changes. Even more restrictive language, however, is found in the Senate report:

This section [11-946] states a clear preference for the use of the Federal rules at both the trial and the appellate levels of the local court system. Unless there is a particular need for deviation from the Federal rules because of the peculiar local jurisdiction or because of the particular exigencies of the local situation, it is expected that the Federal rules shall be followed.

The restrictive discovery of Federal Rule of Criminal Procedure 16 is arguably not practical in a local court, and therefore the peculiar local jurisdiction over common law crimes justifies deviation. In any case, the conference report language does not track the Senate language. The conference committee dropped the paragraph quoted above from its report, and what remained should be accepted as the controlling authority.

In fact, at least one District of Columbia decision ignored the conference report language and relied instead on the Senate language to find the Federal Rules of Civil Procedure controlling in the local courts. The District of Columbia Court of Appeals found that court reorganization explicitly applied the Federal Rules and preempted local custom that "conform[ed] as nearly as may be practicable" to practice under the Federal Rules. Reorganization, the court held, repealed the prior local statute which recog-

34. *House Court Reform Report*, supra note 22, at 44.
35. *Id.*
36. See *Senate Comm. on the District of Columbia, District of Columbia Court Reform Report and Criminal Procedure Act*, S. Rep. No. 405, 91st Cong., 1st Sess. 24 (1969) [hereinafter *Senate Court Reform Report.*] This paragraph is followed by the exact language that the Conference Committee report eventually adopted. See *Conference Committee Court Reform Report*, supra note 33; see also supra text accompanying note 33.
37. *Conference Committee Court Reform Report*, supra note 33, at 225.
38. Varela v. Hi-Lo Powered Stirrups, Inc., 424 A.2d 61, 64 (D.C. 1980). Interpreting the application of D.C. Civil Rule 3 and whether the filing of a complaint tolls the statute of limitations in the absence of service of the summons and complaint, the District of Columbia Court of Appeals thought that the Senate report on reorganization reflected a rejection of any local rule or custom in favor of the Federal Rules, finding the Senate intention "explicit." *Id.*
39. *Id.* at 62 (quoting *Taylor v. Yellow Cab Co.*, 53 A.2d 691, 692 (D.C. 1947)).
nized local rule or custom. The decision did, however, recognize that the court rules could be modified.

Federal law prevents the Supreme Court from promulgating any rules which "abridge, enlarge or modify any substantive right."\textsuperscript{42} The District of Columbia Court of Appeals found that law applicable to rulemaking by the District of Columbia courts, reasoning that Congress would not grant rulemaking authority to the local courts that it denied to the Supreme Court.\textsuperscript{43} In that respect, opponents note that enlarging criminal defendants' pre-trial discovery rights contravenes federal law and District case law. This, however, overlooks holdings which declare that criminal defendants enjoy no fundamental constitutional right to discovery.\textsuperscript{44} Especially when obtained as a condition of providing reciprocal discovery to the prosecutor, pre-trial discovery by the defendant is not a substantive right, and federal law does not proscribe its enlargement by the courts.

The arguments that favor local rulemaking authority closely parallel some of those that favor liberalized discovery. District of Columbia courts are local, state-level organs close to their subjects of jurisdiction and best suited to devise rules according to their procedural needs. As pointed out by the House report: "[H]aving all purely local matters—both civil and criminal—before a local court system brings the administration of justice closer to the people who are most personally affected thereby."\textsuperscript{45}

The main impetus behind the court reorganization legislation was the recognition that the United States District Court for the District of Columbia, under modern conditions, was simply unsuited to carry on such "local" functions as adjudicating common-law felons and deciding automobile accident claims in excess of $10,000 but otherwise devoid of any federal interest. By consolidating much of the local jurisdiction of the United States District Court and the United States Court of Appeals into a purely local court, Congress acted "to give Washington both a trial and an appellate court comparable to those in the States, separate and apart" from the United States courts.\textsuperscript{46} Congress explicitly intended to achieve similarity with the states:

\begin{itemize}
  \item \textsuperscript{41} Varela, 424 A.2d at 64 n.3.
  \item \textsuperscript{43} In re C.A.P., 356 A.2d 335, 343 (D.C. 1976). This juvenile neglect matter involved a court-made rule governing procedure for terminating parental rights. Finding the rule operates to abridge substantive parental rights, the court held its promulgation to be beyond the court's power under D.C. Code Ann. § 11-946 (1981).
  \item \textsuperscript{45} House Court Reform Report, supra note 22, at 34.
  \item \textsuperscript{46} Id. at 5.
\end{itemize}
"In constituting the lower trial court as a purely local court, similar to a state court, it follows that appeals from the local court should be treated like those in the state systems, and that the channel of appeals should be directly to the United States Supreme Court." With respect to the administration of criminal justice, Congress made no specific reservations or qualifications to maintain the primacy of the "federal interest." To the contrary, the legislative history repeatedly emphasized that "the Superior Court will deal with all local common law and statutory crimes much the way the States do." To the extent that any local court system enjoys rulemaking and other powers of self-governance, the District of Columbia courts should possess them as well.

At least one local federal court has recognized the analogous situation of state courts and District of Columbia courts. Even if a law passed by the District of Columbia Council is in the final analysis a United States law, the court reasoned that the fact that it is "authoritatively interpreted, at least at the local level, not by United States Courts, but by the District of Columbia Court of Appeals," makes it comparable to a state law for purposes of abstention and comity. Likewise, the local courts are comparable to their state counterparts. If District of Columbia laws are entitled to such respect, it follows that rules promulgated by its courts should be as well.

Congress has followed this analysis recently in granting additional, state-like powers to the District of Columbia Court of Appeals. In 1986, Congress declared that the local appellate court was entitled to answer questions of local law certified to it by other state high courts, federal appeals courts, and the Supreme Court. Shortly thereafter, Congress removed the superior court jury system from the supervision of the United States District Court and empowered the local court to establish its own independent jury selec-

47. Id. at 34-35.
48. Id. at 87.
50. Id. In a challenge to a Superior Court ruling upholding the District's Human Rights Act of 1977, 24 D.C. Reg. 6038 (codified at D.C. CODE ANN. §§ 1-2501 to 2551 (1981 & Supp. 1988)), the Jaycees argued that abstention and comity should not preclude the federal court from enjoining enforcement of the law because District of Columbia courts are not "state" courts, therefore, the demands of federalism were not implicated. In rejecting this line of analysis, the district court relied on legislative history to find itself not in a position to act because it was only "on a par with other United States District Courts, exercising federal jurisdiction only." United States Jaycees, 491 F. Supp. at 582 (citing HOUSE COURT REFORM REPORT, supra note 22, at 34-35).
tion system.\textsuperscript{52}

These measures reinforce the District of Columbia courts' position as self-governing and autonomous despite their unique relationship to the federal government. In opposing the application of federal “speedy trial” legislation to cases in superior court, then-Chief Judge Greene wrote Congress: “Home rule legislation, the local criminal justice act, and court reorganization all recognize that Washington, D.C. has interests and problems apart from its identity as the federal city...”\textsuperscript{53} The “federal interest” is not so paramount that it cannot accommodate powers of self-governance delegated to the government of the District of Columbia. Although the District of Columbia is clearly distinct from the states in a constitutional sense,\textsuperscript{54} Congress' exclusive plenary legislative power over the District’s affairs allows it to delegate judicial powers to the District however it sees fit.\textsuperscript{55} With this background, it is not difficult to find an explicit delegation of rulemaking power in D.C. Code Sections 11-743 and 11-946.

IV. \textsc{Recent History of Federal Rule of Criminal Procedure 16: Restrictions on Discovery of Government Witnesses}

The national debate over a criminal defendant's right to pre-trial discovery has percolated for decades, evidence of the trend toward broadening such rights incrementally. Serious discussion about further fundamental change of federal defendants' discovery rights emerged following significant Supreme Court decisions of the early 1960's which expanded criminal defendants' substantive and procedural rights. A good example is \textit{Brady v. Maryland},\textsuperscript{56} which required prosecutors to reveal exculpatory evidence to the defendant. The actual promulgation of specific proposals seemed to follow the adoption of broad discovery rights in the state court systems of Florida in 1968,\textsuperscript{57} Illinois in 1971,\textsuperscript{58} and New Jersey in 1973.\textsuperscript{59} Those states had

\begin{footnotes}
\item[54] See Hepburn and Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 447 (1805).
\item[56] 373 U.S. 83 (1963).
\item[57] \textit{Fla. R. Crim. P.} 3.220 (enacted by Fla. Supreme Court in 1968).
\end{footnotes}
adopted in large part the proposals for pre-trial procedure the American Bar Association advocated in a tentative draft published in 1968 and formally approved in 1970. These three states had the experience of California to study. California case law had established extensive pre-trial discovery rights for criminal defendants since at least the 1950's, and recognized a defendant's interest in not being confronted with surprise witnesses as early as 1866.

The Supreme Court had already significantly broadened discovery for the federal defendant in 1966. The government's reciprocal right to discover evidence from a defendant who had used the Federal Rules of Criminal Procedure to obtain discovery from the United States was also added to Federal Rule of Criminal Procedure 16 at that time. That expansion was predicated on case law developed by the United States Supreme Court and before that in California, which, in 1966, first recognized reciprocal discovery rights.

In January 1970, the Advisory Committee on Criminal Rules distrib-
uted a first preliminary draft of additional proposed amendments to the rules. The proposal included, for the first time, an amendment to Federal Rule of Criminal Procedure 16 that would have granted defendants the right to discover before trial the names and addresses of any witnesses the United States intended to call at trial during its case-in-chief. This proposal represented perhaps the most significant expansion of federal criminal discovery in a generation. It was a natural step in the evolution of theories of the administration of criminal justice and judicial efficiency. The reciprocal discovery right of the government, already a part of the rule, would have applied to this new provision as well. The Standing Committee, however, did not see fit at that time to formally forward the expanded Rule 16 to the Judicial Conference for consideration.

In 1971, Chief Justice Burger named a new Advisory Committee on Criminal Rules to continue the work of the prior committee. Chaired by United States Court of Appeals for the Second Circuit Judge J. Edward Lumbard, it had such distinguished members as Eighth Circuit Court of Appeals Judge William H. Webster (subsequently Director of the Federal Bureau of Investigation and currently Director of the Central Intelligence Agency), District of Columbia Circuit Court of Appeals Judge Roger Robb, and United States District Court for the District of Columbia Judge Gerhard A. Gesell. In addition, the state court systems of California, New Jersey, and Massachusetts were represented, as was the United States Department of Justice.

Reconstituted, the committee proposed substantially the same rule modifications first circulated in 1970. For the most part, the Judicial Conference adopted these modifications, and forwarded them to the Supreme Court for promulgation, which transmitted them to Congress for approval in April 1974. Congress responded initially by delaying the effective date of the rules for one year to allow more time for study. Hearings were held in days after transmittal to Congress unless delayed or modified by legislative action. See generally 18 U.S.C. §§ 3771, 3772 (1982); 28 U.S.C. §§ 331, 2072 (1982).

68. 48 F.R.D. 547 (1970); see also 52 F.R.D. 409 (1971).
69. 48 F.R.D. at 587 (proposed rule 16(a)(1)(vi)).
70. Id. at 592 (proposed rule 16(b)(1)(iii)).
1974, and in 1975 the House of Representatives approved the rules with
some modifications as reported from the Judiciary Committee. Respond-
ing directly to the concerns voiced by the Department of Justice, the only
witness to speak in opposition to the proposed discovery of witness lists, the
committee modified the proposed witness list provision (proposed Rule 16
(a)(1)(vi) and 16 (b)(1)(iii)) to allow discovery only three days prior to
trial. This change conformed the rule to a long-standing federal statute
that allowed discovery of witness lists only in capital cases three days prior
to trial. The Senate Judiciary Committee reported a version of the rules
which completely eliminated the witness list provision, but kept most other
modifications intact. That action, ratified by the Senate, became the basis
for the version of the rules the conference committee eventually approved.
Despite the witness list proposal's coverage in testimony and broad support
of the legal community, the conference committee summarily dispatched it
in one paragraph:

A majority of the Conferees believe it is not in the interest of the
effective administration of criminal justice to require that the gov-
ernment or the defendant be forced to reveal the names and ad-
dresses of its witnesses before trial. Discouragement of witnesses
and improper contacts directed at influencing their testimony, were
deemed paramount concerns in the formulation of this policy.

Interestingly, despite the bipartisan nature of the House Judiciary Com-
mittee action, four of the five House committee members subsequently ap-
pointed to the ten-member conference committee (Wiggins, Russo, Hyde
and Mann) had signed a minority report denouncing discovery of govern-
ment witness lists. When joined in conference by Senator McClellan and
Senator Hruska, their endorsement of the House minority report pre-
ordained the fate of the witness list provision.

The debate in Congress over discovery of witness lists pertains to criminal
practice in the District of Columbia courts because the Federal Rules of
Criminal Procedure (as well as the Federal Rules of Civil Procedure) apply
in those courts under D.C. Code section 11-946. Likewise, the Federal

75. Id. at 13, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS at 685.
79. Id. at 716.
81. Section 11-946 of the District of Columbia Code provides:
Rules of Appellate Procedure govern the appellate court. The District of Columbia Court of Appeals has ruled that a superior court rule must be construed in light of the meaning of a corresponding federal rule when they are substantially identical. As such, the legislative history of Federal Rule of Criminal Procedure 16 directly relates to any discussion of modifying Superior Court Rule 16.

V. Expansion of Criminal Discovery at the State Level: The Trend Toward Disclosure of Witness Lists

Although this Article focuses on the desirability of amending local court rules to allow pre-trial discovery of witness lists, arguments in favor of and in opposition to broader discovery in general are relevant. Supporters and detractors have advanced few, if any, new arguments. Basically, supporters urge that "the ascertainment of truth—the primary purpose of criminal trials—is best achieved by well-informed counsel, not by the surprise tactics of the sporting theory of justice." Although opponents frequently cite practical problems of perjury and intimidation of witnesses, they often share a philosophical grounding penned decades ago by the venerable Judge Learned Hand:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. . . . Why in addition [the defendant] should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

D.C. CODE ANN. § 11-946 (1981); see also supra notes 26-29 and accompanying text.

82. See D.C. CODE ANN. § 11-743 (1981). "The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." Id.


84. The "General Note to the Superior Court Rules of Criminal Procedure," issued by the Board of Judges of the Superior Court, notes that Rule 16 is substantially identical to its federal counterpart except for "minor conforming amendments" not pertinent here (deletion of references to witness lists that were removed from the federal rule in technical amendments adopted in 1976). See preface to D.C. SUP. CT. R. CRIM. P.

Our dangers do not lie in too little tenderness to the accused. . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.  

Accordingly, the Supreme Court has never found a fundamental constitutional right to pre-trial discovery in criminal cases. The Court mandates disclosure by the prosecutor to the defendant of information about the government's case only when that information is exculpatory, or material to establishing the defendant's innocence. Even so, the Court deems a failure by the government to disclose material exculpatory information in its possession a constitutional violation only when a reasonable probability exists that, absent the failure to disclose, the result of the trial (conviction) would have been different.  

However, despite the Supreme Court's recently affirmed reluctance to expand the contours of constitutionally mandated discovery, state courts and legislatures have not so hesitated. The history of discovery in American criminal jurisprudence reveals a steadily expanding trend from a policy of no discovery to, in many states today, what is essentially an "open-file" policy. Various needs have been addressed by broad criminal discovery practices, not the least of which has been court congestion and effective trial management. The Attorney General of Pennsylvania wrote in 1958, in support of a criminal defendant's motion for discovery:

> It is submitted that more liberal use of discovery in criminal cases . . . greatly aids in the administration of justice. . . . Under the present system in civilized communities where counsel is informed of the real strength of the Commonwealth's case, he is better enabled to give the proper advice to his client and trials are shortened, issues are met more fairly, guilty pleas are very often made, particularly in homicide cases, and the administration of justice is not only speeded up but made more fair and exact.  

An uncharacteristically frank rendition from a high-level prosecutor, this
submission was not written in the days of widespread open discovery, and it pre-dated Brady by five years. Pennsylvania, however, then and now, remains generally unreceptive to broader pre-trial discovery rights for defendants.\textsuperscript{92}

One may question whether broader discovery improves the administration of criminal justice, assuming that such an amorphous concept is capable of quantification. While increased conviction and lower appeal rates offer some objective measure of success, there is more to attaining justice than counting trial days and conviction and appeal rates, and many components are simply immeasurable. Especially when engaging in comparative analysis, "[g]aps in the availability of national data"\textsuperscript{93} are often limiting. The numbers seem to indicate, however, that more pleas are entered and fewer, shorter trials are conducted when a jurisdiction utilizes broad discovery in criminal cases,\textsuperscript{94} a conclusion corroborated by the claims of criminal justice professionals themselves.

Initially, as more states have moved toward the expansive discovery posture advocated by the ABA,\textsuperscript{95} no jurisdiction has turned back. No state has repealed a broadened discovery scheme or rescinded court rules establishing it. While the movement toward "open file" discovery has gained much momentum in the last twenty years, the trend favoring disclosure of witness lists may appear more dramatic than it actually has been. Many states have always had statutes requiring the endorsement of witnesses appearing before an indicting grand jury. In that respect discovery of at least some witnesses in felony prosecutions has always been possible in many states. What distinguishes these states is the extent to which their high courts have seen fit to enforce the endorsement statutes as a substantive "discovery" right. Allowing a non-endorsed, "surprise" witness to testify at trial would defeat the statutes' aim unless the defense has had an opportunity to anticipate and prepare to meet the testimony (by means of a continuance or otherwise). The majority (nineteen) of states with such statutes have enforced them as a discovery tool since before the turn of the century.\textsuperscript{96} The reason is simply

\textsuperscript{92} Commonwealth v. Woodell, 344 Pa. Super. 487, 490, 496 A.2d 1210, 1212 (1985) (defendant must demonstrate exceptional circumstances and compelling reasons to discover prosecutor's list of witnesses not subject to mandatory discovery under Pennsylvania law).

\textsuperscript{93} Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics at iii (1986).

\textsuperscript{94} See infra notes 145-53 and accompanying text.

\textsuperscript{95} See ABA Project, supra note 60.

\textsuperscript{96} Arkansas: State v. Johnson, 33 Ark. 174, 175-76 (1878); California: People v. Jocelyn, 29 Cal. 562, 564 (1866); Colorado: Minich v. People, 8 Colo. 440, 445-46, 9 P. 4, 7-8 (1885); Florida: Murray v. State, 25 Fla. 528, 534-35, 6 So. 498, 500 (1889); Georgia: Inman v. State, 72 Ga. 269, 275-76 (1884); Idaho: State v. Barber, 13 Idaho 65, 86-87, 88 P. 418, 424-
stated by the Supreme Court of North Dakota:

The practice of indorsing the names of witnesses for the prosecution upon the indictment or information has long prevailed in this country and England. The object is to apprise the accused beforehand of the names of the witnesses against him, to the end that he may investigate their characters and antecedents and be the better prepared to meet and overcome or weaken their testimony by counter testimony gathered in advance of the trial. It is repugnant to the instincts of justice that an accused should be required to battle, it may be for his life, in total ignorance of the witnesses by whose words the state expects to condemn him, and thus necessarily, wholly unprepared to subject them to those tests of accuracy and credibility so potent in the investigation of truth.97

Four more states, for a total of twenty-three, were enforcing endorsement statutes by 1939.98 These protections generally require a demand by the defendant, and where surprise and prejudice can be demonstrated, the defense is usually granted some form of relief which is the functional equivalent of discovery. Twelve states had endorsement statutes prior to 1900 but chose not to enforce them in favor of the criminal defendant.99
Five of those states have subsequently adopted full pre-trial disclosure.100

Today, twenty-eight states grant the defendant as a matter of right pre-trial disclosure of the trial witnesses the prosecutor expects to call.101 Eight more states require the endorsement of grand jury witnesses and enforce the requirement as a discovery tool.102 Seven of these thirty-six states require the listing or endorsement of all witnesses known to the government to have knowledge of the events in question.103 Sixteen states have adopted some version of the pre-trial discovery standards, including for-trial witnesses, as recommended by the ABA.104

Pre-trial disclosure of witness lists is an incremental, but significant step that should be implemented in the District of Columbia Superior Court. Broadening discovery in this way would not eliminate defense counsel’s traditional adversarial duty to investigate, but would merely move it out of cross-examination and closer to the post-incident stage, the time when the state usually performs its duty to investigate. Disclosure of witness lists is a discovery device particularly well-suited to the District of Columbia, where unique jurisdiction prevents other disclosure routinely granted as a matter of right in many states, including discovery of witness statements, grand jury testimony, and statements of the defendant to non-agents.


100. Alaska, Indiana, Minnesota, Vermont, and West Virginia. See infra note 101.

101. ALASKA R. CRIM. P. 16(b)(1)(i); ARIZ. R. CRIM. P. 15.1(a)(1); ARK. R. CRIM. P. 17.1(a)(i); CAL. PENAL CODE § 995a (West 1981) (endorsement); COLO. R. CRIM. P. 16(f)(a)(1)(i); FLA. R. CRIM. P. 3.220(a)(1)(i); GA. SUPER. CT. R. 30.3 (1985); IDAHO R. CRIM. P. 16(b)(6); ILL. ANN. STAT. chap. 38, para. 114-9(a) (Smith-Hurd 1971), ILL. S. CT. R. 412(a)(i); IND. CODE ANN. § 35-3.1-1-2(c) (Burns 1973); IOWA CODE ANN. § 36-813.2-5(3) (West 1978), IOWA R. CRIM. P. 5(3); MD. R. CRIM. P. 4-263(b)(1); MICH. STAT. ANN. § 28.980 (Callaghan Supp. 1988); MINN. R. CRIM. P. 9.01.1(1)(a-c); MISS. R. CRIM. P. 4.06(a)(1); MO. R. CRIM. P. 25.03(A)(1); MONT. CODE ANN. § 46-15-322(1)(a) (1985); N.J. R. CRIM. PRAC. 3:13-3(a)(7); N.M. R. CRIM. P. 5-501(A)(5); N.D. R. CRIM. P. 16(f)(1); OHIO R. CRIM. P. 16(B)(1)(e); OR. REV. STAT. § 135.815(1) (1973); R.I. R. CRIM. P. 16(a)(6); UTAH R. CRIM. P. 4(j); VT. R. CRIM. P. 16(a)(1); WASH. R. CRIM. P. 4.7(a)(1)(i); W. VA. R. CRIM. P. 16(a)(1)(E); WIS. STAT. ANN. § 971.23(3)(a) (West 1976).


103. FLA. R. CRIM. P. 3.220(a)(1)(i); IDAHO R. CRIM. P. 16(b)(6); KAN. CRIM. PROC. CODE § 22-3201(b); NEB. REV. STAT. § 29-1602 (1985); NEV. REV. STAT. § 173-045(2) (1967); N.J. R. CRIM. P. 3:13-3(a)(7); VT. R. CRIM. P. 16(a)(1).

For example, the Jencks Act,\textsuperscript{105} applicable to most prosecutions in superior court,\textsuperscript{106} prevents the pre-trial discovery of recorded witness statements. No amount of judicial discretion can obviate the burden of this federal enactment. Any discovery proposal must recognize this essential limitation. Short of convincing Congress to repeal the Jencks Act,\textsuperscript{107} or to bar its use in local District of Columbia criminal prosecutions,\textsuperscript{108} broader discovery that enhances investigative possibilities is one way to relieve the Jencks Act's unique burden on the District of Columbia.

Disclosure of witness lists has never been favored in superior court. Only one appellate case since court reorganization has addressed the issue, and that was 13 years ago, in United States v. Holmes.\textsuperscript{109} Relying on United

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\textsuperscript{105} Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (1982)), was enacted in 1957 in response to the United States Supreme Court case, Jencks v. United States, 353 U.S. 657 (1957). Jencks involved the federal prosecution of an alleged Communist for filing a declaration of non-membership in the party pursuant to U.S. labor laws. The defense requested to see an F.B.I. agent's notes of some investigative activities he couldn't recall as a witness for the government. The defendant won a reversal of his conviction from the Supreme Court for being denied access to the potentially impeaching notes. Congress reacted to fears (magnified in the then-current political climate) of espionage defendants rifling government intelligence files as a defense tactic. By passing legislation to protect government witness' notes and statements until trial, Congress effectively made pre-trial investigation of witnesses themselves even more important.

\textsuperscript{106} D.C. CODE ANN. § 23-101(c) (1981) provides that most adult criminal prosecutions (except those for violation of police and municipal ordinances or regulations, disorderly conduct, serious traffic and minor penal statutes) will be prosecuted in Superior Court "in the name of the United States by the United States Attorney for the District of Columbia or his assistants." The first line of the Jencks Act reads: "[i]n any criminal prosecution brought by the United States . . . ." 18 U.S.C. § 3500(a) (1982).

\textsuperscript{107} For a convincing argument in favor of just such a proposal, see Rooney & Evans, Let's Rethink the Jencks Act and Federal Criminal Discovery, 62 A.B.A. J. 1313 (1976).

\textsuperscript{108} In opposing the operation of the Jencks Act, the California State Bar Committee on Criminal Law & Procedure said: "Such a restrictive rule places a premium upon the ingenuity, energy, and agility of defense counsel to formulate a defense strategy in the midst of a jury trial. Curiously, we deplore that sporting philosophy in the civil litigation practice, when money and property, not liberty, is at stake." Federal Rules of Criminal Procedure: Hearings Before the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 110 (1975) [hereinafter Senate Criminal Procedure Hearings] (statement of Cal. State Bar Comm. on Criminal Law and Procedure).

\textsuperscript{109} 343 A.2d 272 (D.C. 1975). Holmes involved a murder prosecution where the defense claimed no investigation had been performed in the initial 10 months by previous counsel, and that three sidewalk eyewitnesses could not be located with the most meticulous investigation. The defendant was allegedly so intoxicated at the time that he could contribute nothing to the investigative process. The court found the witnesses' knowledge material to the preparation of the defense because the witnesses' information was crucial to the State's contention that the defendant's observed behavior constituted premeditation, an element of the crime charged. \textit{Id.} at 278. Because the court perceived no danger of reprisal, it ordered discovery of the government's witnesses with protective conditions. \textit{Id.} at 277.
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States v. Richter,\textsuperscript{110} the court found it beyond doubt that trial courts have the inherent power, within their discretion, to order the government to reveal its witnesses to the defense.\textsuperscript{111} The District of Columbia Court of Appeals based its holding on "grounds of fundamental fairness and of administrative efficiency and order, with the latter helping to effectuate the former."\textsuperscript{112} Adopting the balancing test the Supreme Court enunciated in Roviaro v. United States,\textsuperscript{113} the court weighed "the public interest in protecting and encouraging witnesses for the government against the individual's need of the witness or witnesses for the preparation of his defense."\textsuperscript{114} After balancing these interests on a case-by-case basis, however, the bottom line remains "where the defendant in a criminal case requests the production of the government's witness list he must make a clear showing of materiality and reasonableness, as he is required to do under Fed. R. Crim. P. 16(b)."\textsuperscript{115} The court of appeals apparently ratified the trial court's formulation that disclosure should be used only sparingly, and compelled only in "serious criminal cases on a strong showing of particularized need which substantially outweighs the government's interest."\textsuperscript{116}

By adhering strictly to the discretionary provisions of the federal rule and supporting case law, the District of Columbia Superior Court treats local criminal discovery procedure exactly like its federal counterpart. But broader discovery recognizes that the bulk of criminal practice is not analogous to federal practice. The District of Columbia, by embracing the federal model, misses an opportunity to conduct local, common-law criminal litigation in a manner more consistent with the mainstream of American practice. The same arguments that apply to federal criminal procedure do not apply in the District of Columbia. As one District of Columbia Superior Court chief judge, now a federal district judge, told Congress:

[The Speedy Trial Act should not include our] court system which is wholly different from the other courts to which this legislation would apply. Trials for violations of purely federal laws, and the defendants tried in the federal court system for such violations, as a rule differ markedly from the trials and the defendants involved

\textsuperscript{110} 488 F.2d 170, 173 (9th Cir. 1973).
\textsuperscript{111} Holmes, 343 A.2d at 278.
\textsuperscript{112} Id.
\textsuperscript{113} 353 U.S. 53, 62 (1957) (balancing competing interests before allowing disclosure of undercover informant's identity).
\textsuperscript{114} Holmes, 343 A.2d at 277.
\textsuperscript{115} Id. at 278.
\textsuperscript{116} Id. at 274 n.5 (emphasis added).
in the Superior Court process on the basis of charges of common law crimes.\textsuperscript{117}

VI. THE INSUBSTANTIALITY OF WITNESS TAMPERING AND PROMOTION OF PERJURY AS REASONS FOR NONDISCLOSURE OF WITNESSES

The balancing test used by the federal courts when considering requests for disclosure of government witnesses is weighted at the outset against the defense, assuming that most, if not all, defendants will attempt to tamper with named witnesses and that prosecution witnesses are seldom material to the preparation of the defense.

The most serious objection to disclosure of witness lists is the prospect of widespread witness tampering. Curiously, only prosecutors seem to raise this suspicion. Practitioners from jurisdictions with broad discovery, both local and federal, have downplayed its occurrence.\textsuperscript{118} When Congress considered the proposed federal rule amendments, only one federal judge (District Judge Blair of Maryland) raised witness lists as a concern in response to a solicitation of comments from House Judiciary Subcommittee Chairman William Hungate\textsuperscript{119} (now a federal judge himself). The other seventeen responding judges were more concerned with proposals for changing Rule 11 (pleas) and other controversial ideas ultimately adopted. At least four federal judges and each of their colleagues in three federal districts explicitly supported disclosure of witness lists,\textsuperscript{120} as did the bar associations in two states with limited discovery (Connecticut and Delaware).\textsuperscript{121}

Before the House and Senate Judiciary Committees, the Department of Justice presented statements from numerous United States Attorneys attesting to the grave threat of witness intimidation and the potential subornation of perjury.\textsuperscript{122} Their 700 collected examples (often several from one case) represented the scope of the problem over five years, representing a fraction of 1% of all criminal filings in that period.\textsuperscript{123} Several prosecutors emphasized that the bulk of the problem was confined to civil rights, public corrup-

\textsuperscript{117} See Speedy Trial Act Hearings, supra note 53, at 761.
\textsuperscript{118} See infra notes 129-31, 134 and accompanying text.
\textsuperscript{119} HOUSE SUBCOMM. ON CRIMINAL JUSTICE OF THE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., COMMENTARY: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 27-28 (Comm. Print 1974).
\textsuperscript{120} Senate Criminal Procedure Hearings, supra note 108, at 138.
\textsuperscript{121} Id. (statement of Richard Thornburgh, U.S. Att'y for W.D. of Pa. and H.M. Ray, U.S. Att'y for the N.D. of Miss.)
\textsuperscript{122} See House Criminal Procedure Hearings, supra note 71, at 87; Senate Criminal Procedure Hearings, supra note 108, at 176 (statement of W. Vincent Rakestraw, Assistant Att'y Gen. for Legislative Affairs, U.S. Dep't of Justice).
\textsuperscript{123} Rooney & Evans, supra note 107, at 1315.
tion,124 white-collar, and organized crime cases.125 More often than not these incidents involved co-defendants or "confidential" informants.126 Because many informants are either co-defendants, co-conspirators, or at least confederates, witness secrecy rarely protects informant identities from defendants with whom they have worked. The same can be said of co-defendants. Truly confidential informants are used repeatedly, and moved around by police if fear of discovery mounts. They rarely appear as actual trial witnesses and need not be disclosed. In any event, witness tampering would rarely occur in the vast majority of cases disposed of by plea.127

Several federal prosecutors, not represented at the hearings, already had adopted so-called "open-file" discovery policies.128 The United States Attorney for the Southern District of California, one of the busiest districts in the country, reported having disclosed witness lists for years with no untoward results.129 An experienced federal defender in San Diego,130 as well as the California State Bar, corroborated this experience.131 Sifting through the

125. House Criminal Procedure Hearings, supra note 71, at 105 (statement of Richard Thornburgh, U.S. Att'y for the W.D. of Pa.).
126. See Senate Criminal Procedure Hearings, supra note 108, at 188 (statement of U.S. Att'y for the N.D. of Iowa). The submission of the United States Attorney for the District of Kansas, typical for its equivocation and lack of evidence, described how one key witness was the suspected target of a contract killing: "We did not learn of contract until after name was disclosed but believe our witness was suspected of being a snitch and contract may have been previously let." Id. He added, "During past five years there has been only one conviction for intimidating a witness in this District." Id. The United States Attorney for the District of Connecticut said that numerous witnesses reported "feeling" intimidated without providing corroboration. Id. at 179. Even the United States Attorney for the District of Columbia reported only 10 incidents in 13 years. Id.
129. House Criminal Procedure Hearings, supra note 71, at 109. "[W]e routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untowards [sic] results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant." Id. (statement of Harry D. Steward, U.S. Att'y).
130. H.R. REP. No. 247, supra note 74, at 14, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS at 686. Charles Sevilla, chief trial attorney for Federal Defenders of San Diego, Inc., reported: "[Suborned perjury] simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order." Id.
131. Senate Criminal Procedure Hearings, supra note 108, at 110. The California State Bar's Committee on Criminal Practice and Procedure testified before the Senate: Liberal criminal discovery in the State Courts of California has worked well and without a break-down in the search for truth in the criminal justice system for nearly
voluminous and contradictory testimony, the House Judiciary report concluded:

The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation.

... Prosecutors are willing to determine on their own when they can [open their files] without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest. 132

Permitting discovery of witness lists in the District of Columbia Superior Court would simply shift the presumption to favor disclosure. It would not prevent the court from protecting witness identity in appropriate cases. Experience of several decades has demonstrated that witness tampering associated with organized crime, labor, and public corruption simply is not the norm in common law criminal prosecutions of the type conducted in superior court. 133 Thirty-six state court systems now reveal witness identity in some fashion. None has repealed its laws in the face of insurmountable problems. Subcommittee Chairman William Hungate, testifying on behalf of the amendments before the Senate, concluded that:

Intimidation of witnesses ... does not arise in every Federal criminal case or even in a majority of them. Rather, it occurs in a small percentage of cases ....

... Exceptional situations, if they are significant enough, should be provided for, but they should not be a basis for doing away with the general rule. Just because it rains 10% of the time doesn't mean I should always wear a raincoat. 134

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133. See supra text accompanying note 117.
134. Senate Criminal Procedure Hearings, supra note 108, at 137. In the same vein, Supreme Court Justice William Brennan wrote:

[N]o one suggests that discovery in criminal cases should be at large and without the intervention of judicial discretion .... Dangers and other abuses ... 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.

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a generation. In view of California's polyglot population and its diversity of urban and rural settings ... California's experience with liberal criminal discovery would seem to have provided the Congress with a valid laboratory test of full-blown criminal discovery.

Id.
The second main argument against broadening defense discovery is the fear that defendants will "tailor" their defense to meet the prosecutor's case, committing perjury or worse. No commentator, however, has convincingly supported any distinction between civil and criminal defendants that supposedly makes this a problem unique to criminal cases. On the contrary, many prosecutors, including those in the Tax Division of the Department of Justice, concede that they have experienced problems in white-collar criminal cases. Civil litigants, with huge sums of money and reputations at stake, are hardly less prone to deception. Fraud, deception, unfulfilled promises and the like often form the basis for civil claims, but practitioners are inclined to believe that the broad, open discovery used in civil practice forestalls perjury. Like claims of witness intimidation, the perjury argument assumes the worst about a majority of defendants and punishes all, when in truth, few present a problem. As Dean Wigmore remarked:

The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law to allow the accused to produce any witnesses at all.

Both objections, fear of intimidation and perjury, seriously undermine the presumption of innocence and roundly defame the entire defense bar by assuming their cooperation in such schemes. The objections disregard equally the effectiveness of bar disciplinary structures and the courts in dealing with these problems if they arise.

Former United States Attorney James R. Thompson (now Governor of Illinois) rejected this perceived attack on the presumption of innocence and defended traditional discovery. Declaring that the defendant enjoys the ad-

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Facilitation of perjury has been a bogey man of discovery for over a hundred years. No evidence can be produced conclusively to prove or disprove it, and the consensus among lawyers is to reject it. This investigation disclosed the variety of ways in which lawyers use discovery to thwart perjury.

Id. at 1154 (footnotes omitted).

137. 6 WIGMORE, EVIDENCE 488 (3d ed. 1940).

138. Justice Brennan remarked: "To shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seems seriously to imperil the bedrock presumption of innocence." Brennan, supra note 134, at 287.
vantage at every stage of the criminal case except perhaps at time of indictment, Thompson defended the trial's protection of a defendant's presumed innocence: "[I]f the new rules are destined to try to change a balance which may be envisioned to be to the advantage of the prosecutor, that supposed balance is only a vision."\textsuperscript{139} Thompson's analysis glosses over the pre-trial stage and fails to admit the overwhelming investigatory advantage enjoyed by the State. The prosecutor obtains significant pre-trial discovery through ex parte use of the grand jury and its compulsory process, use immunity statutes to compel testimony, and also enjoys a monopoly on sophisticated and comprehensive investigative agencies.\textsuperscript{140} Government investigators usually have access to the scene and physical evidence before anything changes, and to witnesses before memories lapse or they leave the area.\textsuperscript{141} Often the defendant himself reveals much during custodial interrogation.\textsuperscript{142} Revealing witness lists would merely broaden investigatory avenues open to enterprising counsel and afford the defense some minimal measure of parity in the pre-trial stage.

The arguments in favor of broader pre-trial discovery are no fresher today but are corroborated by several decades of experience in the states. While declining to mandate broad disclosure as a constitutional right, the United States Supreme Court has certainly encouraged its use.\textsuperscript{143} According to supporters, broad discovery allows for adequate pre-plea investigation and pre-trial cross-examination preparation and the development of impeachment evidence, it reduces or eliminates mid-trial delay, and it facilitates the plea

\textsuperscript{139} House Criminal Procedure Hearings, supra note 71, at 144-45.

\textsuperscript{140} Katz, Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform, 5 CRIM. L. BULL. 441, 450-51 (1969).


\textsuperscript{142} Katz, supra note 140, at 451; see also Brennan, supra note 134, at 292 (arguing that the "innumerable" cases that come before the Supreme Court alleging police violations of the interrogation process suggest that the fifth amendment is not the barrier to reciprocal discovery that many prosecutors claim. "Success very frequently crowns the [interrogation] effort, if the proportion of guilty pleas and convictions resting upon confessions affords a reliable guide.").

\textsuperscript{143} United States v. Nixon, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." The court that issued the Nixon decision is, incidentally, the same court that proposed the rule change under discussion.); Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973) ("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."); Williams v. Florida, 399 U.S. 78, 82 (1970) ("The adversary system of trial is hardly an end in itself; it is not yet a poker game . . . ."); Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring) ("A criminal trial is not a game in which the State's function is to outwit and entrap its quarry."); see, e.g., Cicenia v. Lagay, 357 U.S. 504 (1958) (prosecutor's disclosure of defendant's statement the better practice).
In short, disclosure of witness lists enhances fairness and the search for truth.

VII. MEASURING IMPROVED ADMINISTRATION OF JUSTICE: A COMPARISON BETWEEN THE DISTRICT OF COLUMBIA AND SAN DIEGO, CALIFORNIA

Generally, claims of improved administration of justice resulting from broader discovery are not susceptible to ready quantification. Comparative statistics are not readily available, and those that exist are inconsistent. Different court systems compile their data bases at different criminal case processing points, and not all jurisdictions use equivalent definitions in the criminal process. What may be indicted as a felony in one jurisdiction may be prosecuted as a misdemeanor in Washington, D.C., and vice versa. Available statistics do not account for personnel constraints, such as the number of courts and prosecutors available. With these limitations in mind, this section will attempt to make a brief statistical comparison between the city of San Diego, California, which uses broad discovery, and the city of Washington, D.C., which uses limited discovery.

These two cities were selected because, among other things, the source statistics include these two urban jurisdictions together in more comparative tables than most other pairs of cities. More importantly, both jurisdictions have similar arrest screening rates, San Diego eventually indicting 29% of all felony arrestees and Washington eventually indicting 32% of all felony arrestees (out of thirteen cities, only Lansing, Michigan, at 30%, was closer to Washington in this respect). Similar prosecution ratios allow a better comparison of actual disposition rates of indicted cases without being skewed by judicial dismissals. The closeness of these statistics may also demonstrate the relatively similar prosecutive priorities of the two cities.

With the inherent limitations of these comparisons in mind, it appears that broader discovery practices contribute to more effective and efficient adjudications. In San Diego, 86% of indicted felonies result in guilty pleas, compared to only 66% in Washington. In Washington, only 57% of the felony pleas are to the top charge (most serious) in the indictment.

146. STATISTICS II, supra note 127, at 7 (Table 5).
147. Id. at 7 (Table 4).
148. STATISTICS I, supra note 145, at 21 (Exhibit 21).
Diego defendants plead to the top charge 75% of the time.\textsuperscript{149}

While 19\% of indicted felonies go to trial in Washington, nearly three times the San Diego rate (7\%), Washington prosecutors win convictions in only 72\% of their trials.\textsuperscript{150} San Diego prosecutors win 84\% of their trials (perhaps as a result of trying significantly fewer cases than their District of Columbia counterparts).\textsuperscript{151} Finally, the median felony trial disposition time in San Diego is 204 days.\textsuperscript{152} In Washington, the median felony trial disposition time is 303 days, 50\% higher than San Diego.\textsuperscript{153}

While the results may not be solely attributable to broad criminal discovery, these statistics suggest that, when measured by objective criteria such as trial time, successful prosecutions, and number of guilty pleas, criminal justice is more efficiently dispensed under San Diego's broad discovery scheme than under the federal model applied by District of Columbia courts. At a minimum, this also suggests that any fear that broad criminal discovery will unfairly tilt the playing field in favor of the criminal defendant is unfounded. In addition, broad discovery contributes to attainment of other objectives of the criminal justice system. In particular, broad discovery ensures that criminal defendants can receive zealous and competent representation of counsel, especially at the pre-plea stage where the need for effective assistance is too often ignored.

\textbf{VIII. THE RELATIONSHIP BETWEEN PRE-PLEA DISCOVERY AND EFFECTIVE ASSISTANCE OF COUNSEL}

Viewing discovery practices solely in the context of the trial proceedings does not account for the vast majority of criminal cases, which are disposed of by guilty pleas.\textsuperscript{154} Many of a defendant's constitutional rights that a trial is designed to vindicate are surrendered in the guilty plea process. But should that include the surrender of aggressive fact investigation by competent counsel? Commentators who do not oppose some form of pretrial discovery nevertheless opine that pre-plea discovery would jeopardize the

\begin{itemize}
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Statistics II, supra} note 127, at 7 (Table 4).
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.} at 33 (Table 28).
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} As with all statistical analyses of American criminal justice, reliable raw numbers are difficult to compile and/or analyze except in the unified federal system. Otherwise, data is collected and presented nearly 50 different ways among the states. Despite this inherent limitation, the American Bar Association estimated that as many as 90-95\% of all criminal cases are disposed of by guilty pleas in some jurisdictions. \textit{Standards Relating to Pleas of Guilty} 1, 2 (Approved Draft 1968). The number of felony prosecutions ended by plea in Washington, D.C. is much lower; about 66\%. See \textit{supra} note 147 and accompanying text.
\end{itemize}
state's ability to secure pleas. Flannery suggests that "guilty defendants" would use pre-plea discovery to "turn up something which would enable them to win an acquittal . . . ." Others have questioned the "necessity" of discovery in the pre-plea stage. The Supreme Court has acknowledged the defendant's dilemma, but has failed to cure it.

The Supreme Court has repeatedly emphasized the tradeoff nature of plea bargaining. Defendants who plead guilty simply have no right to confront the witnesses, demand proof beyond a reasonable doubt, invoke compulsory process on their behalf, or, perhaps most important, remain silent to protect themselves against self-incrimination. As long as a court obtains an "intelligent and competent waiver" of these constitutional rights in accepting a guilty plea, the prosecution will be relieved of its responsibilities concerning the defendant's rights that arise in the trial context, including discovery. Defendants pleading guilty surrender any adversarial posture—the very foundation of criminal trials in the United States—when they fail to put the prosecution to its proof.

Denying pre-plea discovery ignores the reality that many, if not most, guilty pleas are entered at the conclusion of the pre-trial stage, that is, on the verge of trial. The adversary process should not begin only when jury empanelment commences. Throughout this pre-trial stage a defendant retains the fifth amendment guarantee of due process and the sixth amendment right to the effective assistance of counsel. Similarly, throughout this stage there exists a heavy professional responsibility on defense counsel to investigate the case and evaluate a defendant's options. Indeed, the

161. STATISTICS II, supra note 127, at 33 (Table 28).
163. AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE § 4-4.1 (Approved Draft
United States Supreme Court has explicitly relied on the effectiveness (or presumed effectiveness) of defense counsel in validating the practice of defendants’ weighing their options and voluntarily entering guilty pleas.\textsuperscript{164}

The standard for effectiveness, however, is not modeled on the idealistic ABA standards, but is defined by the low end of an average common denominator: what can be expected from counsel within the range of reasonable levels of competence.\textsuperscript{165} The analysis of a lawyer’s competence is not performance geared, but rather is result oriented. The prevailing inquiry is whether the result of the proceeding (conviction) would have been different, absent counsel’s less-than-average performance.\textsuperscript{166} Because courts require a defendant pleading guilty to admit to the existence of a factual basis for the plea\textsuperscript{167} and to forego proof beyond a reasonable doubt, counsel’s fact investigation rarely, if ever, comes under scrutiny. Retrospective review of the effectiveness of counsel prior to plea proceedings is nearly impossible\textsuperscript{168} and

\begin{itemize}
  \item Facts form the basis of effective representation.
  \item ... Apart from any formal processes of discovery that are available, prosecutors and law enforcement officers have in their possession facts that defense counsel must know.
  \item ... The basis for evaluation of these possibilities will be determined by the lawyer’s factual investigation, for which the accused’s own conclusions are not a substitute.
  \item The lawyer’s duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense.
\end{itemize}

\textit{Id.} \textsection 4.54-.55.

\textsuperscript{164} \textit{See, e.g., Brady}, 397 U.S. at 750 (“[N]or is there evidence that Brady . . . could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.”); \textit{McMann v. Richardson}, 397 U.S. 759, 771 (1970) (“[D]efendants facing felony charges are entitled to the effective assistance of competent counsel.”); \textit{Van Moltke v. Gilles}, 332 U.S. 708, 721 (1948) (“[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.”). The right to effective assistance of counsel is one of the few constitutional rights not surrendered by the guilty pleading defendant. \textit{See also Comment, Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy, 72 J. CRIM. L. \& CRIMINOLOGY 165 (1981).}

\textsuperscript{165} The quality of legal advice to a defendant pleading guilty is not judged “on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” \textit{McMann}, 397 U.S. at 771.


\textsuperscript{168} \textit{See Tollett v. Henderson}, 411 U.S. 258, 267 (1973) (upholding counseled plea to murder, stating: “[I]t is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.”); \textit{see also McMann}, 397 U.S. at 769-70 (The court found that in a plea situation “[a]ll the pertinent facts normally cannot be known unless witnesses are examined.” The defendant must rely on advice, “uncertain as [it] may be.”).
rarely effective.

The notion that defendants and the State derive mutual benefits persists in cases upholding plea bargaining and its attendant practices. Under this idealized view, an obviously (or not) guilty defendant admits guilt and surrenders trial rights in exchange (implicit or not) for charging concessions and/or sentencing recommendations. The court saves the time and expense of a trial, and the prosecutor quietly steps back, having again avoided, often at his instigation, being put to the proof. The parties “come to the table” and mutually bargain for a just or achievable resolution between adversaries. In jurisdictions with limited discovery, information critical to an accurate assessment of the strength of the government’s case, which must inform any decision by defendant’s counsel on whether to accept a plea bargain offer, lies solely in the possession of the government. This calculated use of superior bargaining information increases the risk that “a defendant would plead guilty because he was erroneously convinced that the prosecution had a strong case against him.” Conversely, a defendant, ignorant of the state’s case and thereby erroneously convinced of the strength of his own case, is less likely to plead guilty when, in fact, he should. After receiving necessarily uncertain advice from counsel, who is perhaps familiar with only some of the pertinent facts, an under-informed defendant may demand an unnecessary trial. Either result subverts the adversarial character of government/defendant encounters contemplated by our system of criminal justice.

Many citizens are unsympathetic to defendants who plead guilty, and are often opposed to plea bargaining altogether. Perceiving beleaguered prosecutors strapped with impossibly high caseloads, harried judges confronted with defense counsels’ dilatory tactics, and dockets bursting at the seams, the public often views the defendant as having the advantage throughout the entire criminal justice process. These perceptions disregard the presumption of innocence, and are simply not well-founded by what little we do


170. NATIONAL ADVISORY COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE FINAL REPORT 46-48 (1973) (The Commission, a grant-funded project of the Law Enforcement Assistance Administration (“LEAA”), brought criminal justice professionals together from across the nation. It was convened and presided over by LEAA Administrator Jerris Leonard, most recently impeachment and defense counsel to former Arizona Governor Evan Mecham. Leonard apparently did not subscribe to the conclusion of the Commission as he engaged in spirited but fruitless plea bargaining with the Attorney General of Arizona on behalf of Governor Mecham. Mecham was eventually acquitted of criminal charges following his impeachment and removal from office by the Arizona legislature.).


172. See supra note 138.
know about prosecutorial practices and court congestion.

Studies that have attempted to quantify the motives behind plea bargaining and its effects, while approached from different perspectives, have largely reached the same conclusions: plea bargaining is not the result of court congestion and it does not represent the last stand of overworked prosecutors. A long-term look at Connecticut superior courts, conducted by Heumann, showed consistent trial rates between high-volume and low-volume courts as a percentage of cases disposed. “The mean percentage trial to total disposition over this 75-year period is 8.7%. . . . [F]rom 1910 to 1954 it reached the 10% mark only three times.”173 Heumann evaluated nine Connecticut court divisions and examined the three highest-volume and three lowest-volume divisions. Although not controlled for such variables as number of judges and prosecutors in the respective divisions, the study found that “despite the large difference in actual case volume which was used to dichotomize the two groupings, trial rates between them varied minimally, and indeed often the low volume courts tried proportionally fewer cases.”174 Heumann concluded that “[t]he notion that plea bargaining and case pressure ‘go together’ must be reexamined. . . . It should now be evident that guilty pleas will be proffered and accepted for reasons other than case pressure.”175

A more sophisticated study of criminal case disposition practices in Chicago, Baltimore, and Detroit, conducted by Eisenstein and Jacob, validated Heumann’s conclusion. By analyzing courtroom “workgroups” in three major urban cities, Eisenstein and Jacob also found that caseload pressure does not necessarily result in plea bargains.176 The “workgroup” analytical model allowed the researchers to control for the number of judges, court personnel, and prosecutors assigned to a particular load, and they concluded that:

Many observers of criminal courts allege that courts use guilty pleas resulting from plea bargains because of their heavy case load. Our data do not support that contention. Baltimore courtrooms — which disposed only one-third of their cases by guilty pleas — had 671 defendants per courtroom on the average in 1972. Chicago courtrooms — which used guilty pleas twice as often — had 307 defendants per courtroom. Detroit, with the same guilty plea rate as Chicago, had the heaviest courtroom work load: 735 de-
fendants per courtroom. These data indicate that there is no clear relationship between courtroom work load and use of guilty pleas.\textsuperscript{177}

Other research indicates that defendants are not receiving unjustified rewards because of an overburdened adjudication system, and also suggests that unmanageable prosecutorial workloads do not result in overly generous plea offers. Knudten designed a study to examine prosecutors' reasons for bargaining.\textsuperscript{178} Identifying four variables (legal problems, "overcriminalization," case pressures, and the need to individualize justice) in a survey of 140 elected county prosecutors in Wisconsin and Michigan, seventy-one returned questionnaires validating the following conclusions:

The reasons Wisconsin and Michigan prosecutors give as important for plea bargaining group themselves into patterns that conform to those cited in the literature. The most important reason cited is that there are legal problems with a case. . . .

Different types of prosecutors vary on the reasons they indicate are important. No one single type emphasizes legal problems. This highlights the universality of this reason. . . .

The only reason which is associated with actual plea bargaining at a statistically significant level is legal problems.\textsuperscript{179}

These studies suggest that, contrary to the popular wisdom, the benefits derived from plea bargaining may not be so mutual as the prevailing wisdom suggests. When used as the justification for depriving the guilty pleading defendant of important procedural rights, it is important not to lose sight of our ultimate goal: justice, not just convictions.

If a poor government case motivates plea negotiations, no principled reason exists to keep defense counsel in the dark about that fact. If a defendant can be bluff into pleading to a charge more serious than the state could ultimately prove at trial, the system has exploited its superior bargaining position to the detriment of overall justice. Allowing defendants a greater opportunity to discover the strength of the state's case will lead to better informed pleas and fewer justice defeating bluffs with no appreciable loss to the state of its ability to justly prosecute and punish criminals.

If in plea proceedings, according to the Supreme Court, effective assistance of counsel does not encompass comprehensive fact investigation and constitutes waiver of the law's demand for strict proof, some may question why pre-plea discovery be broadened when discovery itself is not even a con-

\textsuperscript{177} Id. (footnotes omitted).


\textsuperscript{179} Id.
stitutional right. Essentially the same reasons that support pre-trial discovery justify pre-plea discovery: the search for truth, the prevention of injustice, notions of fair play, and fundamentally, the improved administration of justice.

IX. CONCLUSION

Congress and the courts have displayed an historical reluctance to embrace broader pre-trial discovery in criminal cases in the District of Columbia primarily as a result of the jurisdiction's relationship to the Federal Government and its reliance on the Federal Rules of Criminal Procedure. The local courts, however, are responsible for their own destiny and should be free to devise adjudication models appropriate to their unique needs and commensurate with their resources.

It is simply unjustified for the local courts to treat this jurisdiction as a mere appendage of the National Government. This is a federal city, but one that is largely self-governing and that provides state-level, county-level, and municipal-level services to its citizens and visitors. The local court has a responsibility for self-governance, and should not rely exclusively on a federal model that does not serve the needs of a state-level court system.

Broadening pre-trial discovery of witness lists in criminal cases by means of a court-inspired amendment to the local rules is an incremental, innovative step that should be taken to address the fastest-growing criminal caseload since court reorganization. In addition to consistently pleading to Congress for increased resources, the District of Columbia Superior Court Board of Judges should exercise responsible leadership by promulgating amendments to the court rules that will bring this state-level jurisdiction into the mainstream of American criminal practice. Broader discovery has worked well in the many states that have implemented it, improving the administration of criminal justice, enhancing standards of lawyer competence, and avoiding the untoward results predicted by many prosecutors. Broad discovery should similarly work well in the District of Columbia.