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Criminal Procedure--Discovery--Movement toward Full Disclosure

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CRIMINAL PROCEDURE—DISCOVERY—MOVEMENT TOWARD FULL DISCLOSURE

Pretrial discovery is the disclosure of information about a case prior to the commencement of the trial.[1] In civil cases, on both the federal[2] and state levels, the normal process of pretrial discovery includes pretrial depositions,[3] examinations and reproduction of documents,[4] physical and mental examinations of persons,[5] and the propoundment of written interrogatories by all parties.[6] This process, when properly employed, virtually eliminates trial by surprize.[7]

In criminal cases, however, almost the reverse is true; defense counsel is frequently surprised at trial by some unknown development. This perplexing situation is due to the common law, which precludes all pretrial discovery in criminal cases.[8] Thus, the seemingly absurd result arises from this common law rule when parties to a minor civil suit receive all the information they need to adequately prepare for their day in court, but a defendant on trial for murder has extremely limited access to information in the hands of the prosecutor.[9]

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[1] *See, e.g.*, Tucker v. United States 151 U.S. 164, 168 (1894).

[2] The basis rules of federal criminal discovery are contained in Rules 16 and 17(c) of the Federal Rules of Criminal Procedure. Rule 16 allows the defendant to inspect copy, or photograph designated books, papers, documents, and tangible objects obtained from, or belonging to, the defendant, or obtained from others by seizure or process, in the hands of the prosecutor, upon motion and a showing that they are material to preparation of his defense and that the request is reasonable. In addition Rule 17(c) of the Federal Rules of Criminal Procedure provides for documentary evidence and objects to be subpoenaed by the parties for inspection prior to the trial. *See also* Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 242 (1957).

[3] Rules 26 and 27 of the West Virginia Rules of Civil Procedure provide for depositions pending action, and depositions before action and pending appeal.

[4] Rule 34 of the West Virginia Rules of Civil Procedure provides for discovery and production of documents and things for inspection and reproduction.

[5] Rule 35 of the West Virginia Rules of Civil Procedure provides for physical and mental examination of persons.

[6] Rules 31 and 33 of the West Virginia Rules of Civil Procedure provide for depositions of witnesses on written interrogatories and for interrogatories of parties.

[7] Datz, *Discovery in Criminal Procedure*, 16 U. FLA. L. REV. 163, 175-76 (1963).

[8] State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, *cert. denied*, 377 U.S. 978 (1964); Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939); Shores v. United States, 174 F.2d 838 (8th Cir. 1949).

[9] Datz, *supra* note 7, at 164.

Several reasons are cited to support this unfair situation.[10] First, pretrial discovery is inconsistent with the adversary sytem;[11] second, it leads to a greater likelihood of perjury or subornation of perjury.[12] Third, pretrial discovery leads to intimidation of witnesses, and, fourth, it is unfair for the state to be required to disclose its case while the defendant is constitutionally protected.[13] The strengths and weaknesses of these arguments have been debated at length,[14] but most writers conclude that the situations in criminal and civil cases are actually very similar and that since none of the problems forecast have arisen under the Rules of Civil Procedure, these reasons do not stand up logically and realistically.[15] In the modern era, the basic question has not been whether pretrial discovery should be allowed in criminal cases, but rather how much should be allowed.[16] The purpose of this note is not to debate the desirability of criminal discovery but to survey its development and application in West Virginia.

Prior to 1965, West Virginia followed the general common law rule and allowed no pretrial discovery.[17] Under the West Virginia Constitution[18] and the West Virginia Code,[19] the courts had no

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[10] Pillans & Presnell, *Florida's Proposed Rules of Criminal Discovery—A New Chapter in Criminal Procedure*, 19 U. FLA. L. REV. 68, 68-69 (1966).

[11] State v. Rhoads, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910).

[12] State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953).

[13] *Id.* at 211-12, 98 A.2d at 885.

[14] *See* Datz, *supra* note 7; Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused; Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-98 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961).

[15] Pillans & Presnell, *supra* note 10, at 69.

[16] Grady, *Discovery in Criminal Cases*, 19 U. ILL. L.F. 827 (1959).

[17] State v. Cowan, 197 S.E.2d 641, 645 (W. Va. 1973).

[18] W. VA. CONST. art. VIII, § 21. This section provides:

> [s]uch parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature. All civil and criminal suits and proceedings pending in the former circuit courts of this State, shall remain and be proceeded in before the circuit courts of the counties in which they were pending.

[19] W. VA. CODE ANN. § 2-1-1 (1966). This section provides:

> [t]he common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred

discretion to allow criminal pretrial discovery. To do so would have changed the common law, violating both the statutory and the constitutional provisions.[20] As a result of this situation, the State continued to retain exclusive control and access to the information it obtained through the police and prosecutors. Many times the defendant was overwhelmed by his own lack of investigatory resources and the State's abundance of them.[21]

In recent years a trend toward liberalizing criminal discovery has swept the nation, and pretrial discovery has increasingly been granted, both through statute and exercise of the courts' inherent power to alter case law.[22]

In 1965 the West Virginia Legislature enacted a statute that provides upon motion of the defendant's counsel before the trial, the judge may compel the prosecutor to allow the inspection and reproduction of tangible evidence within his control.[23] Since the motion was addressed entirely to the court's discretion, varying results were observed. Some judges would grant almost all motions for discovery, while others refused to grant any. Generally, most judges required the defendant to show good cause before granting the motion.[24]

If the motion for discovery was denied, the defendant had no recourse. The applicable standard for review of a judge's discre-

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and sixty-three, or has been, or shall be, altered by the legislature of this State.

[20] Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962).

[21] Datz, *supra* note 7, at 177.

[22] *Id.*; Note, 71 W. VA. L. REV. 341 (1969).

[23] W. VA. CODE ANN. § 62-1B-2 (1966). This section provides:

[u]pon motion of a defendant the court may order the prosecuting attorney to permit the defendant to examine and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the prosecuting attorney to be within the possession, custody or control of the State, (2) results or reports of physical or mental examinations, and of scientific tests of experiments made in connection with the particular case, or copies thereof, which are known by the prosecuting attorney to be within the possession, custody or control of the State, and (3) books, papers, or tangible objects belonging to or seized from the defendant which are known by the prosecuting attorney to be within the possession of custody, or control of the State.

[24] This conclusion is based on interviews with the honorable Fred L. Fox, Judge of the Criminal Court of the Sixteenth Judicial Circuit, August 25, 1974, and the honorable Robert C. Halbritter, Judge of the Circuit Court of the Eighteenth Judicial Circuit, July 24, 1974.

tion, announced by the West Virginia court in *Intercity Realty Co. v. Gibson*, required a showing that the judge had abused his discretion.[25] The court quoted favorably from *Brunner v. United States*:

> Where the law commits a determination to a trial judge, and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated not by a desire to reach a different result, buy by a firm conviction that an abuse of discretion has been committed.[26]

The West Virginia Supreme Court of Appeals has modified the effect of this discovery statute. By imposing the due process requirements of the fourteenth amendment to the United States Constitution on the framework of the statute, the court has limited the scope of the trial court's discretion. In *State v. Smith*,[27] the court held that refusing the defendant's motion for inspection of a substance alleged to be marijuana violated due process when the exact composition of the substance was important to the defense. The court stated, "This certainly was material evidence as to guilt or innocence of defendant."[28] In *State v. McArdle*, the Supreme Court of Appeals disagreed with the state's position that the trial court acted within its discretion in denying a motion to discover the results of a scientific test made to establish the identity of a substance alleged to be marijuana.[29] The court held, first, that the judge abused his discretion in denying a motion under the statute because the evidence was material to guilt or punishment[30] and,

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[25] 154 W.Va. 369, 377, 175 S.E.2d 452, 457 (1970). This doctrine was applied to criminal case in State *ex rel.* Ghiz v. Johnson, 183 S.E.2d 703, 706 (W. Va. 1971), in which the court evaluated the trial judge's discretion in setting the amount of bail.

[26] 190 F.2d 167, 170 (9th Cir. 1951).

[27] 193 S.E.2d 550 (W. Va. 1972). In *Smith* the defendant was convicted of possession of marijuana. The court held that failure to allow the defendant to examine the alleged marijuana to determine if it was, in fact, the illegal part of the plant, was material to guilt and preparation of the defense and thus a denial of due process. *Id.* at 554.

[28] *Id.*

[29] 194 S.E.2d 174, 178 (W. Va. 1973). In *McArdle* the defendant was convicted of sale and possession of marijuana to an undercover officer. The primary defense asserted at the trial was that the defendant sold only parts of the marijuant plant and that these parts were excluded from illegality by the statute. The defendant, however, was not given the opportunity to have his expert inspect the alleged marijuana. The court held that this denial was a violation of due process, since the evidence was material to guilt and reversed the conviction. *Id.* at 178-79.

[30] *Id.*

second, that the defendant was entitled to "a basic standard of fairness."[31]

These two cases to a grest extent established a standard of pretrial discovery to be followed in West Virginia. A prosecutor, pursuant to a general discovery motion prior to trial was required to disclose any evidence that would tend to exculpate the defendant or any evidence the court ordered disclosed. At this time, however, key remained the making of the appropriate discovery motion by defense counsel.

On July 10, 1973, the West Virginia Supreme Court of Appeals handed down its decision in *State v. Cowan*,[32] one of the most liberal pretrial discovery decisions in the nation. George Cowan was accused of committing an armed robbery in Jackson County; while being held in the county jail awaiting trial, the defendant wrote a letter to his alleged accomplice that contained potentially damaging statements.[33] A few months prior to trial, defense counsel moved for pretrial discovery. The trial court granted the motion and ordered:

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[31] *Id.* at 179.

[32] 197 S.E.2d 641 (W. Va. 1973).

[33] *Id.* at 644. The contents of the letter were as follows:

This is what I put in my statement. We left the laundrymat and went to the whiskey store. Dana Monday got a pint of wine for Fredia and I went across the street to get some cigarettes and pop. I told them the cigarettes were for me because you are under age. OK? When I come back you were in the front seat and Fredia was in the back where I was setting. We left there and went to Sandyville, We stopped at a beer joint and Dana gave me money to get beer. We then went to his trailer. I told Ken and Larry that I took Fredia into the bedroom and screwed her. I told them that Dana came in while we were screwing. Now this is what you have to remember! When we come out of the bedroom Dana was trying to get you to let him screw you. You wasn't going to let him. I told Dana to let you alone. He said for me to shut up or he would shot me. I turn around and started to go back to the kitchen table where I was setting and you said (watch out George he is going to get that gun!) I grabbed a knife and made him sit down in the chair. I told you to get his car keys. The rest you know! OK. Just remember to say that he was going to shoot me and everything will be alright. I'm really sorry for getting you into this mess. I guess you are a good laugh out of that, but I really mean it. There is no use crying about it now, but I did want you to know that I'm sorry! I don't have any cigarettes to send you, but I will get some somehow, even if I have to rob someone over here to get them. Just hang in there for awhile. Hey, remember you said you would write me, why didn't you. I kept waiting to hear from you but never did. Dana Monday is supposed to be in the hospital. He is going to have his stomach taken out.

> That defendant's counsel, within a reasonable time, be furnished with a complete list of all witnesses, including their addresses, and any statements, either oral or written, made by the defendant, intended to be used by the prosecuting attorney of Jackson County, West Virginia, or to be subpoenaed by said Prosecuting Attorney in any trial under the above indictment.[34]

At the trial, the State presented part of its evidence in the morning. After the lunch hour, the prosecuting attorney obtained the letter written by the defendant, but he presented four more witnesses without mentioning it and rested. The defense then called the defendant to testify. On cross-examination the prosecutor had the defendant identify the letter and then read it to the jury. Defense counsel objected and moved for a mistrial, because the use of the letter without its prior disclosure violated the judge's pretrial order. The motion was denied, and the defendant was found guilty by the jury. The defendant then brought a writ of error and supersedeas to the Supreme Court of Appeals.[35]

The supreme court reversed the trial court, basing its decision on two important principles. First, from the early case of *State v. Price* the court held that the defendant is entitled to a new trial when he has been unfairly surprised or misled.[36]

Secondly, the court held that the defendant was denied due process of law by the prosecutor's withholding of evidence. The supreme court based its decision on several cases[37] that set forth the doctrine of prosecutorial suppression of evidence.[38] The West Virginia court said that this doctrine "make[s] it constitutionally mandatory that the prosecution advise the defense of evidence in its possession which might be favorable or exculpatory to the defendant,"[39] but the court also stated that these decisions go only

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[34] 197 S.E.2d at 643.

[35] *Id.* at 641.

[36] 100 W. Va. 699, 131 S.E. 710 (1926). *Price* held that a new trial will be granted to a party when he is taken by surprise on a material point or circumstance that could not be due to his own negligence or lack of skill and that resulted in injustice. *Id.* at 701, 131 S.E. at 711. The court in *Cowan* recognized that *Price* could be distinguished but stated that "the principle announced there by this Court is just as applicable to this case where there was such a motion and such an order." 197 S.E.2d at 647.

[37] Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Keogh 391 F.2d 138 (2d Cir. 1968). State v. Smith 193 S.E.2d 550 (W. Va. 1971).

[38] 197 S.E.2d at 644.

[39] *Id.* at 645.

so far as to require revaluation of evidence that might exculpate the defendant.[40] The important change *Cowan* introduced into pretrial discovery is found in the statement that "[d]isclosure is required even in the absence of discovery motions."[41]

The court further announced *Keogh* guidelines for delineating unconstitutional suppression:

> (1) Deliberate bad faith suppression for the very purpose of obstructing the defense, or the intentional failure to disclose evidence whose high probative value to the defense could not have escaped the prosecutor's attention; (2) deliberate refusal to honor a request for evidence which is material to guilt or punishment irrespective of the good or bad faith of the prosecutor in refusing the request; (3) suppression which is not deliberate and where no request was made, but where hindsight discloses that such evidence could have been put to significant use.[42]

These standards of unconstitutional prosecutorial suppression, however, may not extend to all evidence that "might in some fashion be useful to the defense."[43]

Since *Cowan*, the standards for pretrial discovery have been considerably loosened. First, a discovery motion is no longer a prerequisite for getting evidence from the prosecutor, but it is still recommended. Second, either upon or without motion, the prosecutor must disclose evidence that is exculpatory or material to guilt and that meets one of the requirements set out in *United States v. Keogh*.[44] Third, any other evidence may be sought under

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[40] *Id.*

[41] *Id.* The court by implication overruled State v. Hamric, 151 W. Va. 1, 19, 151 S.E.2d 252, 264 (1966). In this case the prosecutor neglected to inform the defendant of a police report that showed glass and wood particles on the murder victim, an important aspect of the defense. The court decided that since the defendant had not requested the police report, grand jury minutes, or other medical reports, and that since in the court's opinion the results would not be changed if they had been available, there was no reversible error committed.

[42] *Id.* The court patterned these standards from those in United States v. Keogh, 391 F.2d 139, 146-47 (2d Cir. 1968).

[43] *Id.*, quoting from Giles v. Maryland, 386 U.S. 66, 74 (1966), in which the Supreme Court specifically declined to consider the question of whether the unconstitutional suppression doctrine covers all evidence useful to the defense. The Supreme Court in *Giles* had found it unnecessary to decide if evidence *merely helpful* to the defense was constitutionally discoverable. The West Virginia court in *Cowan* recognized this limitation.

[44] 391 F.2d 139 (2d Cir. 1968). See text accompanying note 37 *supra*.

the normal statutory motion process, and, fourth, if the prosecutor refuses or neglects to comply with a discovery order, this refusal is prejudicial error if the evidence sought is material to preparation of a defense.[45]

Some aspects of the *Cowan* decision are unclear, however, and may present problems. Although the court spoke only of the disclosure of exculpatory evidence in its summary of the due process requirements,[46] it implied by acceptance of *Brady v. Maryland*, that evidence reflecting on the sentencing of the defendant is also to be disclosed.[47] If this is the case, a much broader scope of discovery is available, since everything material to the defendant's crime and his past, perhaps everything in the prosecutor's file, must then be disclosed. By the court's acceptance of *Brady* as the foundation of the unconstitutional suppression rule in both *McArdle*[48] and *Cowan*,[49] the West Virginia Supreme Court of Appeals has apparently intended to accept this broader rule.

A second conceivable problem area is found in the court's statement that "the value of the evidence . . . is not for the prosecutor to decide, but rather is a question for the judgment of the defense under the exercise of the proper discretion of the court."[50] Although it appears on the face of this statement that defense counsel will have great latitude in exercising his judgment concerning what materials are helpful, the actual result will likely depend on the particular judge. Since the court's exercise of discretion overides any defense judgment and can only be overturned when found to be an abuse of discretion,[51] the defense counsel's judgment can be extremely limited. On the other hand, the judge can order the prosecutor's entire file on the case turned over to the

[45] 197 S.E.2d at 646.

[46] *Id.* at 645. The court stated here that "[t]he rules involved in these cases make it constitutionally mandatory that the prosecution advise the defense of evidence in its possession which might be favorable or exculpatory to the defendant."

[47] 197 S.E.2d at 644. In *Brady v. Maryland*, the Supreme Court said, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment . . . ." 373 U.S. 83, 87 (1963).

[48] 194 S.E.2d at 178.

[49] 197 S.E.2d at 644.

[50] *Id.* at 646.

[51] State *ex rel* Ghiz v. Johnson, 183 S.E.2d 703 (W. Va. 1971); Intercity Realty Co. v. Gibson 154 W. Va. 369, 175 S.E.2d 452 (1970).

defense. The court's judgment is thus substituted for that of the defendant.

Under the *Cowan* rule for pretrial discovery, the prosecutor must disclose evidence exculpatory or material to sentencing and meeting one of the *Keogh* requirements: deliberate bad-faith suppression to hinder the defense or intentional failure to disclose evidence whose high probative value could not have escaped the state's attention; deliberate refusal to honor requests for evidence material to guilt or punishment regardless of the prosecutor's bad faith; and nondeliberate suppression of evidence for which no request was made, but for which hindsight discloses could have been put to significant use. This evidence must be disclosed with or without a motion by the defense.[52]

Several reasons remain for tendering a pretrial discovery motion even though it is not strictly required. First, when no motion is made, the burden of showing materiality or helpfulness in preparing the defense is higher on appeal.[53] Second, if the case may be appealed or reviewed at a later date, the defense attorney will be at least partially protected from a charge of inadequate representation.[54] Third, the more information the defense attorney has available, the better equipped he will be to make a rational evaluation of his client's situation, thus speeding the plea bargaining process and the trial. Finally, the defense attorney should take any steps possible that lessen his chances of being surprised at trial even by minor points that may hurt his case.

In its broadest sense, *Cowan* mandates a right to disclosure of all the prosecutor's evidence; such right approaches that allowed by the Rules of Civil Procedure. The right is limited only by the prosecutor's privilege to his own work product[55] and perhaps by the right of the police to their reports.[56] In its narrowest sense, however,

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[52] 197 S.E.2d at 645.

[53] *Id.*

[54] For a discussion of the inadequate counsel issue, see State v. Thomas, 203 S.E.2d 445 (W. Va. 1974).

[55] *See, e.g.*, McAden v. State, 155 Fla. 523, 21 So.2d 33 (1945).

[56] In *Moore v. Illinois*, 408 U.S. 786 (1972), the United States Supreme Court stated, "We know of no constitutional requirement that the prosecutor make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id.* at 795. Note, however, that the procecutor in this case had turned over his entire file to the defense, and that the majority cites no authority for their position. In a separate opinion, Justice Marshall, joined by Justices Douglas, Stewart, and Powell, took the position that the police are a part of the prosecutorial team

Cowan mandates that only the evidence material to guilt or innocence be disclosed and that all other tangible evidence is subject to discovery only upon the proper motion.[57] In general, however, a post-*Cowan* criminal trial will be less of a contest and more of an ideal fulfilled.

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and are, therefore, subject to the same rules as the prosecutor. *Id.* at 810. (Marshall, J., concurring in part, dissenting in part). *See also* State v. Dudick, No. 13486 (W. Va., Mar. 25, 1975).

[57] For examples of discovery motions, see Preiser, *Criminal Procedure,* WEST VIRGINIA PRACTICE HANDBOOK at 6.49-6.52. Form "M" is a motion to produce and disclose exculpatory evidence and statements, but should be updated to include evidence etc. material to sentencing. Form "N" is a motion to furnish defendants with a list of witnesses, and Form "O" is a motion to produce, inspect, and copy police reports and sheriff's reports.

Note that W. VA. CODE ANN. § 62-1B-3 (1966) provides that the discovery motion be tendered not later than ten days before the trial.