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Nebraska Criminal Discovery

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NEBRASKA CRIMINAL DISCOVERY

One of the controversial issues in today's dynamic criminal law and procedure is the proper role and status of discovery. The notion of criminal discovery has had an exciting if not always successful history,¹ and apparently the trend of the law is toward liberalization.² The Eightieth Session of the Nebraska Legislature attempted to deal with this area by passing two bills, L.B. 702 and L.B. 1417. This comment will examine the current role and status of criminal discovery in Nebraska as a result of the legislation.

I. NEBRASKA PRE-STATUTE LAW

The first Nebraska case to consider a discovery issue was *Marshall v. State*,³ wherein the defendant sought to inspect two forged notes. Early Nebraska law⁴ left it to the discretion of the trial court whether an order for inspection should be entered. Consequently, the Nebraska court found no abuse of discretion when the defendant's application was denied.⁵ However, the defendant was given photostatic copies, and his true purpose seems to have been an analysis of the ink used. "To have permitted such experiment . . . would possibly mutilate [the notes] . . ."⁶

In *Cramer v. State*,⁷ a murder case, the court found no abuse of discretion in a denial of the defendant's application for inspection of his confession independent of statute. However, the court recognized this as a new question and posited some interesting language.

¹ An interesting glimpse of the history of discovery is contained in several New Jersey cases. In *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953), Chief Justice Vanderbilt set forth in a strong opinion the arguments against discovery. Judge—later Justice—Brennan wrote a stirring dissent. (As basic source material, one should also examine Justice Brennan's classic article, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279 (1963).) Five years later the New Jersey Supreme Court took a position more favorable to discovery, and a national trend towards liberalization was under way. See *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); *State v. Cook*, 43 N.J. 560, 206 A.2d 359 (1965).

² 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 252 (1969).

³ 116 Neb. 45, 215 N.W. 564 (1927). In the same year, Chief Judge Benjamin Cardozo was also considering the "glimmering" of some notion of discovery. See *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

⁴ Law of Sept. 21, 1858, Part II—Code of Civil Procedure, ch. 4, § 376, [1858] (repealed 1951).

⁵ 116 Neb. at 55, 215 N.W. at 568.

⁶ *Id.* at 56, 215 N.W. at 569.

⁷ 145 Neb. 88, 15 N.W.2d 323 (1944).

We think that when a prosecution is based upon a written instrument as in a forgery case, the defendant is entitled to inspect and make copies of such instrument under such conditions as the trial court may prescribe. If a prosecution is based upon the correctness or incorrectness of certain records, such as is oftentimes the case in a prosecution for embezzlement, the examination of such records by the defendant should be granted. But as to all statements and documents not admissible in evidence in chief, and obtained for impeachment or other purposes not going to the merits, the defendant has no basis for demanding an inspection of them. . . . The rule generally is that a confession need not be produced. However, we think the trial court should order a written confession produced where the interests of justice require. . . . Where the only reason for the production of a written confession . . . is that it would aid generally in preparing the defense, no basis exists for requiring the state to produce it. The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the state unless a valid reason exists for so doing. In the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon.⁸

Whatever one may have thought the law to be after *Cramer*, the court soon clarified the situation. In *Hameyer v. State*⁹ the statute relied on in *Marshall* was declared inapplicable to criminal cases.¹⁰ Turning then to *Cramer*, the court found the rule to be reasonable but discretionary, and found no abuse of discretion in the trial court's denial of Hameyer's application to inspect a lease which was relevant to the charge of obtaining money by false pretenses. The Nebraska rule had become one of privilege and discretion, and continued unchanged.¹¹

⁸ *Id.* at 94-95, 15 N.W.2d at 327.

⁹ 148 Neb. 798, 29 N.W.2d 458 (1947).

¹⁰ *Id.* at 802-03, 29 N.W.2d at 460. In 1951, the legislature passed L.B. 136 which adopted the rules of discovery found in the Federal Rules of Civil Procedure. Apparently it is thought that these rules, NEB. REV. STAT. § 26-1267.01 *et seq.* (Reissue 1964), are also inapplicable to criminal cases by virtue of the *Hameyer* case. *Hearings on L.B. 1417 Before the Committee on Judiciary*, 80th Neb. Leg. Sess. (1969) [hereinafter cited as *Hearings on L.B. 1417*]. *But see Note, Criminal Procedure—Discovery Practice in Nebraska*, 34 NEB. L. REV. 645, 649 (1955).

¹¹ "The trial court has a broad discretion in ruling upon a discovery motion in a criminal case. *State v. Novak*, 181 Neb. 90, 147 N.W.2d 156. Such a motion should be granted where required by the interests of justice. *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323. The burden is on the defendant to show why the motion should be granted. *Linder v. State*, 156 Neb. 504, 56 N.W.2d 734." *State v. Reichel*, 184 Neb. 194, 195, 165 N.W.2d 743, 744 (1969).

II. THE HISTORY OF L.B. 702 AND L.B. 1417

A. L.B. 702

Legislative Bill 702 was the first of the two bills to be thrown into the legislative machinery. Judge Carter, Chairman of the Judicial Council, had appointed a subcommittee to expand the Nebraska statutes, sections 29-822 to -827, to include pretrial motions in the area of inculpatory statements and confessions and the legality of confrontations between the defendant and those who identified him at lineups.¹² The Judicial Council, with all seven Nebraska Supreme Court judges present, had unanimously approved the bill although some members of the court wanted to expand into the area of general criminal discovery.¹³ Likewise, the bill's sponsor, in his statement of purpose, recognized the objective was "to provide a procedure to discover these objections and to decide these questions ahead of actual trial . . ." and District Judge Elmer Scheele, speaking for the bill, noted that a more general bill (L.B. 1417) was being prepared by the Governor's Crime Commission.¹⁴

Paul Douglas, County Attorney for Lancaster County, Nebraska, appeared in opposition, arguing that sections one and two of the bill as introduced would open the prosecutor's office to the defense. Mr. Douglas suggested that these sections be changed and the Jencks Act definition of "statement" be inserted. Judge Scheele agreed; the Judicial Council was quickly consulted and agreed to the change.¹⁵ Consequently, sections one and two were amended and section three adopted to supply the Jencks Act definition.¹⁶ However, somewhere in committee, the bill changed its purpose.

Sections three, four, and five of the bill as introduced provided the pretrial procedure which was apparently the bill's original purpose. When the bill left the Committee on Judiciary, section three had become a definition of "statement" and there were not any procedural sections.¹⁷ As a result, the purpose seems to have changed from that of providing a pretrial procedure for determining constitutional questions to a discovery method, without any

¹² NEB. REV. STAT. §§ 29-822 to -827 (Reissue 1964) provide pretrial procedure for testing issues of search and seizure.

¹³ *Hearings on L.B. 702 Before the Committee on Judiciary*, 80th Neb. Leg. Sess. (1969) [hereinafter cited as *Hearings on L.B. 702*].

¹⁴ *Id.* See L.B. 702, 80th Neb. Leg. Sess. (1969).

¹⁵ L.B. 702 as introduced provided for a motion to "produce any written or oral confession, admission, or statement made by the defendant." Compare Jencks Act 18 U.S.C. § 3500 (1964).

¹⁶ *Hearings on L.B. 702*, *supra* note 13.

¹⁷ Neb. Laws c. 230, p. 857 (1969).

pretrial procedure for testing issues that might arise.¹⁸ Nebraska now had a discovery statute, and four months later there would be another.

B. L.B. 1417

The Governor's Crime Commission had indeed been working on a general criminal discovery bill as a matter of first priority.¹⁹ Judge Scheele, as chairman of the subcommittee on courts, ordered the first draft to be drawn as a "trial balloon"; and although following much of the substance of Rule 16 of the Federal Rules of Criminal Procedure, the first draft made discovery a matter of right and carefully limited reciprocal discovery by the state.²⁰

This draft was circulated to the bar, prosecutors, defenders, and judges. The responses indicated a consensus favoring discretionary discovery and a more liberal grant of discovery to the state once the defendant had begun the discovery process.²¹

Through the second draft the bill would have been applicable to defendants charged with either a felony or misdemeanor.²² However, by the third draft the scope was limited to felony defendants and the Jencks Act definition of "statement" had been inserted, narrowing discoverable material.²³ Nevertheless, although discovery was discretionary the court should grant it *unless* it found:

(a) the request is not in any way material to the preparation of the defense;

(b) the request is made primarily for the purpose of harassing the prosecution or its witnesses;

(c) the request, if granted, would unreasonably delay the trial of the offense and an earlier request by the defendant could have reasonably been made; or

(d) there is a substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense.²⁴

¹⁸ "The purpose of the bill is to give the defendant the right or the persons who have been charged with crimes to obtain copies of statements made by him. It also gives him the right to interview any witnesses who may have identified him or have claimed to identify him." Minutes of the Legislature 850 (statement of sponsor Senator Fred Carstens, Chairman, Judiciary Committee).

¹⁹ *Hearings on L.B. 1417, supra* note 10.

²⁰ Criminal Discovery Bill (Tent. Draft No. 1, 1968).

²¹ *Hearings on L.B. 1417, supra* note 10.

²² Criminal Discovery Bill (Tent. Draft No. 2, 1969).

²³ Criminal Discovery Bill (Tent. Draft No. 3, 1969).

²⁴ *Id.*

When L.B. 1417 reached the Committee on Judiciary it had made its final change of color. Discovery was to be discretionary, the court *to consider* the previously designated factors in exercising its discretion.²⁵ Senator Pedersen, who introduced the bill at the request of the Governor, stated that it would implement the Federal Rules of Criminal Procedure.²⁶ Judge Scheele stated that it was something that could be lived with, a conservative bill deserving of support.²⁷

During an executive session of the Committee on Judiciary, Judge Scheele offered an amendment to qualify "person" in section six with the phrase "other than the defendant." Without that phrase, depositions could have been taken of the defendant, raising grave constitutional problems.²⁸ The amended bill was adopted and Nebraska had its second criminal discovery statute.²⁹

III. CRIMINAL DISCOVERY UNDER THE STATUTES

A. L.B. 702

Defendant may now file a motion to produce his statement or the names of lineup witnesses, and the county attorney is under a continuing duty to disclose any discoverable matter under an order pursuant to the act. Of course, the court has power to enforce compliance. However, L.B. 702, certainly the more direct of the two acts, raises several questions.

What might be the effect of the definition of "statement" supplied in section three?³⁰ The statutory definition may result in the surprise of unwary defendants by introduction into evidence of admissions not discoverable under the statute. The problem is primarily one of how statements which do not meet the definition can be used in cross-examination at trial. Moreover, it is not apparent that the statute without the definition would have opened the prosecutor's office, or that such a result is altogether wrong.³¹

²⁵ L.B. 702, 80th Neb. Leg. Sess. (1969).

²⁶ *Hearings on L.B. 1417*, *supra* note 10.

²⁷ *Id.*

²⁸ Minutes of the Legislature 3040-41. Interestingly, the limitation "other than the defendant" had appeared in all tentative drafts.

²⁹ Neb. Laws c. 235, p. 867 (1969).

³⁰ Substantially the same definition is found in L.B. 1417 and these comments should also apply there. See note 93 and accompanying text *infra*.

³¹ "Every other civilized nation permits broad discovery. Our military law does so as well. Apparently the existence of discovery has not occasioned a total breakdown of any of these systems." Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 91 (1963).

Will the defendant who discovers constitutionally questionable matter have a pretrial procedure available to challenge its introduction? It appears extremely doubtful that anything remains of such a procedure, which was the act's original purpose. The act has become Nebraska Revised Statutes, sections 29-1922 to -1924, and any correlation to sections 29-824 to -827 will need the most extreme manipulation.

However, the most interesting question involves the act's relation to L.B. 1417. Legislative Bill 702 can reasonably be read to require discovery as a matter of right once the defendant has shown materiality and reasonableness,³² the court having discretion to deny, restrict, or defer only after a sufficient showing by the prosecution. Whether or not such an interpretation is accepted, there is certainly nothing in L.B. 702 that triggers reciprocal discovery.³³ Consequently, a serious problem of interplay exists between L.B. 702 and L.B. 1417.

Legislative Bill 1417 provides for reciprocal discovery by the state as a condition of defendant's discovery; L.B. 702 has no such provision. Statements of the defendant are discoverable under both. Arguably the name of an eyewitness who identified the defendant at a lineup is the name of a witness on whose evidence the charge is based.³⁴ A defendant moving for discovery under L.B. 702 may be met by a prosecutor seeking reciprocal discovery under L.B. 1417.

The narrow category of discoverable matter under L.B. 702 should be exempt from counterdiscovery. Certainly the original purpose of L.B. 702, pretrial procedure for constitutional questions involving statements and lineup identification, does not fit the *quid pro quo* notion of an exchange of privileges by state and defendant. Of course, the original purpose of L.B. 702 was lost in the shuffle. Nevertheless, a reading which makes discovery a right under L.B. 702 could be sustained,³⁵ and the specific categories of L.B. 702 should control the general discovery provided in L.B. 1417.³⁶

³² Neb. Laws c. 230, p. 857 (1969).

³³ Compare Neb. Laws c. 230, p. 857 (1969) with Neb. Laws c. 235, p. 867 (1969).

³⁴ Neb. Laws c. 235, p. 867 (1969).

³⁵ "The purpose of the bill is to give the defendant the *right* . . . to obtain copies of statements made by him. It also gives him the *right* to interview any witness who may have identified him or have claimed to identify him." Minutes of the Legislature 850 (statement of Senator Carstens, sponsor of L.B. 702) (emphasis added). Compare: "Now it allows the defendant as well as the prosecution to get information. . . ." Minutes of the Legislature 3040-41 (statement of Senator Pedersen, sponsor of L.B. 1417) (emphasis added).

³⁶ The two acts may be entirely irreconcilable. It has been suggested that an effort will be made to repeal L.B. 702 in the 81st session of the

B. L.B. 1417

Legislative Bill 1417 is the more formidable of the two statutes, both in scope and in purpose. The scope of L.B. 1417 is purposefully broad to include as discoverable matter all that is consistent with the fair and effective administration of criminal justice. A myriad of reasons have been suggested as underlying the notion of criminal discovery.³⁷ However, this comment will limit itself to several purposes of L.B. 1417 which are of particular importance in the operation of the statute.

It would seem reasonable for a defendant to ask what, if any, benefit can be derived from L.B. 1417 if he was entitled to discretionary discovery under prior case law.³⁸ First, defense counsel may be more likely to initiate discovery procedure with the relatively high visibility of a specific statute. And, the apparently wide range of discoverable items may encourage its use where such items were doubtfully procurable under the case law of discretion. Furthermore, the statute may encourage prosecutors to voluntarily disclose enumerated matter.

Second, and perhaps most important, many Nebraska prosecutors allowed discovery without resort to judicial order. But there was a great discrepancy in the practice from county to county. The statute will hopefully establish a uniform practice across the state. It is in this respect that the language of L.B. 1417 is most unfortunate.

Throughout the drafting stage the bill was phrased in what might be termed semi-discretionary language: "The court *shall* issue such an order pursuant to this section *unless* it finds that: . . ."³⁹ The writer believes that phrasing, and the notion that discovery was to be granted unless the enumerated factors applied, to

legislature. Interview with Walter D. Weaver, Executive Director, Governor's Commission on Law Enforcement and Criminal Justice, March 31, 1970.

³⁷ See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL §§ 1.1-1.5 (Tent. Draft 1969) [hereinafter cited as ABA PROJECT]; TASK FORCE REPORT: THE COURTS 41-44 (1967) [hereinafter cited as TASK FORCE REPORT]. The reasons can generally be classified as those pertaining to pretrial decisions and those concerned with developments at trial. The more obvious pretrial purposes of discovery are found in decisions whether to press charges, whether to go to trial, whether to resist the charges, and in plea bargaining negotiations. At trial, of course, discovery is invaluable in avoiding delays caused by collateral issues, preventing surprise, saving time and money, and assuring effective cross-examination.

³⁸ See *State v. Reichel*, 184 Neb. 194, 165 N.W.2d 743 (1969).

³⁹ Criminal Discovery Bill (Tent. Draft No. 3, 1969) (emphasis added).

be more conducive to the establishment by the Nebraska Supreme Court, through a case-by-case approach, of uniform standards for the grant or denial of discovery. It is hoped that courts will treat the statutory language in a manner amenable to reasoned elaboration rather than as mere boundaries for wide-ranging discretion.

Third, the statute requires that whenever the court refuses to grant a discovery order it shall render its findings in writing.⁴⁰ The efficacy of this provision may well depend on how the courts view their discretionary function. If the enumerated factors are merely to be considered in the exercise of the court's discretion, a written statement of findings may have little value in the establishment of uniform standards.

Fourth, section two of the act should allow defendants an opportunity to make or share results of scientific tests with the state.⁴¹ Should the state have a comprehensive crime laboratory, this provision will take on increased significance and allow courts to establish rules for the joint use of such a facility.

Fifth, section six allows the use of depositions in a felony case. Either party may initiate procedures, the ordering of depositions being discretionary with the court upon a showing of materiality or relevance and that the depositions may be of assistance.⁴² This appears broad enough to almost guarantee that any reasonable request will be granted. Depositions are, of course, limited in their use at trial to impeaching a witness. Hopefully, use of this procedure can avoid surprise at trial. It may also be of benefit to the defendant by alerting the prosecution to a weak case before it has reached a point of no return, thus sparing that defendant the ordeal of trial.

The effect of the depositions provision may be of more moment than is readily apparent. The provision goes well beyond the limits of the Federal Rules of Criminal Procedure. Under Rule 15, depositions may only be taken at the instance of a material witness or the defendant. Their purpose is only to preserve evidence rather than discovery.⁴³ Furthermore, the issuance of an order is severely limited.⁴⁴ Consequently, depositions upon the motion of the prose-

⁴⁰ Neb. Laws c. 235, p. 867 (1969).

⁴¹ This procedure could have solved the problem of ink analysis discussed in *Marshall v. State*, 116 Neb. 45, 215 N.W. 564 (1927). See note 3 and accompanying text *supra*.

⁴² Neb. Laws c. 235, p. 867 (1969).

⁴³ 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 241 (1969).

⁴⁴ *Id.*

cution may raise confrontation clause problems even in the narrow area of impeachment at trial.⁴⁵

Finally, L.B. 1417 creates a continuing statutory duty to inform the other party of discoverable items after an order is granted, provides flexible sanctions for enforcement by the court, and taxes the prosecuting authority the reasonable costs of the process whenever a defendant is adjudged indigent.⁴⁶

C. STATE V. DAVIS⁴⁷

The *Davis* case marks the first appearance of statutory criminal discovery in a Nebraska court. The defendant was denied discovery of reports of scientific tests relating to blood and hair specimens on a station wagon where the body of the deceased had been found.⁴⁸ The state called two expert witnesses from the Federal Bureau of Investigation Laboratory in Washington, D. C., who testified concerning the blood and hair specimens. At the close of the state's evidence the defendant requested a continuance to confer with similar experts. The motion was overruled and assigned as error on appeal from a conviction for first degree murder.⁴⁹

It is apparent that the test results were discoverable under section two of L.B. 1417.⁵⁰ Unfortunately, the court did not clearly decide whether the denial of discovery vitiated the trial. Rather, the court decided that the denial of discovery was one of several errors assigned which, when considered together, presented a question of whether the defendant received a fair trial.⁵¹ However, if considered separately, the particular errors may not have required that the judgment be reversed.⁵²

⁴⁵ *Id.* See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). *But see Pointer v. Texas*, 380 U.S. 400, 407 (1965), and TASK FORCE REPORT, *supra* note 37, at 43. Chief Justice Taft also urged depositions upon motion of the state. Taft, *The Administration of the Criminal Law*, 15 YALE L.J. 1 (1905).

⁴⁶ These provisions may be constitutionally required. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process . . ." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

⁴⁷ 185 Neb. 433, 176 N.W.2d 657 (1970).

⁴⁸ *Id.* at 442-43, 176 N.W.2d at 663.

⁴⁹ *Id.*

⁵⁰ Neb. Laws c. 235, p. 867 (1969).

⁵¹ 185 Neb. at 442-43, 176 N.W.2d at 663.

⁵² *Id.*

Although the court did not decide the effect of a denial of discovery when it is the only error assigned, there is language which suggests that the legislative pronouncements in the area have made the grant of discovery the rule and denial the exception.

We have said that the trial court has a broad discretion in ruling upon a discovery motion, but that such a motion should be granted where required by the interests of justice. We have been slow to reverse where discovery has been denied.

The scientific evidence in this case was of particular importance because it tended to disprove any theory of accidental death. The Legislature has now provided for discovery in felony cases.⁵³

In addition to the discovery statutes, the court and bar should be cognizant of the relevant provisions of the *ABA Code of Professional Responsibility*. The Disciplinary Rules found therein are mandatory in character and state the minimum level of professional conduct.⁵⁴ Disciplinary Rule 7-103 (B) provides:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.⁵⁵

While the special prosecutor in the *Davis* case may have conformed with a narrow reading of DR 7-103 (B), it seems doubtful that the spirit of the provision was being followed.⁵⁶

IV. CONSTITUTIONAL AND POLICY QUESTIONS

There are two questions of overriding importance submerged in L.B. 1417: (1) whether discovery by the defendant is a right or a privilege; and (2) whether any discovery by the government is consistent with the privilege against self-incrimination. In addition, there are other questions of law and policy deserving of consideration.

A. THE STATUS OF DISCOVERY

While liberalization of criminal discovery is an obvious trend, there is no agreement about whether the trend is the result of the recognition of a right, or the expansion of a privilege. It may be that the question poses a linguistic dilemma which can be slipped between only after experience has supplied more facts, for use in policy analysis rather than semantic deadlock.⁵⁷ It is more profit-

⁵³ *Id.* (citations omitted).

⁵⁴ *Preamble and Preliminary Statement, CODE OF PROFESSIONAL RESPONSIBILITY.*

⁵⁵ *ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (B).*

⁵⁶ *See also ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13.*

⁵⁷ 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 252 (1969).

able to examine the expressed and implicit policies involved rather than become embroiled in the rhetoric of right or privilege.⁵⁸

While one generally thinks of discovery as trial oriented, litigated cases are exceptions in our system of criminal justice. Discovery can be an invaluable tool at the pretrial decisional level. Facts are vital to intelligent decisions in determining whether to resist the charges, and in negotiating pleas. Additionally, those cases which are contested can be more readily segregated. "The prompt identification of those cases which should go to trial enables prosecutors and counsel to concentrate greater attention on pretrial preparation, and it encourages early disposition in the remaining majority of cases."⁵⁹

Defendants who are inclined to perjure themselves are likely to do so regardless of whether discovery is granted.⁶⁰ Moreover, risks to witnesses and threats of intimidation are a reality only in the unusual case. It is here that the court can best exercise its discretion to draw protective orders. "If the case is important enough for perjury, intimidation, or bribery, it is important enough for the defendant to employ the necessary means to ascertain the identity of Government witnesses. Discovery is not needed."⁶¹ Fears of character defects in the defense bar, even if assumed to have once been valid, should be alleviated by the changing makeup of defense counsel. The bar is also recognizing that more definite standards of conduct and effective discipline are preferable to a denial of beneficial procedure.⁶²

The seriousness of criminal prosecution should counsel for the widest latitude in disclosing information. A system of justice which places money and property above life and liberty raises grave questions of value.⁶³ Finally, although American experience with broad

⁵⁸ Nevertheless, the writer cannot pass up one rhetorical salvo. "The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses." *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (concurring opinion of Mr. Justice Fortas).

⁵⁹ TASK FORCE REPORT, *supra* note 37, at 42.

⁶⁰ Pye, *supra* note 31, at 91.

⁶¹ *Id.*

⁶² ABA PROJECT, *supra* note 37, at 39.

⁶³ "It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case could not be denied." *State v. Tune*, 13 N.J. 203, 231, 98 A.2d 881, 896 (1953) (Brennan, J., dissenting).

criminal discovery has been limited and not subjected to empirical research, the experience of other nations has not resulted in a breakdown of their systems.⁶⁴

B. DISCOVERY BY THE PROSECUTION

The reciprocal discovery provision of L.B. 1417⁶⁵ raises a critical constitutional question, along with interesting questions of policy. The concept of reciprocal discovery springs from the notion that the "accused has every advantage."⁶⁶ Unfortunately, reciprocal discovery does not tend to perpetuate that notion.

*Jones v. Superior Court*⁶⁷ laid the foundation for the entering wedge of reciprocal discovery. In *Jones*, the defendant filed a motion for a continuance in order to prepare medical evidence for a defense of impotence to a charge of rape. The prosecution filed for and was granted a discovery order. Jones sought a writ of prohibition.

Justice Traynor, writing for the majority, limited the discovery order, but held that the prosecution was entitled to discover the names of witnesses the defendant intended to call and any medical reports or x-rays the defendant intended to introduce into evidence to support the particular affirmative defense of impotence. The court's reasoning was based on judicial approval of "alibi statutes" (requiring the defendant to disclose names of witnesses who are to be called for a particular affirmative defense such as alibi),⁶⁸ and the idea that the disclosure simply requires defendant to disclose information that he will shortly reveal anyway.

A vigorous dissent was drafted by Justice Peters:

The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of facts is a "one way street." It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant's guilt beyond a reasonable doubt.⁶⁹

⁶⁴ Pye, *supra* note 31, at 91.

⁶⁵ Neb. Laws c. 235, p. 867 (1969).

⁶⁶ See Judge Learned Hand's classic statement in *United States v. Garsion*, 291 F. 646, 649 (S.D.N.Y. 1923).

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

⁶⁸ See *New Jersey v. Angeleri*, 51 N.J. 382, 241 A.2d 3 (1968) (collecting cases).

⁶⁹ *Jones v. Superior Court*, 58 Cal. 2d 56, 64-65, 372 P.2d 919, 924, 22 Cal. Rptr. 879, 884 (1962).

Justice Peters argued that the majority had limited the Fifth Amendment protection against self-incrimination to only those defendants who did not, even incidentally, disclose an affirmative defense. Furthermore, the Justice argued that it was a logical impossibility for a trial court to determine in advance what information requested by the state related solely to an affirmative defense, and would not be of aid to the state in the preparation of its case against the defendant.⁷⁰

Justice Dooling, dissenting, prophesied the future:

[A]re we opening the door . . . to a general inquiry by the prosecution . . . ? [If so,] we are depriving the defendant of the right which he heretofore always enjoyed of waiting until the close of the prosecution's case to determine the defense or defenses, if any, which he might then interpose. . . . I am fearful as a matter of policy of the future outcome⁷¹

In the 1966 amendments to the Federal Rules of Criminal Procedure, the Criminal Rules Committee, largely on the strength of *Jones*, opted for conditional reciprocity for the prosecution in Rule 16(c).⁷² However, Rule 16 steps beyond the scope of *Jones*, and L.B. 1417 pushes even further to the wall.

Prosecution discovery is allowed under Rule 16 only when the defendant has been granted relief under subsection (a) (2) or (b) of that rule.⁷³ The court may, under such circumstances, condition the defendant's grant by ordering reciprocity for the government. It should be noted that discovery under Rule 16, subsection (a) (1) does not trigger reciprocal discovery, and that the defendant's discovery of matter under that subsection is treated almost as a matter of right.⁷⁴ Notice that although Rule 16(c) does limit government discovery to comparable items which defendant intends to produce at trial, there is no limit as to its use as an affirmative defense.⁷⁵

Legislative Bill 1417 has further broadened the state's scope of reciprocity by allowing state discovery upon the grant of *any* discovery order for the defendant under sections one or two of the act.⁷⁶ As a result, the defendant's request for his statement may

⁷⁰ *Id.* at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885.

⁷¹ *Id.* at 68-69, 372 P.2d at 927, 22 Cal. Rptr. at 887.

⁷² FED. R. CRIM. P. 16(c). See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 256 (1969).

⁷³ 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 255 (1969).

⁷⁴ *Id.* at § 253.

⁷⁵ FED. R. CRIM. P. 16(c). See 39 F.R.D. 276 (Justice Douglas dissenting from the rule).

⁷⁶ Neb. Laws c. 235, p. 867 (1969).

result in a grant of discovery to the state.⁷⁷ It is also questionable whether L.B. 1417 follows the notion of mutual disclosure found in Rule 16.⁷⁸

A reading of the counterdiscovery provision of L.B. 1417 raises a reasonable fear of a possible interpretation giving too wide a latitude to the state's discovery:

Sec. 5. (1) Whenever the court issues an order pursuant to the provisions of sections 1 and 2 of this act, the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:

- (a) Are in the possession, custody, or control of the defendant;
- (b) The defendant intends to produce at the trial; and
- (c) Are material to the preparation of the prosecution's case.⁷⁹

Certainly, the prosecution's request must be reasonable.⁸⁰ A proper interpretation should consider items and information as one class comparable to the class of matter disclosed by the state upon the grant of defendant's request, and read subsections (a), (b), and (c) as being total and inseparable requirements of the matter before it can be discoverable by the state.

As a question of constitutional law, the issue of self-incrimination is beyond the scope of this comment.⁸¹ However, as a policy issue the counterdiscovery provision of L.B. 1417 should be interpreted as narrowly as possible. Even assuming constitutionality, the great principle of the Fifth Amendment counsels caution and restraint.

⁷⁷ See Neb. Laws c. 230, p. 857 (1969). See also note 32 and accompanying text *supra* which notes the conflicts here between L.B. 702 and L.B. 1417.

⁷⁸ 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 255 (1969). See Reznick, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276 (1966).

⁷⁹ Neb. Laws c. 235, p. 867 (1969).

⁸⁰ Unlike Rule 16(c), reasonableness is not expressly required to be shown before the grant of the discovery order. However, it must be implicit in an area operating on the ragged fringe of the Fifth Amendment. See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 255 (1969).

⁸¹ See Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965). Professor Louisell presents an excellent analysis of the confrontation of issues and the policies which must be considered. See Orfield, *The Federal Rules of Criminal Procedure*, 10 ST. LOUIS U.L.J. 445 (1966); Smith & McCallom, *Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged*, 54 A.B.A.J. 256 (1968); Comment, *Discovery in Federal Criminal Cases—Rule 16 and the Privilege Against Self-Incrimination*, 35 FORD. L. REV. 315 (1966); Note, *Constitutionality of Conditional Mutual Discovery Under Federal Rule 16*, 19 OKLA. L. REV. 417 (1966).

The American Bar Association Project on Minimum Standards for Criminal Justice has rejected the notion of conditional discovery embodied in Rule 16 and L.B. 1417. Avoiding any expression of opinion on the constitutional issue, the Project Advisory Committee's reasoning is of interest:

If disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures. Indeed, there is considerable doubt whether, in practice, the imposition of a condition will accomplish anything but denial of disclosures to the accused. Certainly, the usual reasons for denying disclosures to the accused—dangers of perjury or intimidation of witnesses—are not alleviated by forcing the defendant to make discovery, nor are they by his failure to disclose.⁸²

The A.B.A. Standards do allow for independent discovery by the state which is clearly within constitutional boundaries. Such discovery is of the kind of non-testimonial disclosures by the accused which can be compelled at trial (voice, handwriting, specimens, etc.) and reports prepared by independent experts (physical or mental examinations, scientific tests, and experiments or comparisons).⁸³

C. OTHER POLICY CONSIDERATIONS RELEVANT TO L.B. 1417

Legislative Bill 1417 applies only to felony defendants, misdemeanor defendants having been deleted in the third tentative draft stage.⁸⁴ By contrast, the Federal Rules of Criminal Procedure apply to all criminal proceedings.⁸⁵ Only trials of petty offenses before United States Commissioners are excepted.⁸⁶ Similarly, the A.B.A. Standards apply in "all serious criminal cases."⁸⁷ The Advisory Committee did not draw the distinction between felonies and misdemeanors nor between courts of general or limited jurisdiction.⁸⁸

It would be very difficult, if not impossible, to argue that criminal discovery is fundamental to the American scheme of justice.⁸⁹ Yet, if there is a right to a jury trial in a misdemeanor case,⁹⁰ and

⁸² ABA PROJECT, *supra* note 37, at 45.

⁸³ *Id.* at §§ 3.1-3.2.

⁸⁴ Compare Criminal Discovery Bill (Tent. Draft No. 2, 1969) with Criminal Discovery Bill (Tent. Draft No. 3, 1969).

⁸⁵ FED. R. CRIM. P. 1. See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 21 (1969).

⁸⁶ See 18 U.S.C. §§ 3401, 3402 (1964).

⁸⁷ ABA PROJECT, *supra* note 37, at § 1.5.

⁸⁸ *Id.* at 52.

⁸⁹ Cf. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁹⁰ *Id.*

if the parties are prepared to take the case to trial, it would not seem unreasonable to argue that the procedures available to a felony defendant should be available to the alleged misdemeanant. Indeed, the Equal Protection Clause may require that a similarly situated misdemeanant be afforded the procedures available to the felony defendant.⁹¹ The defendant accused of a serious misdemeanor, facing a litigated determination of guilt or innocence and the ensuing consequences, should be within the purview of L.B. 1417.⁹²

Like L.B. 702, L.B. 1417 limits discoverable statements to those which are made to a prosecuting authority and are substantially verbatim.⁹³ Neither Rule 16 of the Federal Rules nor the A.B.A. Standards makes such a specific limitation.⁹⁴ Under Rule 16, federal courts have allowed discovery of recorded statements between defendants and third persons,⁹⁵ and discovery of government reports summarizing the substance of defendant's statements.⁹⁶

Although the Advisory Committee of the A.B.A. Project split on this issue, the majority believed that a liberal definition of statement was required.⁹⁷ As a secondary effect, the majority felt the liberal standard would discourage the police practice of destroying original notes after transforming them into secondary material so as to avoid cross-examination.⁹⁸ The issue splitting the Advisory Committee was not whether the prosecutor's files would be opened, but the use of the statements on cross-examination.⁹⁹

The restrictive definition of statement in the two bills is unfortunate. Material not fitting the definition should not be altogether undiscoverable. Rather, courts should allow discovery of such mat-

⁹¹ "The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated." Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

⁹² The same arguments should apply to L.B. 702.

⁹³ Neb. Laws c. 235, p. 867 (1969). See Jencks Act 18 U.S.C. § 3500(e) (1964).

⁹⁴ FED. R. CRIM. P. 16; ABA PROJECT, *supra* note 37, at 62-63.

⁹⁵ See *United States v. Black*, 282 F. Supp. 35 (D.D.C. 1968); *United States v. Lubomski*, 277 F. Supp. 713 (N.D. Ill. 1967).

⁹⁶ See *United States v. Scharf*, 267 F. Supp. 19 (S.D.N.Y. 1967). "The philosophy underlying Rule 16, in our judgment, applies equally to verbatim statements and summaries thereof." *United States v. Morrison*, 43 F.R.D. 516, 519 (N.D. Ill. 1967).

⁹⁷ ABA PROJECT, *supra* note 37, at 62.

⁹⁸ *Id.*

⁹⁹ *Id.* But see ABA PROJECT, *supra* note 37, at 135 (Chief Justice Taft believed the liberal definition of statement would hamper law enforcement personnel).

ter as "documents, . . . or other tangible things of whatsoever kind."¹⁰⁰ Rather than deny discovery, the court in its discretion could control the use of summary statements during the cross-examination, and certainly, the nature of the statement could be indicated to the trier of fact.¹⁰¹

A discussion of the policy considerations of L.B. 1417 is incomplete without pondering the decision to include a provision for the use of depositions as a discovery device.¹⁰² Vermont was the first state to allow depositions in criminal cases.¹⁰³ Experience there seems to indicate satisfaction with the notion, the most striking result being a decrease in the likelihood of trial.¹⁰⁴ *Task Force Report: The Courts* also strongly recommends the use of depositions.¹⁰⁵

However, the use of depositions is surrounded with practical (and perhaps constitutional) problems which may need to be ironed out by patient experience and sound judgment. Depositions are a time-consuming affair which may unreasonably prolong the criminal process.¹⁰⁶ The expense involved can be tremendous, and may present special problems in cases involving indigent defendants.¹⁰⁷ Additionally, the use of depositions by the prosecution walks the tight-rope of conduct permissible under the confrontation clause.¹⁰⁸ It is hoped that the Vermont experience will follow in Nebraska, depositions being used to general satisfaction and being more likely to result in a disposition other than by trial.¹⁰⁹

V. CONCLUSION

Criminal discovery is now statutory in Nebraska. It should be apparent that the drafters of L.B. 1417 had as one of their primary purposes the establishment of some degree of certainty and uniformity in criminal discovery. However, the change of purpose in L.B. 702, from a pretrial procedure for testing constitutional questions of criminal procedure to a straightforward discovery pro-

¹⁰⁰ Neb. Laws c. 235, p. 867 (1969).

¹⁰¹ ABA PROJECT, *supra* note 37, at 63.

¹⁰² See note 43 and accompanying text *supra*.

¹⁰³ Langrock, *Vermont's Experience in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

¹⁰⁴ *Id.* at 733-34.

¹⁰⁵ TASK FORCE REPORT, *supra* note 37, at 43.

¹⁰⁶ See Hoffman, *What Next in Federal Criminal Rules*, 21 WASH. & LEE L. REV. 1, 15-16 (1964).

¹⁰⁷ *Id.* See 1 CRIM. L.R. 2016 (1967) (New Jersey's decision not to implement depositions).

¹⁰⁸ See note 43 and accompanying text *supra*.

¹⁰⁹ Langrock, *supra* note 103, at 733-34.

cedure, results in a clash of discovery procedures under the two bills. It is doubtful that the two bills, L.B. 702 and L.B. 1417, can be reconciled.

If reconciliation is possible, either by construction or repeal, L.B. 1417 will need careful application and interpretation to achieve its purposes. The Nebraska Supreme Court should construe the act so as to aid in the establishment of a uniform standard through reasoned elaboration of individual cases. Constitutional questions should be carefully considered by those who apply the act in the first instance and those who will be called upon to determine the legality of the application. The act must be considered not an end in itself, but only one means, in an infinite spectrum of time, by which man seeks the effective and just administration of the criminal law.

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