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Jon R. Rolefson

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Discovery by the Prosecution in Criminal Cases: *Prudhomme* Reconsidered

JON R. ROLEFSON*

On April 1, 1970, the California Supreme Court dealt a stunning blow to the prosecution of criminal cases when it rendered its decision in *Prudhomme v. Superior Court*.¹ In an opinion authored by Justice Burke, the court there held that the prosecution in a criminal case is prohibited from obtaining information from the defense when "disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief."² The announcement of this rule marked a dramatic turnabout in the development of an important aspect of the law of criminal discovery in California. The result has been that, while the scope of permissible discovery by the defense has been expanding by leaps and bounds, the establishment of definitive and equitable guidelines for prosecution discovery has been effectively

* The author is a member of the California State Bar; Deputy District Attorney; Alameda County District Attorney; received a B.A. from the University of California Berkley (1970), and a J.D. from Hastings College of Law (1973); Thurston Honor Society; Order of the Coif upon graduation.

1. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

2. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

stymied. In order to appreciate the impact that *Prudhomme* has had and the problems it has created, the case must be reviewed within the context of the development of the law relative to criminal discovery both before and after it was decided.

Criminal Discovery Before Prudhomme:

At common law a defendant in a criminal case could not compel discovery of evidence in the possession of the prosecution.³ The rationale for this rule was said to be that the defendant might otherwise be more able to fabricate a defense to meet the state's case, and would thereby gain an undue advantage.⁴ This attitude persisted in California, where a comprehensive statutory scheme existed for discovery in civil cases,⁵ though virtually none was available in criminal cases.⁶

People v. Riser,⁷ decided in 1956, was the first California case to deal squarely with this rule. There, following cross-examination of two prosecution witnesses during trial, the defense issued a subpoena duces tecum directing the sheriff to produce their prior written statements for possible impeachment. The prosecution successfully moved for an order vacating the subpoena. In holding that the trial court's order was erroneous, the California Supreme Court reasoned that the rationale behind the common law rule had no application to discovery by the defense *during* trial.⁸ The court then went on to lay the groundwork for liberalization of criminal discovery by the defense stating:

Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution

3. See 6 WIGMORE, EVIDENCE 475-76 (3rd ed. 1940); *People v. Riser*, 47 Cal. 2d 566, 585, 305 P.2d 1, 13 (1956).

4. *Id.*

5. CAL. CODE OF CIV. PRO. § 2016 *et seq.* (West Supp. 1976).

6. "[I]t has long been held that civil discovery procedure has no relevance to criminal prosecutions." *Pitchess v. Superior Court*, 11 Cal. 3d 531, 536, 522 P.2d 305, 308, 113 Cal. Rptr. 897, 900 (1974).

The only exception was found in California Penal Code § 925, which requires that a defendant be provided with a transcript of grand jury proceedings. However, effective January 1, 1976, §§ 859 and 1430 require the prosecuting attorney to make available to a defendant copies of "police, arrest and crime reports".

7. 47 Cal. 2d 566, 305 P.2d 1 (1956).

8. *Id.* at 585, 305 P.2d at 13.

and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.⁹

The stage having been set in *Riser*, the Supreme Court proceeded six months later in *Powell v. Superior Court*¹⁰ to tackle the question whether a defendant may compel discovery *before* trial. *Powell* involved a pretrial motion by the defendant for an order authorizing him to inspect written and tape recorded statements he had made to the police following his arrest. Noting the absence of enabling legislation, *Powell* held that such an application is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice.¹¹ In directing the trial court to grant defendant's motion, the court observed that to deny pretrial discovery "partakes of the nature of a game, rather than judicial procedure."¹² Moreover, it

would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike.¹³

In the wake of *Riser* and *Powell* came a rush of California cases which undertook to define the standards¹⁴ and expand the scope¹⁵ of criminal discovery. During the five-year period immediately following *Powell*, however, these cases dealt only with defense requests for discovery.

In 1962, the California Supreme Court considered for the first

9. *Id.* at 586, 305 P.2d at 13 (citations omitted).

10. 48 Cal. 2d 704, 312 P.2d 698 (1957).

11. *Id.* at 708, 312 P.2d at 700.

12. *Id.* at 709, 312 P.2d at 701. (Quoting from *State v. Tippett*, 317 Mo. 319, 296 S.W. 132, 135 [1927]).

13. *Id.* at 707, 312 P.2d at 699-700.

14. *E.g.*, *People v. Terry*, 57 Cal. 2d 538, 370 P.2d 985, 21 Cal. Rptr. 185 (1962); *People v. Estrada*, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); *People v. Cooper*, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960); *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959); *People v. Chapman*, 53 Cal. 2d 95, 338 P.2d 428 (1959); *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); *Tupper v. Superior Court*, 51 Cal. 2d 263, 331 P.2d 977 (1958).

15. *E.g.*, *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959) (tape recordings made by an undercover police officer during the alleged offense); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958) (taped statement of the victim played to the defendant at the time he was interrogated by police); *Norton v. Superior Court*, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (names and addresses of eyewitnesses to the offense and photographs of defendant shown to them for identification); *Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (1957) (reports of laboratory analysis of physical evidence).

time the question of pretrial discovery by the prosecution. In *Jones v. Superior Court*,¹⁶ the defendant was charged with rape. His defense was that he was impotent as the result of injuries suffered years earlier. Following a successful pretrial motion by the prosecution for discovery relating to that defense, the defendant petitioned for a writ of prohibition restraining enforcement of the trial court's order.

The Supreme Court upheld the order insofar as it required disclosure of witnesses defendant intended to call and reports and X-rays he intended to introduce in evidence at trial. In the opinion he wrote for the majority, Justice Traynor initially noted that: "[d]iscovery is designed to ascertain the truth . . . in criminal as well as in civil cases."¹⁷ He then pointed out that the considerations leading the *Riser* court to order defense discovery are equally applicable in the case of prosecution discovery:

. . . Similarly, absent the privilege against self-crimination [*sic*] or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case. Nor is it any less appropriate in one case than in the other for the courts to develop the rules governing discovery in the absence of express legislation authorizing such discovery.

. . .

. . . That procedure should not be a one-way street.¹⁸

In response to the contention that such an order violates both the privilege against self-incrimination¹⁹ and the attorney client privilege,²⁰ Justice Traynor observed that a number of states have statutes providing for discovery in criminal cases of the identity of witnesses who are to be called to testify in connection with a particular defense, such as alibi, which had been uniformly upheld.²¹ As his opinion points out:

. . . The identity of the defense witnesses and the existence of any reports or x-rays the defense offers in evidence will necessarily be revealed at the trial. The witnesses will be subject to cross-examination, and the reports and X-rays subject to study and challenge. Learning the identity of the defense witnesses and of such reports and X-rays in advance merely enables the prosecution to perform its function at the trial more effectively. . . .

16. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

17. *Id.* at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880.

18. *Id.* at 59-60, 372 P.2d at 920-21, 22 Cal. Rptr. 881.

19. CAL. CONST., art. I, § 15 (formerly CAL. CONST., art. I, § 13); CAL. PENAL CODE § 688; CAL. EVID. CODE §§ 930, 940 (West 1970) (formerly CAL. PENAL CODE § 1323.5).

The fifth amendment to the United States Constitution was not held applicable to the states until after the *Jones* decision, in *Malloy v. Hogan*, 378 U.S. 1 (1964).

20. CAL. EVID. CODE § 954 (West 1970) (formerly CAL. CODE OF CIV. PRO. § 1881, subd. 2).

21. 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882 (cases cited).

...
 Insofar as the trial court's order herein requires petitioner to reveal the names and addresses of witnesses he intends to call and to produce reports and X-rays he intends to introduce in evidence to support his defense of impotence, it does not violate the privilege against self-incrimination. Nor to this extent does it violate the attorney-client privilege. It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable. . . .²²

Following *Jones*, and upon its authority, a number of court of appeal decisions upheld discovery orders in favor of the prosecution in criminal cases. These cases all dealt with so-called "affirmative defenses," reflecting a widespread interpretation of *Jones* as being so limited. In *People v. Dugas*,²³ a pretrial order for disclosure of witnesses defendant intended to call "in any affirmative defense" was held proper.²⁴ In *McGuire v. Superior Court*,²⁵ the discovery order related to the "affirmative defense of diminished capacity."

But in 1969, the Supreme Court, in *People v. Pike*,²⁶ upheld an order requiring the defendant to disclose names, addresses and expected testimony of defense witnesses, without regard for the nature of the defense. This led one appellate court, in *Ruiz v. Superior Court*,²⁷ to comment: "In a recent decision (*People v. Pike*, . . .) our Supreme Court makes clear that it does not view *Jones* as being limited to affirmative defenses."²⁸ Accordingly, *Ruiz* held proper a discovery order insofar as it directed defendant to reveal "the names and addresses of witnesses he intends to call, and written material he intends to offer in evidence . . ."²⁹

The foregoing outline demonstrates that discovery in criminal cases was judicially created, not under statutory or constitutional compulsion,³⁰ but rather to promote the orderly and efficient

22. *Id.* at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

23. 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

24. In compliance with the order, the defendant in *Dugas* disclosed the name of an alibi witness.

25. 274 Cal. App. 2d 583, 79 Cal. Rptr. 155 (1969).

26. 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969).

27. 275 Cal. App. 2d 633, 80 Cal. Rptr. 523 (1969).

28. *Id.* at 634, 80 Cal. Rptr. at 524.

29. *Id.* at 636, 80 Cal. Rptr. at 524. The Supreme Court denied *Ruiz*' application for a hearing on October 22, 1969.

30. "Pretrial discovery in favor of defendants . . . is not required by due process." *Jones v. Superior Court*, 58 Cal. 2d 56, 59, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962). But *cf.* *Brady v. Maryland*, 373 U.S. 83 (1963). *People v. Ruthford*,

ascertainment of the truth. Toward that end, there was no reason why the procedure should not be made equally available to the defense and the prosecution, limited only by statutory and constitutional protections. The resulting rules of discovery prior to *Prudhomme* may be generally stated as follows: subject to a proper showing,³¹ a defendant could obtain before trial information in possession of the state, whether or not the prosecution intended to introduce it at trial; the prosecution could obtain information from the defendant which he intended to introduce at trial.

The Prudhomme Decision

In *Prudhomme*, the defendant petitioned for a writ of prohibition against enforcement of a pretrial order that she disclose to the prosecution the names, addresses and expected testimony of the witnesses she intended to call at trial. The supreme court granted the writ.

In his majority opinion, Justice Burke first had to deal with the *Jones* and *Pike* decisions. He did so in brief fashion, merely declaring that neither case was intended to stand for the broad proposition that *all* defense witnesses were subject to pretrial disclosure.³² After paying lip service to the judicial considerations underlying the *Jones* decision,³³ he next observed that:

... certain significant developments in the law since *Jones* was decided in 1962 caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such an extension could have upon the accused's rights and privileges, and especially his fundamental right not to be compelled to be a witness against himself.³⁴

These "significant developments" were:

(1) The United States Supreme Court had been placing increasing emphasis on the role played by the fifth amendment privilege

14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1975); *In re Ferguson*, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971).

31. "Although the defendant does not have to show, and indeed may be unable to show, that the evidence which he seeks to have produced would be admissible at the trial [citations] he does have to show some better cause for inspection than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." *People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960).

32. 2 Cal. 3d at 323, 466 P.2d at 675, 85 Cal. Rptr. at 130-31 (1970).

33. "We readily acknowledge that pretrial disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective pretrial preparation." *Id.* at 323, 466 P.2d at 675, 85 Cal. Rptr. at 131.

34. *Id.* (Footnote omitted).

against self-incrimination,³⁵ which had been held applicable to the states.³⁶

(2) Pursuant to its rulemaking power, the United States Supreme Court had promulgated in 1966 the Federal Rules of Criminal Procedure, which make limited provision for disclosure of physical evidence the defense intends to introduce at trial, but none for disclosure of defense witnesses.³⁷

(3) The constitutionality of the state "alibi statutes" relied upon in *Jones* was doubtful. A federal district court in *Cantillion v. Superior Court*³⁸ had recently granted habeas corpus to annul a discovery order requiring a defendant to disclose alibi witnesses he intended to call. Furthermore, the United States Supreme Court had granted certiorari in *Williams v. Florida*,³⁹ a case which had upheld Florida's alibi statute against fifth amendment attack.

Finally, Justice Burke quoted from the recent language of *People v. Schader*:⁴⁰

. . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth. [Citations] The People must 'shoulder the entire load' of their burden of proof in their case in chief, without assistance either from the defendant's silence or from his compelled testimony.

He reasoned that analysis of *Jones* in light of the "policy considerations" discussed in *Schader* makes it apparent that the availability of discovery to the prosecution should not depend upon whether the information sought relates to an "affirmative defense," or upon whether the defendant intends to introduce it at trial, but rather depends upon "whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief." This rule, he said, "forbids compelled disclosures

35. U.S. CONST. Amend. V., *see, e.g.*: *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965).

36. *Malloy v. Hogan*, *supra*, 378 U.S. 1 (1964); U.S. CONST., Amend. V.

37. *See* FED. R. CRIM. P. 16 (c). Justice Burke apparently viewed this as an expression of the United States Supreme Court's position on the extent to which the privilege against self-incrimination limits prosecution discovery. However, he noted that even the limited prosecution discovery provided for in the Federal Rules is subject to constitutional question.

38. 305 F. Supp. 304 (C.D. Cal. 1969).

39. 224 So. 2d 406 (1969), *aff'd* 399 U.S. 78 (1970).

40. 71 Cal. 2d 761, 770, 457 P.2d 841, 845-46, 80 Cal. Rptr. 1, 6 (1969).

which could serve as a 'link in a chain' of evidence tending to establish guilt. . . ."⁴¹

Having thus created confusion, Justice Burke proceeded into chaos when he interjected: "We do not intend to suggest that the prosecution should be barred from *any* discovery in this, or any other, case."⁴² With that closing thought, he left the lower California courts to struggle with the riddle of *Prudhomme*: What, if anything, is discoverable by the prosecution?

Prosecution Discovery After Prudhomme

People v. Griffin,⁴³ reported shortly after *Prudhomme*, considered the question of discovery by the prosecution. There, the defendant was charged with murder. His defense was that of diminished capacity due to intoxication.

Before trial and upon the prosecution's motion, the court ordered defendant to disclose the names, addresses and statements of any witnesses he intended to call in support of "his affirmative defenses." Without any underlying discussion, the court of appeal declared the order void, citing *Prudhomme*. In doing so, the court appeared to interpret the Supreme Court's decision as establishing a flat rule of prohibition against *any* pretrial prosecution discovery. The same court later had the opportunity to explain its holding in *Griffin v. Superior Court*.⁴⁴ However, the court continued to reflect the confusion engendered by the language of *Prudhomme* when it stated:

Thus the [prosecution] would have been entitled to the names and addresses of witnesses who meet the criteria of *Prudhomme*, assuming *any do*, if their identity had been ascertained upon proper notice and after a hearing at which the defendant was given the right to show that the disclosure of the information could incriminate him.⁴⁵

The next reported case dealing with prosecution discovery, *People v. Bais*,⁴⁶ demonstrated how unsatisfactory guidelines

41. 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133. As examples, Justice Burke noted situations where disclosure of a defense witness could provide the prosecution with its sole eyewitness to the offense.

42. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134. Significantly, *Prudhomme* did not overrule *Jones*. It did, however, expressly disapprove *Pike*, *Ruiz*, *McGuire* and *Dugas* to the extent that they were inconsistent with the views expressed in *Prudhomme*. (*Id.*, n.11).

43. 18 Cal. App. 3d 864, 96 Cal. Rptr. 218 (1971).

44. 26 Cal. App. 3d 672, 103 Cal. Rptr. 379 (1972). Following reversal of the defendant's conviction in *People v. Griffin*, the case was remanded to the trial court. Before retrial, defendant moved for an order prohibiting the prosecution from calling any witnesses whose identities had been disclosed pursuant to the "void" discovery order in the first trial. When his motion was denied, he petitioned the Court of Appeal for relief by way of writ.

45. *Id.* at 686, 103 Cal. Rptr. at 387 (Emphasis added.).

46. 31 Cal. App. 3d 633, 107 Cal. Rptr. 519 (1973).

produce unsatisfactory results. In *Bais*, the defendant was charged with robbery. After the prosecution had rested, the defense called four alibi witnesses. Before cross-examining the second alibi witness called, the prosecutor moved to discover any written statements in possession of the defense made by each of the four witnesses.⁴⁷ Over objection, the trial court ordered defense counsel to deliver to the prosecutor any statements made by the two alibi witnesses already called, and thereafter the statements of any other alibi witnesses as and when they were called. The defense complied with the order but, following conviction, appealed.

The court of appeal reversed, holding that the discovery order was improper under *Prudhomme*. It noted that no steps were taken by the trial court to assure that the contents of the statements could not possibly "lighten the prosecution's burden of proving its case in chief." In response to the argument that the prosecution had already rested, the court pointed out that it could have been permitted to reopen its "case in chief,"⁴⁸ or could have commenced a new "case in chief" in the event of a retrial.⁴⁹ But the court did not stop there in expanding its interpretation of *Prudhomme*. Astonishingly, it attributed the broadest conceivable scope to the decision when it declared:

It follows that prosecution discovery must be denied, regardless of when requested, if the trial court determines that the matters to be disclosed will conceivably "lighten" the "burden" which the prosecution bears in bringing about a conviction of the accused. "Negating an alibi defense" may very well produce this result, irrespective of the fact that it would be done through the medium of rebuttal evidence. . . .⁵⁰

The court having "picked up the ball" of *Prudhomme* and

47. The right of a criminal defendant to discover written statements of prosecution witnesses who testify has long been recognized. No foundational showing is required, due to the inherent value of such statements for use in possible impeachment. (See, e.g., *People v. Estrada*, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 [1960]. It goes without saying that defense witnesses' statements may be equally valuable to the prosecution.

48. CAL. PENAL CODE § 1093(4) (West 1970).

49. This same reasoning would prevent a pitcher from throwing his surprise pitch in the seventh game of the World Series, because the other teams would be ready for it next season.

50. 31 Cal. App. 3d at 672, 107 Cal. Rptr. at 525-26. (Emphasis by the court.) Curiously, the court injected by way of footnote the *non-sequitur* that, by holding such discovery unconstitutional in absence of statutory authorization, it did not mean to suggest that it would be improper if ordered in compliance with a constitutional statute.

literally run away with it, thus set the scene for a conflict between the courts of appeal as they attempted to apply the new rule. Such a conflict arose quickly.

In *People v. Chavez*,⁵¹ the prosecutor, during his cross-examination of each of five defense witnesses had been allowed to discover statements made by the witnesses to a Public Defender investigator.⁵² Thereafter, the prosecutor called the investigator in rebuttal to impeach three of those witnesses with the statements thus discovered. The appellate court held the orders granting prosecution discovery to have been error, but further held that the error was harmless under the particular facts of the case. However, the rationale for this decision was in direct conflict with the language of *Bais*:

. . . [W]e perceive that under our adversary system in the conduct of trials the prosecutor would have been entitled to discover whether the statements contained any matter that would serve to impeach the witness's testimony at the trial. This conclusion necessarily follows because the witness by his appearance on the stand vouches for his testimony then given and thus subjects it to the proper scrutiny of cross-examination and its concomitant right to the presentation of available matter of impeachment in the ascertainment of the truth.

The procedural defect in the instant case was the trial court's failure to examine the statements in order to determine whether they contained any impeaching matter and if they did, to effectively separate such matter from other non-impeaching collateral matter which might be of assistance to the prosecution in proving its case and thus lighten its prosecutorial burden.⁵³

The next reported⁵⁴ decision by a court of appeal dealing with prosecution discovery was *People v. Ayers*.⁵⁵ In *Ayers*, at the close of the *People's* case, the prosecution moved to discover statements of any defense witnesses for possible use as impeachment. The trial court ordered defense counsel to deliver any such statements to the court, indicating they would be screened and only those portions having a bearing on credibility would be

51. 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973).

52. Statements made by independent witnesses to an investigator are not confidential communications between a client and his attorney. CAL. EVID. CODE § 952 (West 1970); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). Nor are they protected by the "work-product" privilege. CAL. CODE OF CIV. PRO. § 2016(b) (West 1970); see *Kadelbach v. Amaral*, 31 Cal. App. 3d 814, 107 Cal. Rptr. 720 (1973).

53. 33 Cal. App. 3d at 459, 109 Cal. Rptr. at 162-63.

54. *People v. Cox* (Crim. No. 22284) was decided by Division Five of the Second District Court of Appeal on June 27, 1974, and was originally reported in the official advance sheets at 40 Cal. App. 3d 259. In a lengthy discussion, the court there distinguished *Prudhomme* and *Bais* from *Chavez*, and adopted the rationale of the latter. However, on August 21, 1974, the Supreme Court directed that the opinion not be published in the official reports (CAL. RULES OF COURT 976(c)).

55. 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975).

turned over to the prosecution. The statement of one defense witness was disclosed pursuant to that order. On appeal, the discovery procedure was held proper,⁵⁶ the court noting that nothing turned over to the prosecution was "incriminatory."

While a few courts have appeared to be fashioning some workable (albeit restricted) guidelines for permissible prosecution discovery during trial, a general state of confusion has continued to prevail concerning the propriety and scope of pretrial discovery.⁵⁷ This is pointed out by the most recent decision on the subject, *Craig v. Superior Court*.⁵⁸ In that case, the defendant filed a pretrial motion for discovery of statements made to any inspector or attorney of the district attorney's office by any witness who would be called by the prosecution at trial.⁵⁹ The trial court granted the motion, but conditioned its order upon reciprocal disclosure to the prosecution of any statements made to defense representatives by those *same witnesses*.⁶⁰ On defendant's petition, the court of appeal issued a writ of mandate requiring the trial court to vacate its order for prosecution discovery.

However, *Craig* was decided by a divided court. The fact that separate opinions were filed by each of the three justices em-

56. The opinion cited neither *Bais* nor *Chavez*, but implicitly approved the procedure outlined in the latter case.

57. Also decided in 1975 was *Allen v. Superior Court*, 52 Cal. App. 3d 729 (hearing granted), which added a "new twist" to rules regarding compelled disclosure by the defense. There, the trial court ordered the prosecution and the defense to furnish the names of prospective witnesses before jury selection. The intent was to read the names to the prospective jurors to ascertain whether any of the witnesses were known by them. The order enjoined the prosecution from contacting any named defense witnesses until disclosure during trial by the defense in an opening statement or otherwise. On petition for writ of prohibition, the Court of Appeal held the order proper, stating that the remote possibility of the prosecution's burden being lightened thereby should yield to the necessity of securing a fair and impartial jury. However, the Supreme Court granted a hearing in the case on December 30, 1975. The Court of Appeal opinion is therefore not to be published in the official reports and is without effect. CAL. RULES OF COURT 976(d), 977.

58. 54 Cal. App. 3d 416, 126 Cal. Rptr. 565 (1976).

59. The fact the witnesses in question were those to be called at trial by the prosecution is not clearly reflected in the opinion. Review of the records of the Superior Court of Alameda County in *People v. Mario Craig* (No. 59464) shows this to be the case.

60. The Court of Appeal held it improper to impose a condition upon a defendant's otherwise-established right to discovery. 54 Cal. App. 3d at 420, 126 Cal. Rptr. at 566.

phasizes the confusion over the meaning and scope of *Prudhomme*. That each justice took a different approach in applying *Prudhomme* to the discovery order demonstrates its inadequacy.

In his opinion, Presiding Justice Molinari observed without further analysis that it did not clearly appear *on the face of the trial court's order or records* that the statement ordered to be produced could not possibly be incriminatory.⁶¹ He did not consider the order in the context of *the particular facts of the case*, however. In contrast, Justice Sims pointed out in his dissent that the order did not compel disclosure of any information that was not already available to the prosecution, since the witnesses had already been interviewed and could be reinterviewed. He reasoned, therefore, the order could not possibly lighten the prosecution's burden.⁶² But it is the concurring opinion of Justice Elkington which is most revealing:

. . . *Prudhomme*, although stating that in some situations discovery is available to the People, nevertheless appears to foreclose it in *all cases*; for it is the essential nature of the People's discovery that it will "lighten the prosecution's burden of proving its case in chief".⁶³

Considering himself thus "bound, but not gagged,"⁶⁴ Justice Elkington took the opportunity to criticize the Supreme Court's decision, stating that "reason, fairness and most of all, justice, impel a close inquiry into the constitutional propriety of *Prudhomme's* rule."⁶⁵ In an erudite analysis, he concluded "that *Prudhomme* states erroneously Fifth Amendment law and fails to follow the United States Supreme Court and [the California Supreme Court's] own previous decisions."⁶⁶

Justice Elkington having thus invited the Supreme Court to reconsider *Prudhomme*, the People petitioned for a hearing and requested that it do so. The question presented, therefore, was whether the Supreme Court should retract the rule announced in *Prudhomme*. In March, 1976, the California Supreme Court de-

61. Presiding Justice Molinari was apparently influenced to take this approach by the following passage in *Prudhomme*: "Applying the foregoing test to the discovery order in the instant case, neither the order nor the record below enables us to say that it clearly appears that disclosure to the prosecution . . . cannot possibly tend to incriminate her." 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

62. Justice Sims' approach finds support in *Prudhomme's* declaration that a trial judge may order prosecution discovery if "[U]nder the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate defendant." *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

63. 54 Cal. App. 3d at 425, 126 Cal. Rptr. at 569.

64. *Id.*, citing 6 WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 665 at 4579 (2nd ed. 1971).

65. *Id.* at 426, 126 Cal. Rptr. at 570.

66. *Id.* at 424, 126 Cal. Rptr. at 569.

nied a hearing in *Craig v. Superior Court*.⁶⁷

Prudhomme Reconsidered

The inquiry into the propriety of the *Prudhomme* rule must necessarily begin with a consideration of the "significant developments" in the law upon which the court placed such great emphasis. With the benefit of hindsight, it is obvious that those developments did not proceed in the direction anticipated by the court.

Less than three months after *Prudhomme*, the United States Supreme Court delivered its decision in *Williams v. Florida*⁶⁸ upholding Florida's "notice-of-alibi statute"⁶⁹ against constitutional attack. That statute requires a defendant who intends to rely upon an alibi defense to give pretrial notice to the prosecution, together with the names and addresses of intended alibi witnesses and information as to the place where he claims to have been. Thereafter, the prosecution is required to disclose any witnesses it intends to offer in rebuttal to that defense. The threatened sanction for failure to comply with the rule is exclusion of such evidence at trial.

In his opinion for the majority in *Williams*,⁷⁰ Justice White stated that "the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses."⁷¹ The rationale underlying this decision was remarkably similar to that expressed by Justice Traynor in *Jones v. Superior Court, supra*. Observing that such discovery "is designed to enhance the search for truth by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence,"⁷² Justice White reminded that "[t]he adversary system of trial . . . is not yet a poker game in which players enjoy an

67. 54 Cal. App. 3d 416, 126 Cal. Rptr. 565, *hearing den.* C. N. No. 37300 (Ct. of App., 1st Dist., Div. 1, March 10, 1976).

68. 399 U.S. 78 (1970).

69. FLA. R. CRIM. P. 3.200 (West 1975).

70. The Court was divided 6-2 on this issue. Justice Blackmun did not participate. Interestingly, the two dissenting justices—Black and Douglas—are no longer members of the Court.

71. 399 U.S. at 83.

72. *Id.* at 82.

absolute right always to conceal their cards until played.”⁷³ In holding that such prosecution discovery does no offense to fifth amendment concepts, he stated:

At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case— in-chief before deciding whether or not to take the stand himself.⁷⁴

The decision of the United States Supreme Court in *Williams* had its effect on the only other case viewed by the *Prudhomme* court as casting doubt on the constitutionality of alibi statutes: *Cantillon v. Superior Court, supra*. In a per curiam decision dated June 7, 1971,⁷⁵ the United States Court of Appeals remanded the case to the district court for reconsideration in light of *Williams*.⁷⁶

In addition, *Williams* effectively disposed of the reliance in *Prudhomme* on the “apparent” restrictive federal attitude toward prosecution discovery reflected in the Federal Rules of Criminal Procedure.

More significant, however, is the fact that *Williams* and other United States Supreme Court decisions since *Prudhomme* do not place such “increasing emphasis on the role played by the fifth amendment” as to militate against prosecution discovery. The decision in *Harris v. New York*⁷⁷ pointed out the privilege against self-incrimination is not absolute, but must sometimes give way to the competing judicial interest in the search for truth. In that case, a statement taken from a defendant in violation of the rule announced in *Miranda v. Arizona*⁷⁸ was held admissible for the purpose of impeaching his conflicting testimony at trial. As the court declared: “The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense. . . .”⁷⁹ This rule has recently been reaffirmed in *Oregon v. Hass*.⁸⁰

73. *Id.*

74. *Id.* at 85.

75. *Cantillon v. Superior Court*, 442 F.2d 1338 (9th Cir. 1971).

76. No new decision has been published. Since the original proceeding was for habeas corpus relief from a contempt order arising out of discovery non-compliance, it was probably rendered moot with the passage of time.

77. 401 U.S. 222 (1971).

78. *Supra* n.35.

79. 401 U.S. at 226.

80. 420 U.S. 714 (1975).

In *Wardius v. Oregon*⁸¹ the United States Supreme Court did sustain a constitutional attack on prosecution discovery in a state proceeding, but it did so on due process,⁸² not fifth amendment, grounds. That decision involved an Oregon notice-of-alibi statute which, in contrast to the Florida rule, made no provision for reciprocal discovery by the defense.⁸³ Noting the fundamental unfairness of such a procedure, the court held “. . . in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street.”⁸⁴

The most recent pronouncement by the United States Supreme Court on the subject of prosecution discovery is found in *United States v. Nobles*.⁸⁵ There, the defendant was charged with bank robbery. When a defense investigator was called to the stand for the purpose of impeaching two prosecution witnesses with their prior inconsistent oral statements, the trial court ordered the investigator's reports of those statements be disclosed to the prosecutor. In his opinion for a unanimous court,⁸⁶ Justice Powell stated:

. . . “[T]he privilege [against self-incrimination] is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him.”

In this instance disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements allegedly made by third parties who were available as witnesses to both the prosecution and the defense. . . . The fact that these statements of third parties were elicited by a defense investigator on [defendant's] behalf does not convert them into [defendant's] personal communications. Requiring their production from the investigator therefore would not in any sense compel [defendant] to be a witness against himself or extort communications from him.

We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. . . .⁸⁷

These decisions of the United States Supreme Court indicate

81. 412 U.S. 470 (1973).

82. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law” U.S. Const., Amend XIV § 2.

83. ORE. REV. STAT. § 135.455 (formerly § 135.875) (1975).

84. 412 U.S. at 475.

85. 422 U.S. 25 (1975).

86. Justice Douglas did not participate.

87. 422 U.S. at 233-34 (footnote omitted).

that *Prudhomme* is not only without support from, but is also in conflict with, recent "significant developments" in federal constitutional law. Moreover, as Justice Elkington pointed out in *Craig v. Superior Court, supra*, *Prudhomme* fails to follow previously-established law.

As long ago as 1948, in *People v. Trujillo*,⁸⁸ the California Supreme Court held the state constitutional privilege against self-incrimination is not intended to protect a defendant against "any and every compulsion," but rather against "*testimonial compulsion*".⁸⁹ Similarly, the federal constitutional privilege has been held to protect an accused "only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial or communicative* nature . . ."⁹⁰ Compulsion which renders a defendant "the source of 'real or physical evidence' does not violate"⁹¹ the privilege, however.⁹² Thus, as the California Supreme Court stated in *People v. Ellis*:⁹³

It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of *any kind* from an individual in penal proceedings taken against him. [Fn. omitted.] *The privilege includes no such prohibition.*⁹⁴

People v. Schader, supra, upon which the court in *Prudhomme* placed substantial reliance, did not change existing law. That case involved a defendant who testified in his own behalf, and the issue presented was the permissible scope of his cross-examination. Preliminary to dealing with that issue, the court in *Schader* undertook a general review of pertinent, established constitutional doctrines. As it correctly stated, the prosecution must "shoulder the entire load" of its burden of proof "without assistance either from the defendant's *silence* or from his com-

88. 32 Cal. 2d 105, 194 P.2d 681 (1948).

89. *Id.* at 112, 194 P.2d at 685. Quoting 8 WIGMORE EVIDENCE § 2263, at 379 (1961).

90. *Schmerber v. California*, 384 U.S. 757 (1966) (emphasis added).

91. *Id.* at 764.

92. See *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplars); *United States v. Wade*, 388 U.S. 218 (1967) (appearance in line-up; utterance of words used in the crime); *Holt v. United States*, 218 U.S. 245 (1910) (wearing particular clothing); *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966) (uttering words for voice identification); *People v. Lopez*, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963) (assuming particular pose for identification purposes); *People v. Duroncelay*, 48 Cal. 2d 766, 312 P.2d 690 (1957) (blood sample); *People v. Zavala*, 239 Cal. App. 2d 732, 49 Cal. Rptr. 129 (1966) (nalline test for narcotics addiction); *People v. Smith*, 113 Cal. App. 2d 416, 248 P.2d 444 (1952) (handwriting exemplars); *People v. One 1941 Mercury Sedan*, 74 Cal. App. 2d 199, 168 P.2d 443 (1946) (physical examination). But cf. *Boyd v. United States*, 116 U.S. 616 (1885), which held that an accused may not be compelled to produce private papers in his possession.

93. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).

94. *Id.* at 534-35, 421 P.2d at 395, 55 Cal. Rptr. at 387 (emphasis added).

pelled *testimony*." (Emphasis added.) The *Schader* court did not purport to express a constitutional "policy" against *any* compelled disclosures by a defendant, for such a sweeping statement would have been beyond the scope of its decision and contrary to its own previous pronouncements. In *Prudhomme*, however, the court assigned significance to certain phrases taken out of context from *Schader*, and used them to extend the scope of the privilege beyond "testimonial or communicative" compulsion. The result was a rule which is unsupported by and indeed is contrary to legal precedent.

Applied literally, the *Prudhomme* rule would operate to afford a defendant protections that the Supreme Court could not have intended. For example, it would prohibit a court from compelling him to give handwriting, voice or fingerprint exemplars⁹⁵ for identification purposes, since they are clearly capable of incrimination. Similarly, a logical extension of the protection announced in *Prudhomme* would result in a requirement that the police obtain a fifth amendment waiver from an arrestee before seizing evidence or conducting a line-up.⁹⁶ The absurdity of these propositions simply points out that the Supreme Court has not only stretched the privilege against self-incrimination beyond its intended limits, but beyond the bounds of reason as well.

The appropriate remedy is not modification or clarification of *Prudhomme*. The confusion it has caused among the lower courts must be attributed not only to its overbreadth, but also to the fact that it cannot be reconciled with time-honored precepts. Moreover, the court's reliance on an anticipated trend in federal decisions has proved to have been misplaced. Rather than supporting *Prudhomme*, the "significant developments" in fifth amendment interpretation instead confirm that *Jones* reflects the correct application of the law to the area of criminal discovery. Additionally, *Prudhomme* conflicts with the very policy the court has relied upon in extending discovery rights to defendants:

but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict

95. See cases cited note 92 *supra*.

96. *Id.*

with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal.⁹⁷

Thus, perpetuation of the *Prudhomme* rule furthers no legitimate interest. As the same court recognized in *Radar v. Rogers*,⁹⁸ “ ‘When the reason of a rule ceases so should the rule itself.’ ” *Prudhomme* should be overruled.

Whether the Supreme Court *will* do so is an entirely different question. Recognizing the states retain the power to impose higher standards than required by the federal Constitution,⁹⁹ it has shown an increasing proclivity in recent years to rely upon state constitutional provisions as the basis for its decisions.¹⁰⁰ On some occasions it has used that authority to avoid the restrictions of a United States Supreme Court decision with which it did not agree.¹⁰¹

Recently, in *Reynolds v. Superior Court*,¹⁰² the court hinted by way of dicta that it is seriously considering the state constitution as an independent basis for the *Prudhomme* rule. The trial court in *Reynolds* had issued an order directing the defendant to give at least three days’ notice before calling any alibi witnesses, and to disclose the names, addresses and telephone numbers of all such witnesses. The order also required the prosecution to disclose to the defendant any evidence it might obtain which would tend to impeach those witnesses. The threatened sanction for noncompliance was exclusion of such evidence at trial.

On review, the Supreme Court noted that California does not

97. *Evans v. Superior Court*, 11 Cal. 3d 617, 622, 522 P.2d 681, 684, 114 Cal. Rptr. 121, 124 (1974); *In re Ferguson*, 5 Cal. 3d 525, 531, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971).

98. 49 Cal. 2d 243, 249, 317 P.2d 17, 21 (1957); *Quoting* CAL. CIV. CODE § 3510 (West 1970).

99. *See* *Cooper v. California*, 386 U.S. 58, 62 (1967).

100. *See, e.g.*, *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (cruel or unusual punishment); *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) *cert. denied*, 406 U.S. 958 (1972) (cruel or unusual punishment—death penalty); *People v. Compton*, 6 Cal. 3d 55, 490 P.2d 537, 98 Cal. Rptr. 217 (1971) (double jeopardy); *Curry v. Superior Court*, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970) (double jeopardy); *In re Lopez*, 2 Cal. 3d 141, 465 P.2d 257, 84 Cal. Rptr. 361 (1970) (right to counsel in misdemeanor cases).

101. *See, e.g.*, *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr., 360 (1976), which relied upon CAL. CONST. art. I, § 15, in declining to follow *Harris v. New York*; *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975), which refused to apply the fourth amendment standards defined in *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973).

102. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974). *See also* *Rodriguez v. Superior Court*, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970), in which a Court of Appeal had earlier held an order for disclosure of alibi witnesses to be void in the absence of statutory authorization. *But cf.* *People v. Hall*, 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (1970), which upheld a similar order. *Hall* was disapproved by the Supreme Court in *Reynolds*, however.

have a statute which establishes such a discovery procedure. Recognizing that *Williams v. Florida, supra*, had upheld a notice-of-alibi statute against fifth amendment attack, it also observed the potential for due process problems reflected in *Wardius v. Oregon, supra*. Since the order "presents delicate and difficult questions of constitutional law,"¹⁰³ the court concluded that it would be inappropriate for the judiciary to establish such a discovery procedure under its inherent power to administer justice. Rather, it declared that such a rule is better left to the considered judgment of the Legislature.

In holding the trial court's order was improper, the Supreme Court carefully avoided passing upon the constitutional question. It did, however, undertake a review of the "constitutional parameters" involved. And, while the court conceded the *Prudhomme* rule "was in part based on this court's reading of pre-*Williams* federal law,"¹⁰⁴ it went on to state:

Nevertheless, it cannot be gainsaid that *Prudhomme* put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires. Thus, there is no foregone answer to the question we would necessarily face were we to pass on the merits of the superior court's order: whether notice-of-alibi procedures in general are permissible under the California Constitution.¹⁰⁵

While the question is still an open one, the very strong possibility exists that the court will reject the recent expressions of the United States Supreme Court and decline to overrule *Prudhomme*, relying upon the state constitution as the basis for its decision. But *does* the California constitution support such a result or would such result simply represent the personal preference of a majority of the court's justices?

The state privilege against self-incrimination,¹⁰⁶ while not iden-

103. 12 Cal. 3d at 842, 528 P.2d at 49, 117 Cal. Rptr. at 441.

Noteworthy is the fact the court has never found it inappropriate to establish and extend the right of a criminal defendant to compel discovery from the prosecution in the absence of legislative authority. Additionally, the "delicate and difficult" problems the court found in such an order under *Wardius v. Oregon* are actually non-existent in California, since defendants are accorded extremely liberal discovery rights. The holding in this case thus reflects the same attitude as its dicta; a reluctance by the court to extend discovery rights to the prosecution in any form.

104. *Id.* at 843, 528 P.2d at 50, 117 Cal. Rptr. at 442.

105. *Id.*

106. "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . ." CAL. CONST. art. I, § 15.

tical, is substantially similar to the corresponding federal constitutional guarantee.¹⁰⁷ Since the California constitution was adopted after the adoption of the federal Bill of Rights,¹⁰⁸ the similarity of these guarantees presents a strong indication that the former was patterned after the latter. Of course, this is not to say the state constitution must conform with federal constitutional interpretation. California's Article I, section 24 declares: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." However, it does appear to have been the intent of the people of California in adopting the privilege that the standards which define the federal right be persuasive factors in its interpretation. Support for this observation lies in the fact the California guarantee was adopted in 1849 to provide individuals the same protection against the state that they enjoyed against the federal government, because the fifth amendment was not then binding upon the states.¹⁰⁹ Additionally, the California framers' respect for the federal provisions is reflected in the state Constitution itself: "[T]he United States Constitution is the supreme law of the land."¹¹⁰ Indeed, the California Supreme Court recognized the persuasiveness of federal constitutional interpretation in *Gabrielli v. Knickerbocker*:¹¹¹

State courts in interpreting provisions of the state Constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal Constitution. [Citations]. But these decisions declare that cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.

The court's increasingly frequent departures from this standard have been severely criticized by its dissenting judges. The most recent—and perhaps most convincing—criticism was voiced by Justice Richardson in *People v. Disbrow*.¹¹² In that case the court rejected the rule of *Harris v. New York, supra*, on state constitutional grounds. Richardson stated:

107. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend V.

108. Article I, section 15 of the California Constitution was adopted on November 5, 1974. The self-incrimination privilege was formerly embodied in article I, section 13. That section provided: "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . ." The change in phraseology in no way suggests an intent to change the meaning. Rather, a review of the present and former provisions of article I's Declaration of Rights reveals a wholesale change designed to delete all exclusively-male references therein, as a result of recent social movements.

109. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833).

110. CAL. CONST. art. III § 1.

111. 12 Cal. 2d 85, 89, 82 P.2d 391, 392-93 (citation omitted) (1938).

112. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

In my view, in the absence of very strong countervailing circumstances we should defer to the leadership of the nation's highest court in its interpretation of nearly identical constitutional language, rather than attempt to create a separate echelon of state constitutional interpretations to which we will advert whenever a majority of this court differ from a particular high court interpretation. The reason for the foregoing principle is that it promotes uniformity and harmony in an area of the law which peculiarly and uniquely requires them. The alternative required by the majority must inevitably lead to the growth of a shadow tier of dual constitutional interpretations state by state which, with temporal variances, will add complexity to an already complicated body of law.

The vagaries and uncertainties of constitutional interpretations, particularly in the Fourth and Fifth Amendment sectors of our criminal law, are the hard facts of life with which the general public, the courts, and law enforcement officials must grapple daily. This condition necessarily breeds uncertainty, confusion, and doubt. It will not be eased or allayed by a proliferation of multiple judicial interpretations of nearly identical language.¹¹³

Justice Richardson's argument is particularly compelling, when applied to the question of discovery by the prosecution in a criminal case. The state privilege against self-incrimination has already been interpreted in *Jones v. Superior Court, supra*, as presenting no bar to disclosure of evidence a defendant intends to introduce at trial. The corresponding federal guarantee has received the same interpretation by the United States Supreme Court upon the same rationale. No interest peculiar to California calls for a contrary reading of the state constitution. Perpetuation of the *Prudhomme* rule therefore necessitates a rejection of both state and federal persuasive authority based solely on "the personal whims of the Court's membership."¹¹⁴ Additionally, continuing conflict between *Prudhomme* and the *Williams-Nobles* line of federal decisions serves only to compound the confusion over the permissible extent of a valuable aid in the search for truth. Since California's Declaration of Rights "may not be construed to impair or deny others retained by the people,"¹¹⁵ the unwarranted perpetuation of the *Prudhomme* rule will tend to defeat not only the state's right to a fair trial, but justice itself.

113. *Id.* at 119, 545 P.2d at 284, 127 Cal. Rptr. at 372 (Richardson, J., dissenting).

114. Kurland, 1971 SUP. CT. REV. at 265-66.

115. CAL. CONST. art. I, § 24.

