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# A Proposal for Rules in Oklahoma

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If one cannot accept the theses of Bandura and Walters, Szasz, Glasser, and others regarding mental illness, the practical necessity for society in its self-governance to abjure conventional psychiatry—and with it its inroads upon tests of criminal responsibility based upon rational existence—must be recognized. One jurist has done so with clarity. Judge Weintraub of the Supreme Court of New Jersey has written: "Man may one day obtain a better glimpse of himself, but until a basis for personal blameworthiness can be scientifically demonstrated, I would not tinker with the existing law of criminal accountability."[54]

*M. David Riggs*

[54] State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959).

## CRIMINAL DISCOVERY — A PROPOSAL FOR RULES IN OKLAHOMA

> *"The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial."*[1] Mr. Chief Justice Marshall.

A fair and impartial trial to Mr. Chief Justice Marshall was one in which the prosecution and defense were placed by the law on equal ground.[2] It would seem, therefore, that the best way to insure an impartial *criminal* trial is through full use of discovery procedures such as are available in civil actions.

The purposes of this article are (1) to discuss the foundation of criminal discovery in the United States; (2) to acquaint

[1] United States v. Burr, 25 F. Cas. 30, 32-33 ( No. 14,692d) (C. C. D. Va. 1807) (sitting as Circuit Justice).
[2] *Id,* at 33.

the reader with Oklahoma's new, limited criminal discovery statute;[3] (3) to demonstrate the need for the court to supplement this statute by rule; and (4) to suggest rules needed to effect more complete discovery.

Discovery furnishes a means of forcing full disclosure of the facts of a case where counsel refuses voluntarily to disclose them.[4] Before the Federal Rules of Civil Procedure, a civil suit was a game of wits; too often the outcome was dependent upon a lawyer's ability to conceal the true facts and sway the jury by persuasive oratory.[5]

In civil actions, discovery serves three distinct purposes:

(1) To obtain evidence for use at trial.

(2) To secure information concerning the existence of evidence that may be used at trial and to ascertain how and from whom it may be procured.

(3) To narrow the issues, so that evidence at the trial need only concern matters which are actually disputed and controverted.[6]

It has been recognized that when both parties use civil discovery procedures, there is less likelihood of trial. When there is a trial, there is a narrowing of issues, and the result is more likely to be just.[7]

The arguments that support rules of civil discovery to expidite the administration of justice in civil litigation are just

[3] OKLA. STAT. tit. 22, § 340 (Supp. 1967).
[4] *See* Chandler, *Discovery and Pretrial Procedure in Federal Courts*, 12 OKLA. L. REV. 321 (1959).
[5] *Id.* at 322.
[6] Hickman v. Taylor, 329 U.S. 495, 501 (1947), *citing* Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1 (1939); Pike & Willis, *The New Federal Deposition-Discovery Procedure* pts. 1-2, 38 COLUM. L. REV. 1179, 1436 (1938).
[7] Chandler, *supra* note 4, at 325.

as valid support for the formulation of rules for criminal discovery. The Constitution is equally as concerned with life and liberty as it is with property. If the accused is innocent, we should be concerned that he suffers no more anxiety of mind and derangement of affairs than is necessary. If he is guilty, society demands that the accused be brought to punishment quickly.

I

*Rex v. Holland*[8] is commonly cited as authority for the proposition that discovery in criminal cases was not available at common law. In that case an information based on the report of a board of inquiry was filed against an officer of the East India Company. The court held that the defendant had no right to inspect the report and stated that it lacked the discretionary power to grant such a request. Lord Kenyon stated that to hold otherwise would be to "subvert the whole system of criminal law".[9] Justice Buller was of the opinion that the court was bound to proceed according to the act of Parliament: if that act gave the defendant the right he claimed, it removed the court's discretion; if it gave no right, the court could not assume such a discretionary power.[10]

Although the American courts have adopted the English common law system, their source of power is not derived from any parliamentary body, but is established by constitutional grants.[11] Therefore, our courts should have discretionary power to formulate rules of procedure to implement the judicial process.[12]

In *United States v. Burr*,[13] Mr. Chief Justice Marshall dis-

[8] 100 Eng. Rep. 1248 (K. B. 1792).
[9] *Id.* at 1249.
[10] *Id.*
[11] *See* U.S. CONST. art. III; OKLA. CONST. art. VII.
[12] *See* State v. Roy, 40 N. M. 397, 60 P.2d 646 (1936); Goodwin v. Bickford, 20 Okla. 91, 93 P. 548 (1908).
[13] 25 F. Cas. 30 (No. 14,962d) (C. C. D. Va. 1807).

cussed the constitutional mandate to the court to aid the accused in obtaining a fair and speedy trial. The proceedings were commenced by bringing the prisoner before Marshall as a committing magistrate for preliminary examination. The charges were: (1) setting on foot and providing the means for an expedition against territories of a nation at peace with the United States, and (2) committing high treason against the United States. The defendant, Burr, sought a subpoena duces tecum directing the President to obtain copies of orders and letters which Burr claimed might be material to his defense. The prosecution argued that until the grand jury, then meeting to consider Burr's activities returned a true bill, the accused was not entitled to subpoenas nor the aid of the court to obtain testimony. Mr. Chief Justice Marshall stated:

> So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defense, and to obtain the process of the court, for enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which often are oppressive. . . .
>
> The [sixth] amendment to the Constitution[14] gives the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and

[14] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (Authors' footnote.)

> the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? *It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court.*[15]

The prosecution argued that allowing the accused the court's process to obtain evidence for his defense might lend itself to abuse. However, the Chief Justice emphasized:

> [A] motion to the court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. . . . The court [should] not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, *and which may be material to his defence.* . . .
>
> . . . .
>
> It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. *These former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial.*[16]

These statements not only constitute a foundation for criminal discovery, but also indicate it is an essential element within the constitutional scheme of a fair trial.

[15] United States v. Burr, 25 F. Cas. 30, 32-33 (No. 14,692d) (C.C.D. Va. 1807) (emphasis added).

Why then did *United States v. Burr* pass into obscurity? One reason is that most criminal cases are tried in state courts. The Supreme Court in *Barron v. Baltimore*[17] held that the Bill of Rights enunciated in the United States Constitution provided limitations on the encroachment of individual liberties by the federal government and was not applicable to state or local governments. On the basis of the holding in the *Barron* case, the Supreme Court of Florida characterized Marshall's opinion in *Burr* as not in point and unavailable to a defendant in a state criminal trial.[18]

> Thus, with the exception of the restrictions in the original Constitution, the states were left free to define, protect, limit, or abolish political and civil rights as they saw fit without interference from the federal courts.[19]

Another reason appears to be that Marshall was looked upon with suspicion by his fellow jurists because of his alleged habit of making law.[20] This suspicion caused many judges to limit the application of their holdings, to narrow issues, and to ignore the broad principles of law laid down by Marshall. The *Burr* decision met this fate in *Worthington v. Scribner*,[21] where the court held that Marshall had merely held that a subpoena duces tecum might issue to the President of the United States. The court then stated the principle which has been adopted as the rule in all jurisdictions:

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage

[16] *Id.* at 35-36.
[17] 32 U.S. (7 Pet.) 243 (1833).
[18] Pittman v. State, 51 Fla. 94, 41 So. 385, 389 (1906).
[19] R. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 349 (1959).
[20] *See* United States v. Kendall, 26 F. Cas. 702, 709 (No. 15,517) (C.C.D.C. 1837), where the court noted: "[T]he practice of Justice Marshall, of traveling out of his case, to prescribe what the law would be in a moot case, not before the Court, is very irregular and censurable."
[21] 109 Mass. 487 (1872).

> him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question of how far and under what circumstances the names of the informers and the channels of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information [by any person] without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.[22]

Today, after over one hundred years, *Burr* has again emerged, set free by the Supreme Court in preserving the individual liberties guaranteed by the Constitution. The principle of the *Worthington* case was eroded by the Supreme Court in *Roviaro v. United States*,[23] where the refusal of the government to divulge the identity of an informer in a narcotics prosecution was in issue. The Court held that where disclosure of the identity of an informer or the contents of his communication is relevant and helpful to the defense of the accused or essential to a fair determination of a cause, the sovereign's privilege to withhold that information must give way.[24] Mr. Justice Burton stated:

> We believe that no fixed rule with respect to disclosure is justifiable. *The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.* Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[25]

[22] *Id.* at 488-89; *see In re* Quarles, 158 U.S. 532 (1894); Vogel v. Gruaz, 110 U.S. 311 (1884).
[23] 353 U.S. 53 (1957).
[24] *Id.* at 60-61.
[25] *Id.* at 62 (emphasis added).

The Supreme Court has broadened the right of the accused to obtain a fair and impartial trial by its holding in *Escobedo v. Illinois*.[26] Condemning the grilling of the accused without permitting him to consult with his attorney, the Court said: "[T]he 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination'."[27] The Court rejected the state's argument that such a practice would take away the effectiveness of the prosecution in obtaining convictions. It admonished the state: "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[28] The court concluded that when the process shifts from investigatory to accusatory, the sixth amendment's right to counsel begins to operate.[29]

In *Pointer v. Texas*[30] the constitutional guarantee of the right of the accused to be confronted by the witnesses against him was held to be obligatory upon the states through the fourteenth amendment and that this right might arise at the preliminary hearing. If the sixth amendment's guarantee of counsel begins at the accusatory stage, should not its further guarantees of the right to process and to confrontation begin at least as soon as one is charged and committed? Discovery is but the means of obtaining the testimony of one's accuser so that he may have time to gather evidence to refute that testimony at trial. If the accused must wait until trial to know the nature of the state's evidence, his rights are weakened by placing the prosecution in a position to surprise the defense with testimony he is unprepared to meet. Where life and liberty are at stake there is no place for the element of sur-

[26] 378 U.S. 478 (1964).
[27] *Id.* at 487, *quoting In re* Groban, 352 U.S. 330, 344 (1957) (dissenting opinion).
[28] *Id.* at 490.
[29] *Id.* at 492.
[30] 380 U.S. 400 (1965).

prise. Such a practice tips the scales of justice against the individual.

II

In 1967 the Oklahoma Legislature amended the criminal procedure code to provide that, upon request, a transcript of the testimony of witnesses appearing before a grand jury shall be made available to the accused, and in the event that he is an indigent, it shall be provided at the expense of the state.[31] The legislature may have been concerned about the rising number of grand jury investigations, the conduct, and the competency of evidence received. Under the new law, even though the defendant has no right to appear and be heard before the grand jury,[32] he may determine, from the record, the nature of the evidence and be able to gather additional evidence for refutation.

Questions may be raised as to whether this new law invades the secrecy of the grand jury. The rule of secrecy was was not, however, designed for the protection of witnesses, but rather, for the protection of the grand jurors in the furtherance of public justice.[33] The legislature now has determined that furnishing a copy of the testimony of witnesses before the grand jury is in the public interest. This law in no way requires disclosure of how individual grand jurors voted or expressed themselves on any matter.[34]

III

The Oklahoma constitution authorizes prosecution of felonies by information or by indictment.[35] Prosecution by in-

[31] OKLA. STAT. tit. 22, § 340 (Supp. 1967). Prior to the amendment no transcript was allowed. Law of Feb. 21, 1961, ch. 4c, § 1, [1961] Okla. Sess. Laws 236 (amended 1967).
[32] People v. Goldenson, 76 Cal. 328, 19 P. 161 (1888), as an example from another jurisdiction.
[33] People v. Young, 31 Cal. 563 (1867).
[34] *See* OKLA. STAT. tit 22, § 341 (1961).
[35] OKLA. CONST. art II, § 17.

formation does not violate due process.[36] "It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection he is entitled under law."[37] This rationale may have been true in 1909; however, a serious question of due process arises with the enactment of the recent amendment. Even if criminal discovery is not constitutionally guaranteed, the legislature has given the accused a limited right to discovery in prosecutions by indictment. The defendant has no right to take depositions from the witnesses who appeared before the grand jury, but the receipt of their testimony is an invaluable aid in preparing his defense. If the state elects to prosecute by information, however, the defendant has no discovery rights. In some Oklahoma counties, few grand juries have ever been convened.[38] If the legislature did not intend to give the accused a hollow right, due process would seem to demand that he be given a similar right to discovery with respect to prosecution by information.[39].

It has been suggested that the Oklahoma appellate courts, in supervising the administration of the inferior courts, have much more rule-making power than they have exercised to date.[40] Oklahoma courts have inherent power at least to make

[36] *In re* McNaught, 1 Okla. Crim. 528, 99 P.2d 241 (1909), *following* Hurtado v. California, 110 U.S. 516 (1884).

[37] Hurtado v. California, 110 U.S. 516, 520 (1884), *approving language of Mr. Justice Freelon in* Kalloch v. Superior Court, 56 Cal. 229, 241 (1880); *see In re* McNaught, 1 Okla. Crim. 528, 538, 99 P.2d 241, 245 (1909).

[38] *See* Pierro v. Turner, 95 Okla. Crim. 425, 247 P.2d 291 (1952).

[39] Accomplished in California by Statute, CAL. PENAL CODE §§ 869, 943 (West 1956); § 938.1 (West Supp. 1967). Statutes provide a defendant the right to a transcript of grand jury testimony if he is prosecuted by indictment or a transcript of testimony at his preliminary hearing if he is prosecuted by information.

[40] Comment, *Rule Making—The Judicial Regulation of Procedure,* 4 OKLA. L. REV. 259 (1951).

rules of practice which do not contravene any statute or law of the land.[41] In recent months the Oklahoma Supreme Court has expressed a desire to improve and expedite the administration of justice.[42] That court has adopted rules of civil discovery patterned after the Federal Rules of Civil Procedure.[43] If the Oklahoma Supreme Court has the power to make civil rules to expedite justice, surely the Oklahoma Court of Criminal Appeals should have the power to formulate standard rules of criminal discovery.[44]

IV

The following set of rules are presented for consideration in the hope that they might aid in providing a working procedure to insure that all relevant facts are exposed and that the rights of the accused remain inviolate. The underlying premise is Marshall's command that the law should place the prosecution and defense on equal ground.[45] Cases and statutes from states which lead in the formulation of criminal discovery procedures will be cited to support these rules and to show that a system of complete discovery is practical.

1. *Once brought before a magistrate, an accused shall be entitled to a true and correct copy of any and all statements or confessions he has given to the police.* In *Powell v. Superior Court*[46] the trial court denied defendant's motion for an order authorizing petitioner and his attorney a pretrial inspection of his signed confession and a transcript of statements made

[41] Goodwin v. Bickford, 20 Okla. 91, 93 P. 548 (1908).
[42] 38 OKLA. B. A. J. 1952 (1967).
[43] OKLA. STAT. tit 12, ch. 2 Appendix, R. 5, 12, 14, 15 (Supp. 1967).
[44] *See* Inverarity v. Zumwalt, 97 Okla. Crim. 294, 298, 262 P.2d 725, 730 (1953). "[The Oklahoma Court of Criminal Appeals has] supervisory power over all criminal actions in every court from which any appeal may be perfected to [it], directly or through an intermediate court, as where a case has been 'commenced' by filing of a preliminary information and issuance of warrant."
[45] See text accompanying notes 1-2 *supra.*
[46] 48 Cal 2d 704, 312 P.2d 698 (1957).

to the police. Basing its decision on the defendant's allegation that he needed the information to refresh his recollection and on respondent's admission that the material was relevant to the issues of the case, the Supreme Court of California allowed inspection. It held that an application for pretrial inspection of a signed confession, admission, or transcripts of statements is addressed to the sound judicial discretion of the trial court and should be allowed where it is in the interest of justice.

2. *At the time he is brought before a magistrate, the accused or his attorney shall be given a copy of all reports upon which the charge is brought.* In *People v. Riser*[47] the California Supreme Court stated that, in the absence of some governmental requirement that information be kept confidential, a defendant is entitled to have discovery during trial of statements that witnesses have given to police. The court reasoned that discovery should be allowed for purposes of impeachment since one goal of a criminal trial is the ascertainment of facts. Using the *Riser* case as a steppingstone, the same court in *Funk v. Superior Court*[48] allowed discovery of witnesses' statements made at the pretrial stage. It said that there is no sound reason for applying a different rule merely because production is requested prior to, rather than during, trial. The Supreme Court of Missouri in *State v. Tippett*[49] earlier had given defendant the right to obtain statements in the hands of police in order to impeach the testimony of a witness.

> . . . That it was desired that the state's evidence remain undisclosed, partakes in the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.[50]

[47] 47 Cal. 2d 566, 305 P.2d 1 (1956).
[48] 52 Cal 2d 423, 340 P.2d 593 (1959).
[49] 317 Mo. 319, 296 S.W. 132 (1927).
[50] 296 S.W. at 135.

3. *Once committed, the accused shall be entitled to take depositions of all witnesses whom the prosecution intends to call in support of its case at trial.* In 1961 the Vermont Legislature passed a statute which gives the accused, after the filing of the indictment or information, the right to take the deposition of any witness whose testimony would be material to his defense.[51] In a recent article on criminal discovery in Vermont it is pointed out that the effect of this statute has been to decrease the likelihood of a trial because the defendant can readily determine the nature of the state's case. The element of bluffing is eliminated, and the parties are encouraged to work out a solution to the charge.[52]

4. *In order to be sure that all relevant facts are brought forth, the accused shall be required to give to the prosecution the names and addresses of all witnesses whom he intends to call in his defense.*

5. *The prosecution shall have the right to take the depositions of the disclosed defense witnesses before trial.*

6. *The prosecution shall have the right to direct interrogatories to the accused to require him to answer questions on all the matters that he intends to present at trial.*

7. *The accused shall not be required to answer any question relating to a matter that he does not intend to present at trial or which would tend to incriminate him.*

The Supreme Court of California in *Jones v. Superior Court*[53] allowed the prosecution pretrial discovery of the names of physicians, medical reports and X-rays which were intended for use at trial to prove the defendant impotent and incapable of rape. The court stated that this rule did not violate the privilege against self-incrimination because it only

[51] VT. STAT. ANN. tit 13, § 6721 (Supp. 1965).
[52] Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).
[53] 58 Cal 2d 56, 372 P. 2d 919, 22 Cal. Reptr. 879 (1962).

required the defendant to disclose information he would shortly reveal in any event. Absent the privilege against self-incrimination or any other privilege provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence which can throw light on the issues of the case.

8. *A failure of the accused to take advantage of the opportunities which these rules would present shall constitute a waiver of his right to a new trial on the basis of newly discovered evidence if such evidence reasonably could have been obtained through these procedures.* The supreme courts of both Vermont and California have held that where a defendant does not use a reasonable effort, including discovery, to produce all his evidence at trial he is not entitled to a new trial on the basis of newly discovered evidence which would have been made known to him had he used the method available.[54]

> The parade of "horribles" escaping from Pandora's box as proposed by the opponents of change . . . are numerous. They include possible intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on the prosecution officer, increased costs of the administration of criminal law, etc.

The interesting thing shown by Vermont's experience is that all of these "horribles" are imaginary.[55] After five years of practice under the system neither prosecutors, judges nor defense counsel were calling for a return to the old law. "Let us not cut ourselves off from the good because of a few islands of potential danger. If there is real danger, it can be controlled."[56]

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[54] People v. Williams, 57 Cal. 2d 263, 368 P. 2d 353, 18 Cal. Reptr. 729 (1962); State v. Ciocca, 225 A.2d 65, (Vt. 1967).
[55] Langrock, *supra* note 53, at 734.
[56] *Id.*