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Criminal Procedure - Discovery - Right of Prosecution to Discover Evidence Defendant Intends to Use in Support of Affirmative Defense

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now clear that a representative corporate officer can be indicted under § 1 of the Sherman Act, there seems to be no good reason why he may not, alternatively and at the discretion of the Justice Department, be indicted under the appropriate section of Clayton Act which carries a lesser maximum penalty. There is certainly some question whether Congress ever anticipated putting such power in the hands of the Justice Department. Although the Department traditionally has made recommendations to the courts regarding the severity of the penalty to be imposed, the courts have always retained the option of ignoring the suggestion and subjecting the violator to a stricted fine. If an action may now proceed under either Act, an indictment under the Clayton Act would preclude the courts from imposing any greater monetary burden than the five thousand dollar fine. This would seem to be contrary to Congress's purpose of increasing the penalty provision of the Sherman Act to fifty thousand dollars. On the other hand, if the present case is to be interpreted as implying that § 14 of the Clayton Act is merely supplemental to § 1 of the Sherman Act and is not to be used for the purpose of indictment, the present Court has by judicial fiat repealed the former as it applies to representative corporate officers.[30]

Myron A. Hyman

CRIMINAL PROCEDURE—DISCOVERY—RIGHT OF PROSECUTION TO DISCOVER EVIDENCE DEFENDANT INTENDS TO USE IN SUPPORT OF AFFIRMATIVE DEFENSE.

Jones v. Superior Court (Cal. 1962).

Petitioner was charged with rape. On the day set for trial, his motion for a continuance on the ground that he needed more time to gather medical evidence to support his intended defense of impotence was granted. A month later, the court granted the district attorney's motion for a discovery order, requesting that petitioner and his attorney make available

States v. Beacon Brass Co., 344 U.S. 43, 73 S. Ct. 77 (1952); United States v. Gilliland, 312 U.S. 86, 95-96, 61 S. Ct. 518, 523 (1940).

30. It should be noted that Congress is still concerned with the inconsistency created by the 1955 Amendment. In July, 1961, two bills, H.R. 3138, 88th Cong., 1st Sess. (1961) and H.R. 3136, 88th Cong., 1st Sess. (1961) were introduced which, if passed, will make the penalty provisions of the two Acts essentially the same. It is submitted that the United States Supreme Court in the instant case has attempted to second guess the legislature by declaring that the provisions were always essentially the same. It is of course possible that convictions secured either under the Sherman Act or the Clayton Act would result in the same penalty as long as that penalty is under $5,000, but this only demonstrates that the Court's decision has, for practical purposes, nullified the penalty provision of the Clayton Act as it applies to representative corporate officers. It appears likely that the Department of Justice will continue to seek indictments solely under the Sherman Act since the Government will have greater discretion in recommending a penalty.

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to the prosecution the names of all physicians and surgeons who had been subpoenaed to testify on the issue of impotence, the names of all physicians who had treated petitioner prior to trial, the reports of the doctors relating to the injuries which allegedly caused his impotence and, finally, all x-rays of petitioner taken immediately following the injuries. In an action by petitioner for a writ of prohibition to restrain enforcement of the trial court's order, the Supreme Court of California, *per* Justice Traynor, *held* that the prosecution was entitled to discover the names and addresses of the witnesses whom petitioner intended to call in support of his "affirmative defense" of impotency, and any reports and x-rays the latter intended to introduce as evidence thereon; but the prosecution was not entitled to the names and reports of *all* the doctors who had examined defendant regardless of whether the latter intended to introduce them to establish his defense. *Jones v. Superior Court,* 22 Cal. Rptr. 879 (1962).

Since *Powell v. Superior Court,*[1] California has increasingly taken the lead in the field of criminal discovery. There, the California Supreme Court ordered the prosecution to furnish the defendant with copies of statements made to the police by the defendant. Even though the question of granting such discovery lies essentially within the discretion of the trial judge, the cases subsequent to *Powell* have followed that decision with such routine that it can fairly be said that a defendant in a criminal case in California is entitled, as a matter of law, to discovery of the prosecution's evidence.[2] Justification for this breach in traditional procedure may be found in the need for securing to the accused the fairest possible trial.[3] In the present case, the California Supreme Court has declared that such procedure "should not be a one way street:"[4] the prosecution is equally entitled to discover certain unprivileged evidence.

The concept of discovery by the prosecution is not a new one. Although it seems that only California has extended its application to all "affirmative defenses," many states have acted similarly when the defense was one of alibi or insanity. For instance, fourteen states have adopted so-called Alibi Statutes which force a criminal defendant contemplating an alibi defense to give notice of such intent to the prosecution and to furnish the latter with the names of witnesses and the character of their testimony.[5] If the defendant fails to provide the required notice, he is

1. 48 Cal. 2d 704, 312 P.2d 698 (1957).

2. *E.g.,* Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (1959); Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958). For an excellent article on the whole system of discovery by a criminal defendant in California, see Louisell, *Criminal Discovery: Dilemma Real Or Apparent?,* 49 CALIF. L. REV. 56 (1961).

3. Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007 (1957); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956).

4. 22 Cal. Rptr. 879, 881 (1962).

5. *Cf.* Louisell, *Criminal Discovery: Dilemma Real Or Apparent?,* 49 CALIF. L. REV. 56, 61, n.13 (1961). Along this same line, fifteen states also require defendant to give advance notice of his intent to use the defense of insanity. *Cf.* WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 389 (1954).

precluded from raising the defense. Prior to the instant decision, the California Law Revision Commission had recommended that such a provision be inserted in the California Penal Code.[6] Although no action had been taken in this matter by the legislature, the California Supreme Court in the present case seemed to have assumed the task of judicially creating such discovery machinery for the prosecution in regard to "affirmative" defenses. Further, it can be inferred that this discovery process will be augmented by a general interrogatory requiring the defendant to answer whether he intends to rely upon an "affirmative" defense.[7]

The dissenting members in the instant case seemed concerned with the notion that the whole problem of discovery by the prosecution should be entrusted to the legislature because of the apparent inability of the majority's decision to be reconciled with the privilege against self-incrimination. Initially, it would seem that the ennunciated rule does represent a flagrant disregard of a defendant's privilege against self-incrimination as guaranteed by the California Constitution and Statutes.[8] However, it is submitted that the majority has just as firm a regard for this traditional safeguard as does the dissent. It is significant that both opinions cited *People v. Talle*,[9] which held that to compel an accused to give testimony prior to the establishment of a prima facie case against him is a flagrant, shocking and prejudicial invasion of his constitutional rights. Nonetheless, from this common source, contrary conclusions were reached. It is suggested that the decision in the present case does not violate the principle of the *Talle* case nor the privilege against self-incrimination, and can be justified on an analysis of the term "affirmative" defense. As used in its criminal sense, it can be said to refer to those defenses which actually traverse material elements of the indictments, and which, in disregard of the state's evidence, attempt to set up an independent state of facts inconsistent with certain averments in the indictment. In short, "affirmative" defense directly relates to no part of the state's case; consequently, *the discovered material cannot possibly be used by the prosecution in establishing its prima facie case.* It's only function

6. *California Law Revision Commission, Recommendation And Study Relating To Notice Of Alibi In Criminal Actions* (1960).

7. This is pointed out by Justice Peters, in his dissenting opinion:

> If the majority opinion were sound, it would mean logically that the prosecution could serve interrogatories upon a defendant demanding to know whether or not he intends to rely upon an 'affirmative' defense, what it is, and what evidence he has to support it. 22 Cal. Rptr. 879, 885.

To give any real meaning to the rule it could not be restricted to those cases in which the defendant accidentally disclosed his intention of raising an 'affirmative' defense.

8. CAL. CONSTIT. art. 1, § 13 reads: "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . ." CAL. PENAL CODE § 688 provides: "No person can be compelled, in a criminal action, to be a witness against himself . . ."; § 1323 states: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself . . ."; § 1323.5 provides that in all criminal proceedings "the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness."

9. 111 Cal. App. 2d 650, 245 P.2d 633 (1952).

can be to rebut the "affirmative" defense if it is raised. Therefore, the right of the defendant to remain absolutely mute until the establishment of a prima facie case is in no sense undermined. The use of the discovered evidence will not furnish "leads" to the prosecution,[10] for nothing can be uncovered with this evidence which will assist the prosecution in establishing its initial case against the defendant. Further, as the majority points out, "the discovery 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."[11] And if, after hearing the presentation of the case against him, the defendant decides to abandon his "affirmative" plea, he has not been prejudiced in any way. The defendant is not deprived of his traditional right of waiting until the close of the prosecution's case to determine the defense or defenses, if any, which he might then interpose.

The decision in the instant case is a sound one and an important one. It represents a progression away from the archaic thinking on which the adversary system of trial is based, and sets up a "wholly reasonable rule of pleading which in no manner compels a defendant to give evidence other than what he himself may give at trial."[12] One of the principal elements in an adversary proceeding is surprise.[13] Why this should have any place in a criminal trial where the attainment of truth and justice is paramount cannot be easily seen. The courts have struggled hard to guarantee to the defendant the fairest possible trial. The California courts

10. Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195 (1892), established a rule of complete immunity where a defendant bargained away his right against self-incrimination in return for a promise of immunity from prosecution. It was held that the immunity granted must be as broad as possible to prevent prosecution for other crimes discovered by the use of evidence or "leads" given by the defendant under a promise of immunity against prosecution for another crime.

11. 22 Cal Rptr. 879, 882 (1962).

12. *Ibid.*

13. In this connection see 8 MINN. L. REV. 357 (1923), where, in a letter written to the Bench & Bar, Edward Freeman, a Minnesota district court judge, stated:

> At the present time, under his plea of 'not guilty', he [defendant] can sit back and make just as much trouble as he wishes for the state, making the state prove every item of the crime, and prove it to such an extent that the state can feel it can rest knowing that the defendant may not take the stand. They can, a great many times, cause the state a great deal of trouble in proving some of the facts, and after the state has, perhaps, taken a week or so to put in its case, the defendant will calmly go on the stand, admit all the facts it has taken the state several days to prove, and will then proceed to build his defense on the testimony the state has had to use. He may change his ground of defense several times and at the last moment may come with some matter in defense that it is almost impossible for the state to rebut in the short notice it is given.

Also in this regard, see Dean, *Advance Specification Of Defense In Criminal Cases*, 20 A.B.A.J. 435 (1934), where it is observed that:

> In a criminal case pleadings tell nothing, and at the appropriate moment the defendant with a perjured defense has his choice of a corps of insanity experts, alibi witnesses who will testify that he was in another locality at the time of the offense, friends who will assert he acted in self-defense, was entrapped into committing the crime, that he labored under mistake or ignorance of law or fact, that he was an infant, coerced, intoxicated, immune from prosecution, or otherwise justified. Prosecution flounders in the dark. There is a last minute futile attempt to collect rebuttal evidence. Reasonable doubt has been raised. An acquittal follows, and the books on trial tactics have another illustration on how to 'beat the case' through surprise.