St. Mary's Law Journal

Volume 6 | Number 2 Article 4

6-1-1974

The Omnibus Proceeding: Clarification of Discovery in the Federal Courts and Other Benefits.

J. Michael Myers

COMMENTS

THE OMNIBUS PROCEEDING: CLARIFICATION OF DISCOVERY IN THE FEDERAL COURTS AND OTHER BENEFITS

J. MICHAEL MYERS

The heavy criminal case load placed upon the federal district court system[1] has engendered increased interest in reducing the burden through the use of pretrial procedures.[2] One response has been the focusing of judicial attention upon the Omnibus Hearing Project, broadly defined as a formal pretrial conference held in open court wherein issues normally raised in trial are fully explored prior to trial.[3] The program must be individually implemented by each federal district court system,[4] and some of the more innovative courts have beneficially employed the omnibus proceeding in the quest for expeditious administration of criminal justice.[5]

---

1. If the majority of the criminal cases in the federal courts were not disposed of by guilty pleas, the administration of the federal courts would face a serious breakdown. McCarthy v. United States, 394 U.S. 459, 463 n.7 (1969); United States v. Von Der Heide, 169 F. Supp. 560, 565 (D.D.C. 1959); 8 J. MOORE, FEDERAL PRACTICE § 11.02(1)(a) (2d ed. 1973).

2. *See* CHRISTIAN, USING PREHEARING PROCEDURES TO INCREASE PRODUCTIVITY, 52 F.R.D. 55 (1971); PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE EIGHTH JUDICIAL CIRCUIT OF THE UNITED STATES, 50 F.R.D. 427 (1970). *See also* United States v. Westmoreland, 41 F.R.D. 419, 426 (S.D. Ind. 1967) wherein the court stated that the pretrial conference is one of the most efficient methods in criminal and civil cases for discovery.

3. PROCEEDINGS AT THE 1969 JUDICIAL CONFERENCE, TENTH JUDICIAL CIRCUIT OF THE UNITED STATES, 49 F.R.D. 347, 455 (1969) [hereinafter cited as 1969 PROCEEDINGS]. *See also* THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 154 (1973). The Committee defined omnibus as "a highly successful technique of promptly disposing of a great many criminal cases that would otherwise remain in the system for lengthy periods of time." *Id.* at 154.

4. AMERICAN BAR PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 4 (Approved draft 1970) [hereinafter cited as ABA STANDARDS]. Some jurisdictions may deem it necessary to adopt or modify their court rules to implement omnibus, whereas other circuits may find legislation appropriate. The present standard of adoption of omnibus, however, is individual application by the district courts. *Id.* at 4.

5. *See, e.g.*, OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 284 (1972); 1969 PROCEEDINGS 451.

Omnibus is a voluntary program[6] which inures to the benefit of both the prosecution and the defense,[7] as well as the judiciary.[8] The reduction of issues in the field of discovery makes omnibus an invaluable tool for complete and informal discovery by the prosecution and defense,[9] thus providing the latter with a more intelligent and enlightened plea.[10] Other benefits of the omnibus hearing, which include a more logical and cogent case presentation,[11] reduction of postconviction procedures,[12] minimization of speedy trial deprivations[13] and increased numbers of guilty pleas,[14] demonstrate that the omnibus program could considerably diminish the multiple burdens facing the federal district courts.[15] This description of the omnibus hearing

---

6. United States v. Shafer, 455 F.2d 1167, 1170 (5th Cir. 1970). Omnibus contemplates voluntary disclosure between counsel, and the court may not punish a defendant for refusal to participate in the program. *See also* 1969 PROCEEDINGS 452. Additionally, any disclosures made at a pretrial hearing must be on a purely voluntary basis. United States v. Westmoreland, 41 F.R.D. 419, 426 (S.D. Ind. 1967).

7. *See generally* 1969 PROCEEDINGS 455, 460.

8. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 274 (1972). Jurists who dislike retrying cases make a careful inquiry into any refusals by counsel to participate in a full pretrial discovery.

9. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess., 155 (1973). The open disclosure aspect of omnibus provides both the defense and the prosecution with all information in the case. *But see* REPORTS OF THE CONFERENCE FOR DISTRICT COURT JUDGES, 59 F.R.D. 415, 449 (1973). Some reluctance has been displayed on the part of United States Attorneys and defense counsel to open their files and voluntarily exchange all information. This has been pronounced where the prosecution receives less information than that which it has divulged. *Id.* at 449. *See also* R. NIMMER, THE OMNIBUS HEARING FINAL REPORT, AMERICAN BAR FOUNDATION REPORT 45, 46 (Tent. draft 1973).

10. Letter from Chief Judge Adrian A. Spears to Raymond T. Nimmer, August 6, 1973, in which it is noted that if the defendant is uninformed as to the case of the prosecution, his position must be based upon "speculation, conjecture and pure guesswork." *Id. See also* FED. R. CRIM. P. 11 prescribing that the plea by the defendant must be made "voluntarily with understanding of the nature of the charge and the consequences of the plea."

11. 1969 PROCEEDINGS 463-64.

12. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 271, 280 (1972).

13. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 156 (1973). The Committee determined that use of omnibus has "virtually eliminated the written motion practice; saving counsel and court time and effort; exposing latent procedural and constitutional problems; providing discovery for an informed plea and substantially reducing the congestion of the trial calendar." *Id.* at 156. *See generally* Comment, *Devitalization Of The Right To Speedy Trial: The "Per Case" Method v. The "Per Se" Theory*, 5 ST. MARY'S L.J. 106 (1973).

14. *See* STANDARDS RELATING TO DISCOVERY AND PRETRIAL PROCEDURE, 57 F.R.D. 320, 329 (1972).

15. ABA STANDARDS 1-2.

endeavors to explore the benefits of this valuable procedural device and to encourage its adoption throughout the federal district court system.

BRADY V. MARYLAND: ITS FORBEARS AND PROGENY

Although the omnibus hearing is designed to serve an unusually wide variety of pretrial procedural purposes,[16] the most significant benefits accrue to federal discovery[17] which is derived from the due process clause of the 14th amendment.[18] It is well settled that acts or omissions on the part of the prosecution that deprive the defendant of the required notice of adverse evidence, or prevent the defendant from presenting evidence to refute the accusation against him, constitute a denial of due process.[19] Additionally, a conviction obtained through the use of tainted testimony, known to be such by the prosecution, must fail under the 14th amendment,[20] and the mere passive, unsolicited presentation of such evidence, allowed to go uncorrected by the prosecution, is similarly invalid.[21]

These early doctrines were ultimately distended in *Brady v. Maryland*[22] in which Mr. Justice Douglas, in pronouncing the majority opinion, stated:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[23]

The rationale of the *Brady* decision was not to penalize society for the misdeeds of a prosecutor, but rather to avoid the possibility of an unfair trial.[24]

---

16. *Id.* at 116. Omnibus is expected to facilitate pretrial determinations whether or not the case is destined for trial. *Id.* at 117.

17. 1969 PROCEEDINGS 463. *See also* United States v. Atlantic Richfield Co., 286 F. Supp. 742, 753 (D.N.J. 1968) where the court determined that "expanded discovery will promote rather than hinder" the criminal process. *But see* Williams v. Wolff, 473 F.2d 1049 (8th Cir. 1973). The Court of Appeals for the Eighth Circuit noted that there was "little in the prosecutor's file which might not *aid* in some remote or fanciful way the defense of a case." *Id.* at 1054.

18. Mooney v. Holohan, 294 U.S. 103, 106 (1935).

19. *Id.* at 107.

20. *See* White v. Ragen, 324 U.S. 760, 764 (1945); New York *ex rel.* Whitman v. Wilson, 318 U.S. 688, 690 (1943); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Curran v. Delaware, 259 F.2d 707, 712 (3d Cir. 1958). This rule applies even if the false testimony goes only to the credibility of a witness. Napue v. Illinois, 360 U.S. 264, 269 (1959).

21. *See* Alcorta v. Texas, 355 U.S. 28, 31 (1957); United States v. Dye, 221 F.2d 763, 765 (3d Cir. 1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382, 387 (N.D. Ill. 1949).

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

23. *Id.* at 87.

24. *Id.* at 87. The Court went on to state that where the prosecution withholds evidence that may help exculpate the defendant or reduce his penalty, a situation is

Thus, in *Brady*, the safeguarding of individual freedoms required that the burden be placed upon the prosecution to share potentially exculpatory evidence with the defense.

The tenet expressed in *Brady* has been expanded by some courts to the extent that failure by the defense to request the production of relevant documents will not preclude consideration of possible constitutional infirmities.[25] Neither lack of knowledge on the part of the prosecution[26] nor passive nondisclosure has been considered sufficient cause for failure to produce unrequested information to the defense.[27] Furthermore, a myriad of criteria, *inter alia*, bad faith, negligence or inadvertence on the part of the prosecution,[28] the degree of harm resulting to the defense as a consequence of the nondisclosure,[29] and the materiality of the evidence,[30] has been formulated by federal courts in their attempts to determine whether the defendant has been denied due process. The ultimate result of such a deprivation is a new trial, due to the prejudicial effect of nondisclosure upon the defendant's case.[31]

Conflicts have arisen among the courts as to the application of the *Brady* doctrine, with dissension being most pronounced on issues involving the burden of production,[32] and the materiality of the evidence.[33] In contrast to

---

created that bears heavily on the defendant. *Id.* at 87-88. *See also* Wilde v. Wyoming, 362 U.S. 607 (1960).

25. *See, e.g.*, Clements v. Coiner, 299 F. Supp. 752, 758 (S.D.W. Va. 1969). *But see* United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968) holding that the burden is on the defendant to request the evidence. This is the standard followed by the Texas courts. Harris v. State, 453 S.W.2d 838, 839 (Tex. Crim. App. 1970); Bell v. State, 442 S.W.2d 716, 719 (Tex. Crim. App. 1969).

26. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).

27. *Id.* at 847.

28. United States v. Maynard, 476 F.2d 1170, 1177 (D.C. Cir. 1973).

29. United States v. Davila-Nater, 474 F.2d 270, 275-76 (5th Cir. 1973).

30. United States v. Keogh, 391 F.2d 138, 147-48 (2d Cir. 1968); United States v. Tomaiolo, 378 F.2d 26, 28 (2d Cir. 1967).

31. United States v. Polisi, 416 F.2d 573, 577-78 (2d Cir. 1969).

32. *See* United States v. Deutsch, 475 F.2d 55, 58 (5th Cir. 1973) holding that the burden of production of records and documents favorable to the defendant is on the prosecution; United States v. Maynard, 476 F.2d 1170, 1177 (D.C. Cir. 1973); Ashley v. State, 319 F.2d 80, 84 (5th Cir. 1963). *But see* Layman v. Tollett, 347 F. Supp. 914, 915 (E.D. Tenn. 1972), *aff'd*, 473 F.2d 912 (6th Cir. 1973) holding that the burden is not on the prosecution to communicate preliminary, unchallenged or speculative information; United States v. Conder, 423 F.2d 904, 911 (6th Cir. 1970); United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968) concluding that the burden is on the defense to request the evidence. *See generally* United States v. DeLeo, 422 F.2d 487, 498 (1st Cir. 1970) limiting *Brady* so as not to authorize extensive pretrial discovery for the defendant; United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965).

33. *See* United States v. Eisenberg, 469 F.2d 156, 180 (8th Cir. 1972), *aff'd*, 410 U.S. 1067 (1973); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); United States v. Tomaiolo, 378 F.2d 26, 28 (2d Cir. 1967); United States v. Maroney, 319 F.2d 622, 627 (3d Cir. 1963).

the standard of nonsuppression announced in *Brady*, it has been held that the government cannot be required to make a pretrial determination of the favorability of the evidence to the accused.[34] Notwithstanding this construction, the prosecution's failure to make such a decision may provide grounds for a postconviction allegation of lack of discovery.[35] Other courts have determined that to constitute denial of due process, the undiscovered evidence must be of some substantial use to the defense,[36] and that the prosecution is not obligated to divulge immaterial evidentiary information.[37] The dilemma facing the prosecution under this criterion is in formulating a pretrial judgment on the apparent substantiality and materiality of the evidence.

The *Brady* case has created an appreciable degree of strife within the federal district court system. It has brought about variances within the decision-making process and complex balancing tests with which the courts have had to grapple.[38] The responsibilities placed upon the prosecution have been likened to an impossible "crystal-ball type decision,"[39] and *Brady* has been referred to as a case in which the Supreme Court, while saddling the federal district court system with a stringent discovery doctrine, neglected to properly provide means for the accomplishment of the announced standard.[40]

THE JENCKS ACT

Along with the disputes flowing from *Brady*, the federal district courts are also confronted with questions involving compliance with the Jencks Act as encompassed within the ambit of federal discovery. There is a propensity among the federal courts to place upon the prosecution a dual set of respon-

34. United States v. Conder, 423 F.2d 904, 911 (6th Cir. 1970).

35. *See generally* United States v. Maynard, 476 F.2d 1170 (D.C. Cir. 1973); ABA STANDARDS 120.

36. United States v. Tomaiolo, 378 F.2d 26, 28 (2d Cir. 1967).

37. United States v. Sink, 56 F.R.D. 365, 368 (E.D. Pa. 1972); *accord*, United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968) in which the Court of Appeals for the Second Circuit refused to invalidate a conviction, although a post trial search through the files of the prosecution revealed evidence beneficial to the defense. The court reasoned that such a standard would create intolerable burdens and uncertainties. *Id.* at 148.

38. *See, e.g.*, United States v. Maynard, 476 F.2d 1170, 1177 (D.C. Cir. 1973); Clements v. Coiner, 299 F. Supp. 752, 758 (S.D.W. Va. 1969); United States v. Armantrout, 278 F. Supp. 517, 518 (S.D.N.Y. 1968) holding that *Brady* did not deal with pretrial discovery by the defendant. *But see* United States v. American Oil Co., 286 F. Supp. 742, 753 (D.N.J. 1968) concluding that the outcome of a discovery motion is dependent upon a balancing of the competing interests, including the objectives of justice and fair trial; United States v. Leighton, 265 F. Supp. 27, 34 (S.D.N.Y. 1967), *cert. denied*, 390 U.S. 1025 (1968). *See generally* United States v. Isaacs, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972) recognizing the movement sponsored by law professors and judges for further liberalization of discovery; ABA STANDARDS 24-25.

39. United States v. Conder, 423 F.2d 904, 911 (6th Cir. 1970).

40. 1969 PROCEEDINGS 464. The burdens placed upon the federal district courts have been characterized as "onerous" and "impossible." *Id.* at 464.

sibilities, combining prosecution and justice.[41] In *Berger v. United States*,[42] the Supreme Court stated that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done."[43] It has, therefore, been deemed unconscionable for the government to initiate prosecution and then invoke governmental privilege to deprive the defense of material evidence.[44] Judge Learned Hand, in speaking of discovery, demanded that "it must be conducted in the open, and will lay bare [the prosecution's] subject matter."[45] Generally, the obligations of the government, in the production of evidentiary matter possessed by the prosecution, has been only that it be competent, relevant and outside of any exclusionary rule.[46]

These standards were broadened in *Jencks v. United States*,[47] wherein the Supreme Court determined that all statements which relate to the testimony of a prosecution witness on prior examination must, upon demand, be made available to the defense for use in cross-examination, and that failure to comply with the demand would result in dismissal of the case.[48] The Court further disapproved of the method whereby government documents were proffered to the trial court judge for a determination of their relevancy, noting that the defense should be entitled to view the documents and ascertain whether germane application could be made of them.[49] Justice Brennan concluded:

> The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.[50]

Pursuant to *Jencks*, Congress enacted the Jencks Act[51] which entitles the defendant in a federal criminal prosecution to any competent and relevant

41. *See* United States v. Reynolds, 345 U.S. 1, 12 (1953).
42. 295 U.S. 78 (1935).
43. *Id.* at 88; *see* Burkhalter v. State, 493 S.W.2d 214 (Tex. Crim. App. 1973). The court stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 218; *accord*, United States v. Perry, 471 F.2d 1057, 1062 (D.C. Cir. 1972) stating that the primary objective of the government in a criminal prosecution should be maximum truth in the courtroom.
44. United States v. Reynolds, 345 U.S. 1, 12 (1953).
45. United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). *See also* United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946).
46. Gordon v. United States, 344 U.S. 414, 420 (1953); *see* Roviaro v. United States, 353 U.S. 53, 60 (1957) placing the further limitation on the government privilege that it must be fundamentally fair.
47. 353 U.S. 657 (1957).
48. *Id.* at 672.
49. *Id.* at 669.
50. *Id.* at 672.
51. 18 U.S.C. § 3500 (1969).

statements in the possession of the government which relate to the events and activities to which the government witness has testified.[52] The principle objective of the Jencks Act is to enhance the contingency for truth by enabling the defense to obtain prior statements of witnesses and to use them to test the accuracy of the actual testimony given in court by the same witnesses.[53]

Some courts have viewed the Act as affording the defendant a right to the evidence in the possession of the government, holding that failure by the prosecution to produce that evidence will constitute reversible error.[54] The Court of Appeals for the Tenth Circuit, however, has considered the Jencks Act to be restricted in scope and has defined it as a "studied congressional purpose based upon considerations of public policy to *limit* the right of a defendant in a criminal case to the production of documents from the files of the Government."[55] Thus, the ultimate purpose of the Act was construed to be one of restraint, circumscribing what evidence may be obtained, and the purposes for which it may be used. Consequently, although the Act has been interpreted as requiring that the prosecution relinquish all reports to the defense,[56] it has also been construed to limit the nature of evidence necessarily obtainable from the prosecution.[57]

A further dichotomy has arisen within the federal court system involving the scope of the Jencks Act. The courts have been split as to which party has the right to inspect the evidence; some courts have followed the *Jencks* decision and permitted the defense to examine the evidence and determine what materials may be used,[58] while other tribunals have ignored *Jencks*, and followed the previous standard that the trial judge is the arbiter and has the duty of separating related from unrelated matter.[59]

There are many controversies revolving within the discovery sphere that remain unresolved. The *Brady* doctrine and Jencks Act have created as many issues as they have answered, and have placed the prosecution, the defense, and the courts in a quandary concerning the procedural application

52. *Id.* § 3500; *see* Moore v. Administrator, 475 F.2d 1283, 1286 (D.C. Cir. 1973); United States v. Perry, 471 F.2d 1057, 1062 (D.C. Cir. 1972); Foster v. United States, 308 F.2d 751, 755 (8th Cir. 1962).

53. United States v. Perry, 471 F.2d 1057, 1062 (D.C. Cir. 1972).

54. *See, e.g.*, Clancy v. United States, 365 U.S. 312, 316 (1961). *But see* Rosenberg v. United States, 360 U.S. 367, 371 (1959) holding that failure to provide a document to the defense may in some cases result in harmless error.

55. United States v. Kelly, 269 F.2d 448, 452 (10th Cir. 1959) (emphasis added). *See also* Hill v. State, 319 S.W.2d 318, 319 (Tex. Crim. App. 1958).

56. Holmes v. United States, 271 F.2d 635, 638 (4th Cir. 1959).

57. Ubiotica Corp. v. Food & Drug Admin., 427 F.2d 376, 381 (6th Cir. 1970); Foster v. United States, 308 F.2d 751, 756 (8th Cir. 1962); Anderson v. United States, 262 F.2d 764, 772 (8th Cir. 1959).

58. Moore v. Administrator, 475 F.2d 1283, 1286 (D.C. Cir. 1973); United States v. Palermo, 21 F.R.D. 11, 13 (S.D.N.Y. 1957).

59. *See, e.g.*, Holmes v. United States, 271 F.2d 635, 637 (4th Cir. 1959).

of the discovery standards. However, a fluid and viable solution merely awaits adoption by the federal district courts of the omnibus hearing which provides a suitable remedy to the discovery controversies, eliminating some and clarifying others.

THE OMNIBUS PROCEEDING

The Purposes and Effects of the Omnibus Proceeding

The purposes of the omnibus proceeding are manifold,[60] but the primary end sought is the elimination of discovery issues.[61] Among the stated goals of the omnibus project is the promotion of voluntary disclosure by the prosecution of their basic case.[62] Discovery is to be secured by the prosecution and the defense within the constitutional limitations produced by the 5th amendment protection against self-incrimination,[63] with the court ruling upon and supervising any additional discovery requests made by the parties.[64] Omnibus is designed to promote "a full and free exchange of information between counsel, and between counsel and the court . . . ."[65] Ad-

60. 1969 PROCEEDINGS 463. The stated purposes of the omnibus project are to:
1. Eliminate the written motion practice, except where necessary.
2. Secure discovery by the prosecutor and the defense within the constitutional limits permitted.
3. Encourage voluntary disclosure by the prosecution of its basic case.
4. Rule upon and supervise additional discovery requested by the parties.
5. Expose and dispose of latent constitutional issues.
6. Provide a period of time prior to the omnibus hearing for disclosure, exploration and plea discussion between counsel.
7. Allow the defendant discovery so that he may make an informed decision.
8. Use the procedure, as far as possible, for those cases where either (a) sufficient information has not been secured for an informed plea, or (b) where the case will probably go to trial.
9. Postpone for formal hearing those matters which will require, of necessity, preparation of written documents, affidavits, memoranda and/or the calling of witnesses.
10. Provide a check list, suggesting to defense counsel the various procedures and tools available to them.

61. *Id.* at 462-63.

62. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155-56 (1973).

63. 1969 PROCEEDINGS 463.

64. *Id.* at 463.

65. ABA STANDARDS 122. However, the standard of open disclosure is not without its detractors. *See* State v. Tune, 98 A.2d 881, 884 (N.J. 1953) in which the court opined that open disclosure will lead to perjury and suppression of evidence; *accord*, DISCOVERY IN CRIMINAL CASES, 44 F.R.D. 481, 485 (1968) expressing concern that open discovery may effectuate threatening, removal or liquidation of proposed witnesses for the prosecution. *But see* United States v. Projansky, 44 F.R.D. 550, 556 (S.D.N.Y. 1968) confronting the contentions that open discovery will create perjury and suppression of the evidence, and referring to these arguments as "folklore;" *cf.* BRENNAN, REMARKS ON DISCOVERY, 33 F.R.D. 56, 62 (1963) stressing the importance of the standard of open discovery as a method by which to accomplish expeditious administration of criminal justice, and criticizing the established arguments against the fruition of the standard as being archaic. *See generally* ABA STANDARDS 36-37.

vocates of fair and proper administration of justice have declared disclosure by the prosecution of relevant evidentiary materials to be preferable to suppression.[66] Therefore, counsel participating in the omnibus proceeding are encouraged to conduct full discovery, exploration and plea discussion[67] under the theory that "the broadest sort of discovery in criminal cases is in the interest of the administration of criminal justice."[68]

Application of omnibus also entitles the defendant to increased knowledge of the case of the prosecution, thereby allowing for a more informed plea.[69] The federal rules of criminal procedure provide that the defendant's plea must be made "voluntarily with understanding of the nature of the charge and the consequences of the plea."[70] The purpose of this standard is to discourage numerous postconviction attacks based upon the constitutional legitimacy of pleas,[71] and failure to strictly adhere to the doctrine will result in an invalidation of the plea.[72] Thus, the federal district courts are encumbered with a broad rule that is incompatible with prosecutorial nondisclosure, as the court is obligated to insure that the defendant comprehends the situation, his rights and the effects of his plea.[73] The open disclosure phase of omnibus assures the defense of an adequate opportunity to appraise the evidence, thus facilitating an enlightened plea.[74] A standard inferior to complete disclosure would not appear to comply fully with the purpose of this rule, and those courts confronting postconviction allegations relying on inadequate plea cognizance should greet omnibus with approbation.

Ancillary goals contemplated by the application of the omnibus proceeding include elimination of the written motion practice, preservation of time

66. Dennis v. United States, 384 U.S. 855, 773-74 (1966).

67. 1969 PROCEEDINGS 453.

68. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 279 (1972).

69. 1969 PROCEEDINGS 462. Omnibus is designed to provide for those cases destined for guilty pleas as well as those expected to result in a trial. ABA STANDARDS 116-17.

70. FED. R. CRIM. P. 11. *See generally* United States v. Smith, 440 F.2d 521, 525 (7th Cir. 1971); United States v. Akins, 420 F.2d 960 (9th Cir. 1969); United States v. Russell, 320 F. Supp. 1028 (E.D. Pa. 1970).

71. McCarthy v. United States, 394 U.S. 459, 465 (1969).

72. *Id.* at 472. *See also* Boykin v. Alabama, 395 U.S. 238 (1969) in which the Court determined that the right to confront one's accusers is a fundamental right that cannot be waived. *Id.* at 243. Furthermore, the record must affirmatively show that the accused voluntarily and knowledgeably made the guilty plea. *Id.* at 242. *See generally* Vickery v. State, 367 F. Supp. 407 (D.S.C. 1973).

73. Schnautz v. Beto, 416 F.2d 214, 216 (5th Cir. 1969); *see* Monroe v. United States, 463 F.2d 1032, 1036 (5th Cir. 1972); Colson v. Smith, 438 F.2d 1075, 1079 (5th Cir. 1971).

74. 1969 PROCEEDINGS 460.

and effort by the courts and counsel, exposure of latent procedural and constitutional problems, and substantial reduction of trial court congestion.[75]

The Omnibus Procedure

Pursuant to Rule 17.1 of the Federal Rules of Criminal Procedure,[76] the federal district courts are allowed, subsequent to indictment or information, to hold a pretrial conference in order to promote a fair and expeditious trial.[77] Omnibus is the corollary of this rule, and although its procedural application does vary among the districts,[78] it is an uncomplicated, albeit effective, pretrial consultation.[79]

The omnibus hearing is initiated when the defense counsel in a criminal matter is identified to the court.[80] A notice containing the date of arraignment and an explanatory letter concerning the omnibus proceeding are forwarded to defense counsel by the court's clerk.[81] Upon a decision to participate in the program, a pre-arraignment conference is scheduled between the prosecution and defense counsel wherein they engage in an entirely open discovery process.[82] The issues which require formal pretrail hearing and

75. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155 (1973).

76. The Rule provides:

> At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

See also FED. R. CRIM. P. 16(a), providing that the court may, subsequent to indictment, and upon motion by the defendant, order the prosecution to permit the defendant to inspect designated papers and documents if the evidence sought is material and the request reasonable. The rule is intended to give only a limited right of discovery. United States v. Bentvena, 193 F. Supp. 485, 497 (S.D.N.Y. 1960); United States v. Haug, 21 F.R.D. 22, 26 (N.D. Ohio 1957), *cert. denied*, 365 U.S. 811 (1961). There is no requirement under Rule 16 that the government completely open its files to the defense. United States v. Brown, 179 F. Supp. 893, 896 (E.D.N.Y. 1959). The purpose of the rule is to give the defendant access to material in the possession of the government that is unavailable to the defense. United States v. Woodner, 24 F.R.D. 33, 35 (S.D.N.Y. 1959), *cert. denied*, 375 U.S. 903 (1963).

77. FED. R. CRIM. P. 17.1.

78. *Compare* OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 271 (1972) (procedural aspects of the Western District of Missouri), *with* 1969 PROCEEDINGS 592-606 (procedure used in the Western District of Texas).

79. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 157 (1973).

80. *Id.* at 154.

81. *Id.* at 154-55.

82. *Id.* at 155.

plea discussion are determined, and counsel are urged to compile a complete check list of all potential pretrial motions and defenses.[83] If it is concluded that no motions will be filed, then the omnibus hearing is not scheduled.[84] If the omnibus hearing is necessary, however, a date is scheduled and the defendant is informed in open court that admissions made during omnibus, unless reduced to writing, will not be used against him.[85] The court then determines the validity of the controverted motions, and reserves the right to demand written motions and briefs.[86] Any refusals by the prosecution to make a full disclosure are noted on the omnibus hearing report subsequent to an inquiry by the court as to the legitimacy of the declination.[87] If the court determines that the denial is unwarranted, it may order mandatory disclosure.[88]

If during the omnibus hearing the defendant neglects to assert an issue upon which he intends to rely, he is precluded from subsequent presentation of the matter.[89] Although waiver appears to be a harsh penalty for the mere failure to raise an issue, one of the primary designs of the program is to circumvent unnecessary and repetitious hearings and trials.[90] Additionally, the defense is provided a thorough check list on which to assemble all pertinent issues, so there is no justifiable excuse for nonpresentation during omnibus.[91] The waiver proviso further insures good faith participation on the part of the defense, and eschews conversion of the program into a strategic ploy utilized by the defendant to obtain a successful disposition of the case.[92]

Although the necessity for a trial is frequently eliminated,[93] it has been noted that when a case does enter the trial stage, the result is a more logical presentation in a diminished period of time,[94] as well as an abrogation of

---

83. *Id.* at 155.

84. *Id.* at 155. Issues not asserted during omnibus, however, are waived by the defendant. ABA STANDARDS 117.

85. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155 (1973).

86. *Id.* at 155.

87. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 273 (1972).

88. ABA STANDARDS 101. Rule 4.4. provides that:

> [u]pon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof.

FED. R. CRIM. P. 4.4.

89. *Id.* at 120.

90. *Id.* at 120.

91. *Id.* at 121.

92. *Id.* at 120.

93. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155 (1973).

94. 1969 PROCEEDINGS 463-64.

the multiple trial recesses formerly essential to provide counsel the opportunity for examination of witness statements.[95] The omnibus proceeding, from the initial informal conference between counsel to the formally conducted open court hearing, is a process so elementary that it can be effectively used by inexperienced attorneys.[96] It may seem incongruous that an uncomplicated hearing such as omnibus would resolve many of the complex problems currently plaguing our federal district court system, but most jurists employing omnibus have concluded that it is an indispensable program without which they would be precluded from managing the burgeoning criminal case load.[97]

The Benefits of Omnibus

The advantages of the full and open discovery aspect of omnibus are particularly evident. Each participant involved in the criminal proceeding is assisted by the discovery process provided by omnibus. It has generally been recognized that pursuant to the open discovery procedure the defendant discloses those matters that he intended to reveal during trial.[98] Conversely, the prosecution normally exposes information without any notable prejudicial effect resulting to their case.[99] Furthermore, allowing the defendant access to the complete government file reduces the extreme burden which the trial court and prosecution face in their endeavor to make a pretrial determination of the materiality of the evidence,[100] and abrogates the number of postconviction allegations based on the Jencks Act and *Brady* requisites that evidentiary materials be furnished to the defense prior to trial.[101] It has been observed that:

95. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155 (1973).

96. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 280 (1972).

97. *Id.* at 282; *see* San Antonio Light, Jan. 31, 1974, at 1-F, col. 2. The Western District of Texas is the largest of the 94 federal judicial districts, and has one of the heaviest criminal case loads in the nation. However, the district is number one in the time required for disposition of criminal cases, due in part to the use of the omnibus system. *See also* 1969 PROCEEDINGS 464-65. *See generally* OLIVER, OMNIBUS PRETRIAL PROCEEDINGS, A REVIEW OF THE EXPERIENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270 (1972). Although the statistical profile for the Western District of Missouri displays that its criminal case load is the largest of the 10 district courts in the Eighth Circuit, and tenth nationally, the district is first in the circuit and in eighth place nationally in speedy disposition of cases, due to the implementation of the omnibus program. *Id.* at 282.

98. 1969 PROCEEDINGS 452. It has been recognized that under omnibus, however, the defense often reveals information it would not be required to disclose. United States v. Shafer, 455 F.2d 1167, 1170 (5th Cir. 1972).

99. 1969 PROCEEDINGS 452.

100. *Id.* at 458-59.

101. OLIVER, OMNIBUS PRETRIAL PROCEEDINGS: A REVIEW OF THE EXPERIENCE OF

> [T]he [omnibus] project . . . reduces . . . the possibility of error being produced by following the strict letter of the *Jencks Act.* Further, the problems involved under the rule of *Brady v. Maryland* . . . are eliminated. With full disclosure of the Government file, the Jencks Act is a thing of the past, and no one can say that the Government has withheld evidence favorable to the defendant on the issue of guilt, when *all the evidence* in the Government file has been furnished to the defendant prior to trial.[102]

The most persuasive reason for adoption of omnibus, however, is that it allows the defendant to make a more intelligent and enlightened plea.[103] A thorough understanding by the defendant of the case against him often results in a plea of guilty,[104] or a request for a trial without a jury.[105] Both options have induced evaluation of omnibus as a "monumental time-saver,"[106] thus mitigating postconviction reliance on claims by defendants of deprivation of speedy trial.[107] Furthermore, candid discovery may persuade the prosecution to dismiss the case upon a realization of the innocence of the accused or of a faulty case.[108]

The prosecution also benefits by use of the omnibus discovery standard. The pretrial discovery conference allows the government to make a summary exploration of alibis and may lead to an early conclusion that refutes the alibi defense.[109] Under the project, the prosecution obtains a list of character witnesses expected to be used by the defendant, and may be able to adduce information that will disqualify those witnesses, thereby precluding certain testimony relating to the character of the defendant.[110] Additionally, even though disqualification may not occur, knowledge by the prosecution

---

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, 58 F.R.D. 270, 280 (1972).

102. 1969 PROCEEDINGS 458-59.

103. *Id.* at 458.

104. *Id.* at 458. During omnibus the defendant should be allowed to change his plea. ABA STANDARDS 120.

105. *Id.* at 457. Although the defense may be reluctant to plea bargain, the judicial system is still benefited by elimination of the expensive and time-consuming jury-selection process.

106. *Id.* at 460. The program has also been so characterized because of the requirement that all motions to suppress admissions and confessions, as well as those relating to search and seizure, must be heard in advance of trial. The result is to eliminate lengthy, expensive delays in which the jury is retired from the courtroom in order to provide an initial hearing on a motion to suppress. 1969 PROCEEDINGS 457. Specific benefits accrue through the use of omnibus in narcotics cases. Often the principal issue is not whether the defendant was in possession of the contraband, but rather the legality of the search and seizure. A pretrial motion filed under omnibus challenging the propriety of the search may conclude with either dismissal by the prosecution or a guilty plea by the defendant. *Id.* at 457.

107. *Id.* at 464.

108. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 155-56 (1973).

109. 1969 PROCEEDINGS 456.

110. *Id.* at 456.

concerning the origin of the witnesses may aid the prosecution in procuring unfavorable character witnesses.[111]

Although the element of surprise may be a valuable weapon for victory in a pure adversary system, an underlying concept of omnibus is the elimination of surprise to either side.[112] Useless sparring between counsel is avoided,[113] and knowledge of the expected testimony of government witnesses and evidence to be introduced by the prosecution is also of ample assistance to the defendant's trial preparation.[114]

Experience has indicated that adoption of omnibus reduces long and costly delays at both the pretrial and trial stage.[115] Although due in part to the open discovery process, inordinate delays are also diminished through virtual elimination of the written motion practice.[116] The federal district courts have been inundated in the past with written motions. Subsequent to the adoption of omnibus, however, the steady stream of written motions is decreased, and the court can more prudently weigh the merits of the infrequently filed motions.[117] Additionally, the defense and prosecution both profit by the accrual of additional time in which to brief more complex matters.[118] Therefore, it has been concluded that "on all fronts, omnibus operates always in the interests of every party concerned with a criminal trial in the United States District courts."[119]

THE OMNIBUS EXPERIMENTS

Pursuant to a proposal by the American Bar Association advocating the adoption of the omnibus program,[120] the procedure was used on an experimental basis in the Federal District Courts for the Southern District of California and the Western District of Texas. Implemented in each region in 1967, the impact of omnibus in the respective districts has indicated many benefits and occasional defects within the program. Although omnibus impaired the operation of the judicial process in California, substantial benefits accrued within the Texas district.

---

111. *Id.* at 456.
112. *Id.* at 461; ABA STANDARDS 31.
113. 1969 PROCEEDINGS 460.
114. *Id.* at 460.
115. *Id.* at 464.
116. *Id.* at 453.
117. *Id.* at 453.
118. *Id.* at 457-58.
119. *Id.* at 463; *see* STANDARDS RELATING TO DISCOVERY AND PRETRIAL PROCEDURE, 57 F.R.D. 320, 339 (1972) in which omnibus is depicted as a "two-way mutual exchange of information that assists both sides without the sacrificing of any of the defendant's rights, and it is substantially beneficial in all its aspects to the rights of the government, the defendant, as well as our society."
120. ABA STANDARDS 114.

The Southern District of California Experience

The introduction of omnibus in the Federal District Courts for the Southern District of California followed a format identical to that suggested by the A.B.A. Minimum Standards.[121] Supported at the outset by the district judiciary,[122] the emphasis was placed on the discovery aspect of omnibus,[123] resulting in informal and voluntary disclosure in 75 percent of the criminal cases within the jurisdiction during the experimental period.[124] The high degree of prosecutorial compliance in complete discovery may be imputed to an incentive to cooperate with the expressed desires of the district judges,[125] as well as to a preexisting voluntary disclosure standard within the district.[126] Thus, in California omnibus merely increased the proportion of cases in which informal discovery occurred, rather than initiating an innovative standard into the district.

Although thoroughly successful in promoting open disclosure between the prosecution and defense counsel,[127] the program produced severe detriments within the California system. One counterproductive element was the consumption of additional time by the court.[128] The time increases, however, were attributable to a relaxed attitude within the district concerning prompt adjudication of criminal matters.[129] Another reason for the time increment factor was the particular omnibus procedure used initially in the district, which consisted of a three-step process that included the informal consultation, the formal omnibus hearing and an additional court appearance to dispose of subsequently arising issues.[130] The courts frequently allowed time-consuming ancillary appearances,[131] and the existence of multiple in-court procedures resulted in an increase in delays between the indictment and the final disposition of the case.[132] The average time per case roughly doubled after the implementation of the omnibus program,[133] but these delays may partially be ascribed to a deference in final formulation of defense tactics until completion of the discovery process.[134] Court time was decreased,

121. R. NIMMER, THE OMNIBUS HEARING REPORT, AMERICAN BAR FOUNDATION REPORT 4, 35 (Tent. draft 1973).
122. *Id.* at 104. Although the judges in the Southern District were enthusiastic, their replacement during the experiment by justices who were uninspired about the program may have forecast the failure of omnibus within the district. *Id.* at 104.
123. *Id.* at 48.
124. *Id.* at 41.
125. *Id.* at 41.
126. *Id.* at 41.
127. *Id.* at 35.
128. *Id.* at 35.
129. *Id.* at 54.
130. *Id.* at 48.
131. *Id.* at 47.
132. *Id.* at 35.
133. *Id.* at Table A2.
134. *Id.* at 55.

however, by deemphasizing the formerly prevalent standard of filing written motions in each case,[135] and after three years of employing the omnibus hearing, time expenditures per case were substantially lessened due to a reduction in the necessity to use the hearing to enforce disclosure[136] and the omission of one of the formal in-court hearings.[137] Nevertheless, the procedure was still time-consuming, with approximately 45 to 60 judicial days annually involved in the omnibus process.[138]

Another unanticipated result of the use of omnibus in California was an absence of change in the guilty plea rate.[139] Although there was early concern that omnibus would decrease guilty plea rates by bolstering the position of the defense,[140] the American Bar Association Minimum Standards predicted an acceleration in the guilty plea level.[141] The constancy in the guilty plea level, however, was due to the strikingly high degree of plea bargaining already present in the district,[142] and may further be attributed to the fact that the open disclosure process rarely indicated impotency in the government's case.[143] The guilty plea rate is of dubious import, however, in that it is based upon such abstract elements as the desire of the defendant to admit guilt, the nature of the concessions offered the defense in return for a plea of guilty, and the emphasis placed by the court on a fast and efficient disposition of the case.[144]

Although the advantages derived from the California experiment included maintenance of broad disclosure and an eventual decrease in judicial court time,[145] dissatisfaction has been expressed concerning the disclosure standards initiated in the district. This criticism emphasizes that discovery was often unavailable subsequent to the omnibus hearing[146] and that the informal disclosure did not sanction inspection of grand jury testimony.[147]

Omnibus was reduced to a minimal level of productivity in California by delegating the procedure to a magistrate,[148] and the experiment has been

135. *Id.* at 50.
136. *Id.* at 107.
137. *Id.* at 107. The final in-court hearing, designed to dispose of delayed issues, was eliminated. These questions were resolved through counsel consultation or during trial. *Id.* at 107.
138. *Id.* at 108.
139. *Id.* at 35. There were, however, minor fluctuations in the plea rate before and after adoption of omnibus. *Id.* at 43.
140. *Id.* at 43.
141. ABA STANDARDS 9.
142. R. NIMMER, THE OMNIBUS HEARING REPORT, AMERICAN BAR FOUNDATION REPORT 47 (Tent. draft 1973).
143. *Id.* at 44.
144. *Id.* at 43-44.
145. *Id.* at 103.
146. *Id.* at 115.
147. *Id.* at 115.
148. *Id.* at 106.

concluded to have been a failure.[149] The inauspicious debut of omnibus in California, however, has been ascribed to deficiencies inherent within the Southern District, and not the omnibus program itself. For example, the lack of a sufficient number of courtrooms, a tendency within the district to grant continuances and a 25 percent increase in the annual criminal case load subsequent to the adoption of omnibus all combined to defeat the program.[150] The primary disappointment, however, was the eventual lack of judicial interest displayed by replacements in the judiciary within the district after introduction of the program.[151] Although the initial impact of omnibus within the Southern District was nonproductive, the original program has been reintroduced within the system and early reports indicate a more successful implementation.[152]

The Western District of Texas Experience

The experimental use of the omnibus procedure in the Federal District Courts for the Western District of Texas is indicative of the possible benefits of the program. In 1967 the district had a smaller criminal case load than the California courts,[153] there was minimal plea negotiation,[154] and guilty pleas to reduced charges constituted less than 5 percent of all guilty pleas.[155] Furthermore, in contrast to the California procedure, continuances were rare in Texas.[156]

The Western District of Texas initially adopted the omnibus method promulgated by the A.B.A.,[157] and full disclosure was rapidly established as a routine standard.[158] This was due to judicial pressure placed upon the participating counsel to cooperate in complete discovery,[159] and to severe reduction of the time-consuming written motion practice.[160] Direct judicial pressure on counsel encouraged timely compliance with the omnibus proce-

149. *Id.* at 42.
150. *Id.* at 56-57.
151. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 156 (1973). The Committee determined that "the San Diego [Southern District] failure was not due to the program itself, but to a lack of concerted and interested leadership." *Id.* at 156. *See also* Letter from Chief Judge Adrian A. Spears to Raymond T. Nimmer, August 6, 1973, stating that "in order for omnibus to work effectively it must be utilized by people who understand it and want it to succeed."
152. R. NIMMER, THE OMNIBUS HEARING FINAL REPORT, AMERICAN BAR FOUNDATION REPORT 4, n.22 (Tent. draft 1973).
153. *Id.* at 63-64.
154. *Id.* at 64.
155. *Id.* at 64.
156. *Id.* at 66.
157. *Id.* at 67.
158. *Id.* at 63.
159. *Id.* at 66-68.
160. *Id.* at 68.

dure,[161] and prevailed over a reluctance by counsel to engage in thorough discovery.[162] The effect of full disclosure within the Western District revealed no significant impact on the prosecution's ability to obtain convictions,[163] and this discovery standard remained throughout the experimental period as the most successful element of omnibus application.[164]

There was 90 percent counsel participation within the district,[165] due to incentives such as the firm commitment of the judicial administration[166] and the promise of a reduction in the number of written motions and briefs filed per decided issue.[167] Written motions and briefs were required by the courts only in cases where discussion at the omnibus hearing failed to adequately disclose the basis of a motion and the nature of the response,[168] or where new and unusual questions of law were presented.[169]

Early in the experimental period, there was an increase in court time and in delays in the disposition of criminal cases,[170] due to general inexperience with the program.[171] For example, the estimated time per case in heroin importation cases rose from a pre-omnibus time of 32.4 minutes in court to an average 66.9 minutes in court,[172] and similar results were noted in other types of cases.[173] Yet a dramatic decrease resulted after the court and counsel became familiar with the program,[174] and in those cases handled by experienced, retained counsel there was either a reduction or no alteration in mean elapsed time.[175] There was a continued increase in court time,

161. *Id.* at 71-72.
162. *Id.* at 72. The courts, however, did not order mandatory disclosure in cases where an informant had led to the arrest of the defendant, thereby giving the prosecution a limited right of concealment in certain cases. *Id.* at 72.
163. *Id.* at 70.
164. *Id.* at 67.
165. *Id.* at 67. This percentile is limited to those cases in which defendants pleaded not guilty at arraignment. Voluntary disclosure, however, occurred in most cases. *Id.* at 67.
166. *Id.* at 67.
167. *Id.* at 68.
168. *Id.* at 77.
169. *Id.* at 79.
170. *Id.* at 80 (Figure 2).
171. *Id.* at 86.
172. *Id.* at 81 (Table 10).
173. *Id.* at 81. Data also displayed an increase in time required for disposition in mail theft cases (from 25.9 estimated minutes in court prior to omnibus to an estimated 51.5 minutes in court during omnibus); auto theft cases (from 36.3 estimated minutes in court prior to omnibus to an estimated 47.4 minutes in court during omnibus); and minor theft cases (from 24.6 estimated minutes in court prior to omnibus to an estimated 53.0 minutes in court during omnibus). *Id.* at 81 (Table 10).
174. *Id.* at 83. Omnibus obviated the necessity for other ancillary hearings for these attorneys and eliminated, pursuant to the full discussion of the case during the hearing, the necessity for filing additional motions requesting other hearings. *Id.* at 85.
175. *Id.* at 89.

however, in cases tried by inexperienced, appointed attorneys.[176] This was partially imputable to a preexisting standard in the district by which these cases were disposed of by guilty pleas, whereas under omnibus the pleas were deferred until completion of full discovery.[177]

In an attempt to remedy these early impediments, the administration for the district modified the omnibus procedure in 1970, placing the informal conference within an interval between indictment and arraignment.[178] This procedural modification, coupled with additional experience with omnibus, eliminated the necessity for a formal omnibus hearing in most cases, and produced marked ramifications.[179] There was a 30 percent increase in guilty plea rates,[180] and in those cases where there was no guilty plea, the formal hearing was reduced in time from one hour to 20 minutes.[181] Other ameliorating effects included a reduction in mean elapsed time from indictment to final disposition,[182] and the requirement of written briefs from both sides in only 35 percent of the cases using omnibus.[183] Delays resulting from a lack of preparation on the part of counsel were also eliminated,[184] and there was a severe decrease in the number of cases in which the formal omnibus hearing was requested.[185]

The bar's experience with omnibus transformed the process from one involving considerable in-court monitoring, to a system of cooperative informal conferences between counsel.[186] Ultimately, the formal hearing became an infrequent and unnecessary procedure, which the court sometimes conducted prior to arraignment.[187] The overall benefits within the Texas district included an increase in the guilty plea rate, a decrease in the necessity for written motions and briefs, and the establishment of full and open disclosure as a routine standard. Consequently, the Western District experience establishes a demonstrable correlation between the application of the omnibus program and the expeditious administration of the criminal case load, as it

176. *Id.* at 151.
177. *Id.* at 90. The inexperienced attorneys were selected by a rotation procedure implemented within the district, and appeared in fewer than four criminal cases over an 8 year period, and then only as appointed counsel. Therefore these attorneys not only lacked experience with criminal proceedings generally, but also with federal criminal cases. *Id.* at 86-87.
178. *Id.* at 116.
179. *Id.* at 118-19.
180. *Id.* at 118.
181. *Id.* at 118.
182. *Id.* at 125.
183. *Id.* at 124. In 55 percent of the cases utilizing the omnibus hearing, no written briefs were filed. In another 10 percent of these cases a written brief was required by the court from only one side of the issue. *Id.* at 124.
184. *Id.* at 66.
185. *Id.* at 119-20.
186. *Id.* at 120.
187. *Id.* at 116.

has been determined that omnibus "performed at a level approximating maximum feasible achievement" within the Western District of Texas.[188]

The concurrent experiments conducted within the Federal District Courts for the Southern District of California and the Western District of Texas have produced contrasting results which may primarily be attributed to the degree of judicial interest in each district coupled with the adherence within the legal community to the spirit of the program. While there were problems intrinsic to the California district which combined to reduce the effectiveness of omnibus,[189] the Texas district was ideal in which to implement the practice.[190] It may be concluded that omnibus, although no longer a revolutionary standard, is still in its infancy, and only through continuous use, experimentation and advocacy will it achieve the goals predicted by the American Bar Association.

CONCLUSION

The hesitancy of members of the judiciary to adopt the omnibus proceeding may be attributed in some degree to a lack of discernment concerning the benefits of the program, while others may view it as a menancing threat to their anachronistic techniques. It is essential to the successful implementation of omnibus that it receive the full support of the judiciary and the counsel within each district;[191] lack of such support will cause the program to fail.[192]

---

188. *Id.* at 99. Omnibus is still regularly practiced within the Western District. *See* PLAN OF THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF TEXAS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES, Rule 6(f) (1973), stating:

> The omnibus procedure contemplated by the American Bar Association Standards for Criminal Justice relating to discovery and procedure before trial shall be utilized in every division of this district through arraignment, and thereafter, in the discretion of the Court, to the fullest extent practicable.

189. R. NIMMER, THE OMNIBUS HEARING FINAL REPORT, AMERICAN BAR FOUNDATION REPORT 61 (Tent. draft 1973). During the experiment the Southern District was heavily burdened with in excess of 1400 criminal cases annually. Guilty pleas were the predominate disposition due to the plea bargaining standard, and therefore the guilty plea maintained a consistently low rate before and after adoption of omnibus. *Id.* at 36. The court lacked sufficient resources to even try most of the cases proceeding beyond omnibus. *Id.* at 59-60. Another problem in the district during the omnibus experiment was the replacement of highly committed judges with arbiters who refused to take effective steps to enforce omnibus. *Id.* at 111. However, the Southern District experience was not a total failure, as open disclosure and an increased degree of fairness were secured within the district. *Id.* at 61.

190. *Id.* at 99. In the Western District of Texas there was minimal plea negotiation, and the judicial process was concentrated on the disposition of issues of law and fact. Judicial authority was centered in a judge highly committed to the program, and there was a caseload sufficient to allow detailed attention by the court in each case. *Id.* at 99.

191. THE SELECT COMM. ON CRIME, STREET CRIME: REDUCTION THROUGH POSITIVE CRIMINAL JUSTICE RESPONSES, H.R. No. 358, 93d Cong., 1st Sess. 156 (1973).

192. *Id.* at 156.

Several states have adopted procedures similar to omnibus,[193] and all should be encouraged to study the benefits of the program. Most states adhere to the *Brady* and *Jencks* standards, thus struggling with dilemmas comparable to those confronting the federal courts.[194] Omnibus could be enacted by appropriate legislation, leaving those modifications necessarily inherent to the individual state procedures within the realm of the state courts.

Omnibus is not a panacea for all of the maladies presently plaguing the federal district court system. It is merely a conduit alleviating postconviction allegations of lack of discovery and deprivation of speedy trial, while reducing many of the procedural burdens congesting the district courts. Acceptance of omnibus will allow the federal district court system to provide a more flexible and viable forum for the administration of justice. It is therefore urged that the omnibus proceeding be adopted in order to increase efficiency and improve the competency of the federal district court system.

---

193. N.Y. CRIM. P. LAW § 210.20 (McKinney 1971) providing for an all-inclusive omnibus proceeding to seeek dismissal of an indictment; WASH. PROPOSED R. CRIM. P. § 4.5(a) (1971) providing that upon a plea of not guilty by the defendant, "the court *shall* set a time for an omnibus hearing" (emphasis added). Thus, the Washington standard differs in that omnibus is mandatory. Other states have initiated pretrial proceedings which are similar to omnibus, although more limited in scope. *See* CAL. PENAL CODE ANN. § 1538.5 (Deering 1971) providing for special pretrial hearings to determine the admissibility of evidence; TEX. CODE CRIM. P. ANN. art. 28.01 (Supp. 1972) allowing a pretrial hearing to consider various specified motions and to determine discovery issues; State v. Tahash, 141 N.W.2d 3, 6 (Minn. 1965) describing a pretrial hearing initiated to determine the admissibility of the evidence. The prosecution is required to open its files to the defense upon request. State v. Tahash, 141 N.W.2d 3, 13-14; *accord*, State v. Davis, 157 N.W.2d 907, 912-13 (Iowa 1968) (dissenting opinion).

194. Many state court decisions have involved confrontation with the *Brady* doctrine. *See generally* State v. Maloney, 464 P.2d 793, 796 (Ariz. 1970), *cert. denied*, 400 U.S. 841 (1970); Smith v. Urban, 434 S.W.2d 283, 285 (Ark. 1968); People v. Brawley, 82 Cal. Rptr. 161, 172 (1969), *cert. denied*, 400 U.S. 993 (1971); Lee v. People, 460 P.2d 796, 799 (Colo. 1969); Ferguson v. Smazer, 196 A.2d 432, 436 (Conn. 1963); Mears v. State, 232 So. 2d 749, 751 (Fla. Ct. App. 1970); Daniel v. State, 163 S.E.2d 863, 865 (Ga. Ct. App. 1968), *cert. denied*, 394 U.S. 919 (1969); State v. Kunz, 250 A.2d 895, 899 (N.J. 1969); State v. Connall, 475 P.2d 582, 585 (Ore. 1970); Lewis v. Court, 260 A.2d 184, 187 (Pa. 1969); Wallace v. State, 458 S.W.2d 67, 70-71 (Tex. Crim. App. 1970); State v. Davis, 438 P.2d 185, 190 (Wash. 1968); Britton v. State, 170 N.W.2d 785, 789 (Wis. 1969). The state courts also have to contend with application of the *Jencks* standard. *See generally* Strange v. State, 197 So. 2d 437, 441 (Ala. Ct. App. 1966); State v. Superior Court, 390 P.2d 109, 113 (Ariz. 1964); State v. Cocheo, 190 A.2d 916, 917 (Conn. Ct. App. 1963); Lentini v. State, 231 So. 2d 275, 276 (Fla. Ct. App. 1970); People v. Sumner, 252 N.E.2d 534, 538 (Ill. 1969); State v. Hill, 394 P.2d 106, 112 (Kan. 1964) (dissenting opinion); Veney v. State, 246 A.2d 608, 612 (Md. Ct. App. 1968), *cert. denied*, 394 U.S. 948 (1969); Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968), *cert. denied*, 395 U.S. 965 (1969); State v. Robinson, 377 P.2d 248, 251 (Wash. 1962), *cert. denied*, 375 U.S. 846 (1963).