(Previously published in *The Legal Intelligencer*, January 10, 2012)

**A New Resource For Criminal Discovery**

A Review of *Federal Criminal Discovery* by Cary, Singer, and Latcovich

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In federal civil litigation there is a well defined procedure for mutual discovery for all parties. Civil discovery has become so extensive and complex that the courts have engaged in efforts to limit the practice, with mixed success. One eastern district judge recently described the scope of e-discovery in a case before him as “staggering”. The American College of Trial Lawyers formed a task force to study the growing demands of civil discovery, and in 2008 issued a white paper calling for reforms including a return to fact pleading.

In contrast discovery in federal criminal cases is severely limited. The defendant is not entitled to a list of government witnesses, there are no depositions (except in extremely rare situations approved by the court), the use of subpoenas for production of documents pretrial is very restricted, and the defendant’s requests for details of the government’s allegations by means of a bill of particulars are denied by the courts over ninety percent of the time. The sparse criminal discovery is the result of a long held philosophy by the courts and congress, that if the defendant is provided with a list of witnesses and the evidence against him, the defendant will intimidate the witnesses and manufacture a false exculpatory defense. Indeed, Judge Learned Hand, writing an opinion in a criminal appeal said, “Why . . . he [the defendant] 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 . . .” This was often derisively referred to as the “poor crook” theory. It is an old saw that continues to this day.

Because there is such a dearth of criminal discovery there are few meaningful publications on the subject. I am pleased to present a review of a recent publication which is well written, and very instructive. It is *Federal Criminal Discovery*, by Robert M. Cary, Craig D. Singer, and Simon A. Latcovich, all partners at the Washington, D.C. firm of William & Connolly. It is published by the American Bar Association.

The book covers the entire breadth of federal criminal discovery, and is well supported with discussion of relevant cases. This is a practical book, meant to serve the working practitioner who must deal with prosecutors on a regular basis. The twelve page introduction to the book, which recites the painful history of the progress of federal criminal procedure since its meager formal inception in 1946 should be distributed to all law students in their first course in criminal law.

The first chapter of the book is an extensive discussion of the production of documents pursuant to the requirements of the Supreme Court case of *Brady v Maryland* (*Brady* material). This is a particularly sensitive issue for the authors, as all three were on the team that defended Senator Stevens of Alaska. Stevens’ conviction was thrown out for actions of the federal prosecutors in withholding or failing to turn over relevant favorable information to the defense. The authors go into extensive detail about how to request *Brady* material, the elements of *Brady* material, and the cases relevant to the process. Over 40 pages are devoted to this topic. It is an area that is not well pursued by many defense counsel, especially in the sentencing process.

An area that is often neglected by practitioners is Rule 17(c) subpoenas to third parties for production of documents pretrial. The authors devote a chapter to the subject. Subpoenas for pretrial production of documents must be approved by the court and must adhere to certain tests for specificity. Unlike civil subpoenas, Rule 17(c) subpoenas cannot be used to subpoena broad categories of documents in hope of finding useful evidence or material that will lead to useful evidence. The discussion of the various requirements and relevant cases in this chapter is one of the most extensive I have seen on this subject.

There is a very practical and thorough examination of the production of witness statements by the prosecutors, popularly referred to as *Jencks Act* material, named for the federal statute passed in response to the Supreme Court decision of *United States v Jencks*. The procedure is also covered by Criminal Rule 26.2. The authors provide a useful history of the *Jencks* decision and the *Jencks Act* which should give guidance when requesting witness statements. Prosecutors are not required to give a defendant the prior statements of a government witness until the witness has completed his direct testimony. This is a draconian rule and the authors discuss methods of arriving at a negotiated informal method of obtaining prior statements of government witnesses in advance of trial. The authors discuss the relationship between producing *Brady* material and *Jencks Act* statements. Courts have reached different conclusions on the timing of the production of each. Some prosecutors contend that disclosure of *Brady* material contained in the *Jencks Act* statements satisfies their *Brady* obligations. The authors contend that such disclosure violates the requirements of *Brady* and offer arguments to be made in support of this position. Limited as it is, the *Jencks Act* remains one of the main areas of discovery of the prior statements of adverse witnesses, and an understanding of the process is essential.

The authors describe Rule 16 as the cornerstone of criminal discovery and devote a considerable space to the nuances of the application of the rule. Rule 16 was first enacted in 1946. It is the key provision for discovery of relevant documents, and includes *Brady* disclosures. Discovery under the rule is limited to categories of documents and materials specified in the rule. The authors discuss each type of discovery available, and what is excluded. Rule 16 discovery of documents is the most likely area for expansion resulting from fallout of the Stevens decision.

The book contains material and discussions on subjects rarely found in other criminal discovery materials. These include chapters on The Inherent Authority of the Court, Discovery Obligations Under Ethical Rules, Department of Justice Criminal Discovery Policies, and a chapter devoted to Local Practice in U.S. Courts. There are very astute observations and practical advice in each of these chapters on many tactics available that are not often employed by defense counsel. For example, seeking *Brady* material by asserting the obligations required by ethical rules is a valuable tool especially for sentencing, and I have often wondered why that tactic is so seldom used.

I would have liked to have seen more attention devoted to discovery at the sentencing process. This is an area that is largely ignored by prosecutors, defense counsel and the courts. Some federal districts (all three Pennsylvania federal districts included) do not even require the prosecutor to serve the defense counsel with material the prosecutor provides to the probation officer who prepares the presentence report. Sentencing is one phase of the criminal process where *Brady* material can have a significant effect, especially in the adjustments applied by the sentencing guidelines. It should be remembered that *Brady v. Maryland* was a case involving sentencing. In fairness, research and discussion regarding entire sentencing process would most likely have required at least another lengthy chapter or two. This does not detract from the quality of this book.

At my request I sought an independent review of the book by Mike Engle, the former president of the Pennsylvania Association of Criminal Defense Lawyers. Mike said, “*Federal Criminal Discovery* is the best and most comprehensive resource for exploring and understanding the complexities of discovery matters and other pre-trial issues arising in complex federal criminal litigation. Every serious federal criminal trial lawyer must have this book in his or her library.”

At last someone is taking on the vagaries of criminal discovery. This could be a harbinger of change in this archaic process.