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Sharon Fleming

Washington University School of Law

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DEFENDANT ACCESS TO PROSECUTION WITNESS STATEMENTS IN FEDERAL AND STATE CRIMINAL CASES

Overburdened criminal dockets of federal and state courts across the United States demand discovery¹ procedures that ensure optimal use of court time while promoting just disposition of cases. One aspect of criminal discovery—the timing of defendant access to prosecution witness statements—plays a significant role in criminal prosecutions.

In 1957, Congress enacted the Jencks Act,² which affords defendants in federal criminal cases the right to obtain a prosecution witness' prior statements only after the witness has testified on direct examination at trial.³ While fourteen states similarly deny access to such statements

1. In the context of this Note, the term "discovery" refers to the receipt of information by the defense, and the term "disclosure" refers to prosecutorial relinquishment of information to the defense.

2. The Jencks Act, 18 U.S.C. § 3500 (1976).

3. The Jencks Act provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) . . . Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

1) a written statement made by said witness and signed or otherwise adopted or approved by him;

2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Id.

Rule 26.2 of the Federal Rules of Criminal Procedure, which became effective on December 1, 1980, placed in the criminal rules the substance of the Jencks Act. In addition, Rule 26.2 provides

until after direct testimony,⁴ the remaining states afford access to prosecution witness statements at various stages of the judicial process.⁵

Part I of this Note provides a brief summary of the traditional arguments favoring and opposing criminal discovery. Part II examines federal and state enactments withholding defendants' access to prior statements of prosecution witnesses until after direct testimony at trial. Part III explores state enactments allowing discovery of such statements prior to the witness' direct testimony.⁶ Part IV discusses access to witness statements in those states in which discovery of such statements is governed by case law.⁷

I. HISTORICAL BACKGROUND

At common law there existed no right to discovery of the name or testimony of any prosecution witness.⁸ Statutes enacted in the late

for production of the statements of defense witnesses at trial in essentially the same manner as is now provided for with respect to the statements of government witnesses. The Advisory Committee notes that follow the rule, however, state that the rule is not intended to discourage earlier voluntary disclosure. The Committee reasoned that such early disclosure will avoid delays at trial. The Rule also requires disclosure of statements in the possession of either party when the witness is called by the court pursuant to the Federal Rules of Evidence. *See* FED. R. CRIM. P. 26.2.

4. The states which allow defendants access to prosecution witness statements after direct testimony are Alaska, Arkansas, Connecticut, Delaware, Hawaii, Kansas, Louisiana, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas and Wyoming. *See infra* notes 67-93 and accompanying text.

5. *See infra* notes 104-05, 116-17, 123, 133 & 141-64 and accompanying text. Georgia and Virginia appear to deviate from the textual statement. *See infra* notes 166-76 and accompanying text. The positions taken by the states on the timing of defendant access to prosecution witness statements is presented in chart form in the Appendix to this Note.

6. Pretrial discovery is viewed as a sub-class of pre-direct testimony discovery for the purpose of this Note. Thus, the Rules of Criminal Procedure and federal and state statutes dealing with pretrial discovery are considered *in pari materia* with those aimed at pre-direct testimony discovery. Although pretrial discovery rules are inoperative once the trial begins, the seminal consideration in this Note is defendant access to prosecution witness's prior statements at some time before the witness takes the stand versus access after the direct testimony of the witness at trial. The defense counsel's responsibility to take advantage of pretrial discovery procedures and the consequences of his failure to do so are matters beyond the scope of this Note.

7. For a compilation of pretrial discovery rules across the country in 1971, see Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 600 app. a.

8. *See, e.g.,* Rex v. Holland, 100 Eng. Rep. 1248 (K.B. 1792). Responding to a motion for discovery of a report on which the charges against the defendant were based, the court stated:

Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law. . . . And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent.

nineteenth and early twentieth centuries introduced the use of preliminary hearings and marked the beginning of criminal discovery in England.⁹

In the United States, the extent of defendants' access to statements of Government witnesses in federal criminal prosecutions prior to 1957 was governed primarily by appellate court decisions.¹⁰ Similarly, most states left the development of criminal discovery to the judiciary.¹¹ Traditionally, little, if any, formal discovery has been available to the criminal defendant.¹²

Among the early objections to criminal discovery, the most often cited was the possibility that severe penalties would motivate criminal defendants to procure perjured testimony and to fabricate defenses.¹³ Opponents argued that criminal discovery thus served to thwart honest fact-finding rather than to promote justice. Opponents further argued that discovery of the identity of prosecution witnesses might result in bribery or intimidation of the witnesses by the defendant or his

Id. at 1249-50.

9. 6 J. WIGMORE, EVIDENCE § 1850 n.1 (Chadbourn rev. 1976). *See generally* Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U. L. REV. 749, 750-54 (1964) (discussing the origin of the preliminary hearing in England and its use as a discovery device).

10. *See, e.g.*, *United States v. Krulewitch*, 145 F.2d 76 (2d Cir. 1944). The Second Circuit initiated the practice of requiring Government documents to be produced for a determination of their relevancy and materiality for impeachment purposes. *See United States v. Grayson*, 166 F.2d 863, 869-70 (2d Cir. 1948); *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946); *United States v. Cohen*, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1944); *United States v. Krulewitch*, 145 F.2d 76, 78-79 (2d Cir. 1944). *See generally* 11 STAN. L. REV. 297, 297-301 (1959); 67 YALE L.J. 674 (1958).

11. *See* 8 FORDHAM URB. L.J. 731, 731 (1980). *See generally* 23 SYRACUSE L. REV. 89, 89-90 (1972).

12. *See, e.g.*, *Goldman v. United States*, 316 U.S. 129 (1942). In *Goldman*, the accused was denied the right before trial to inspect notes and memoranda of federal agents made during their investigation. The Supreme Court declared that "[t]he judge was clearly right in his ruling . . . as the petitioners should not have had access, prior to trial, to material constituting a substantial portion of the Government's case." *Id.* at 132. *See also* *Blevins v. State*, 220 Ga. 720, 722-23, 141 S.E.2d 426, 429 (1965); *State v. Spica*, 389 S.W.2d 35, 51-52 (Mo. 1965), *cert. denied*, 383 U.S. 972 (1966); *Melchor v. State*, 404 P.2d 63, 68 (Okla. 1965).

13. *See, e.g.*, *Commonwealth v. Mead*, 78 Mass. (12 Gray) 167, 170 (1858); *State v. Tune*, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953), *cert. denied*, 349 U.S. 907 (1955); *State v. Rhoads*, 81 Ohio St. 397, 423-24, 91 N.E. 186, 192 (1910). *See also* J. WIGMORE, *supra* note 9, at § 1863. In England, criminal defendants were not given the right to call witnesses and to present a defense until 1867. Traynor, *supra* note 9, at 753. *See generally* *Guzman, Arkansas' 1971 Criminal Discovery Act*, 26 ARK. L. REV. 1, 2-4 (1972); *Zagel & Carr, supra* note 7, at 560-61; 8 FORDHAM URB. L.J. 731, 731-33 (1980).

accomplices.¹⁴

Some opponents of criminal discovery believed that the defendant's right to remain silent, coupled with the prosecution's burden to prove guilt beyond a reasonable doubt, afforded the defendant every advantage.¹⁵ Thus, they argued, allowing the defendant access to the prosecution's evidence would serve only to obstruct the prosecution of crime.

This opposition to criminal discovery eventually became the subject of critical commentary. One commentator described the argument that defense discovery would invite perjury¹⁶ as a "hobgoblin" and a "complete fallacy,"¹⁷ because there was no evidence that discovery in criminal cases would result in a greater incidence of perjury and fabrication.¹⁸ Furthermore, proponents of criminal discovery assert that the danger of misuse of discovered evidence by the dishonest defendant in no way justifies refusing the honest defendant a fair and effective means of preparing an adequate defense.¹⁹ Proponents also criticize the perjury argument as an insult to the criminal defense bar because it implies that defense attorneys will encourage perjury once

14. See, e.g., *State v. Tune*, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953), *cert. denied*, 349 U.S. 907 (1955); *People v. DiCarlo*, 161 Misc. 484, 485-86, 292 N.Y.S. 252, 254 (N.Y. Sup. Ct. 1936).

15. See, e.g., May, *Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 661 (1876) ("[I]t may fairly be said, that, so soon as a man is arrested on a charge of crime, the law takes the prisoner under its protection, and goes about to see how his conviction may be prevented. . . .").

In *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923) Judge Learned Hand stated:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he [the defendant] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Id. at 649.

16. See *supra* note 13 and accompanying text.

17. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291.

18. See *United States v. Projansky*, 44 F.R.D. 550, 556 (S.D.N.Y. 1968). The court described the argument as being built on "untested folklore."

19. See, e.g., 6 J. WIGMORE, *supra* note 9, at § 1863 ("That argument [that pretrial discovery will result in perjury and fabricated defenses] is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all.").

discovery is obtained.²⁰

In response to the witness intimidation argument,²¹ proponents forward the availability of protective orders and other sanctions within the discretion of the trial court as effective safeguards when circumstances appear to justify secrecy.²² For example, when it is apparent that a defendant may subject a witness to economic harm, physical injury or other coercion, the trial court in its discretion may properly deny a defense request for disclosure of the witness' name and address.²³ Moreover, commentators rebut the claim that the accused has the advantage in criminal prosecutions by noting that the prosecution has the investigative advantages of manpower and facilities.²⁴

In sum, proponents argue that a criminal defendant who faces the loss of liberty should, in the interest of fairness, be accorded at least the same rights of discovery as those allowed the civil defendant.²⁵ Furthermore, the presumption of innocence mandates discovery in criminal cases: if the defendant is presumed innocent he must be presumed to have no personal knowledge of the crime charged.²⁶ Proponents also

20. See, e.g., Brennan, *supra* note 17, at 291-92.

21. See *supra* note 14 and accompanying text.

22. See, e.g., Brennan, *supra* note 17, at 292; Traynor, *supra* note 9, at 250.

23. See, e.g., FLA. R. CRIM. P. 3.220(h).

24. See, e.g., Jackson v. Wainwright, 390 F.2d 288, 294 (5th Cir. 1968) (possibility of unfairness arising from prosecution's superior resources is a weakness of the adversary system); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 533-36 (1973); Zagel & Carr, *supra* note 13, at 560-61. Generally, the prosecution's investigative capability outweighs that of the defense in terms of manpower and facilities. In addition, the accused often gives the prosecution a statement or confession or is forced to appear in a line-up. *Id.*

Professor Goldstein points out that even the defendant who uses his own resources to locate witnesses who have spoken to the police, prosecutor or grand jury will probably find that such witnesses are unwilling to talk with him. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1182 (1960). Professor Goldstein suggests that the wide discrepancy between prosecution and defense investigative resources could easily be overcome if the accused were allowed access to state equipment and files. *Id.* at 1182 n.110.

25. See, e.g., Goldstein, *supra* note 24, at 1193 ("Every one of the many excellent arguments which carried the day for pretrial discovery in civil cases is equally applicable on the criminal side."); Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 83 (1963) (defendant usually unable to recall every detail of the transaction, unaware of the names of all the witnesses or what they have said in prior statements and does not possess all the evidence which may be relevant at his trial).

26. Zagel & Carr, *supra* note 13, at 560. See also Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 372 (1960) ("Criminal prosecution is not designed to determine the better of two contestants; to argue that we should not afford the defendant a certain degree of discovery because it gives him a better chance to win is to assume he is guilty.").

claim that pretrial discovery promotes the ends of justice and the search for truth by ensuring the exposure of all relevant facts at trial and by eliminating the use of surprise tactics.²⁷ This improves the efficiency of criminal justice administration and assures the defendant of his right to a fair trial by enabling him to adequately prepare his defense.²⁸ Finally, proponents contend that pretrial discovery economizes the use of court time by allowing the accused to weigh the evidence and determine whether to enter a plea of guilty or not guilty in the context of plea-bargaining.²⁹

II. DISCLOSURE AFTER DIRECT TESTIMONY AT TRIAL

A. *The Jencks Decision and Subsequent Legislation*

In 1957, in *Jencks v. United States*,³⁰ the Supreme Court announced for the first time the accused's right to obtain confidential statements made by government witnesses in federal criminal prosecutions. The *Jencks* Court held that upon motion to the court, a defendant is entitled, for impeachment purposes, to an order directing the prosecution to produce for the defendant's inspection all relevant statements or reports in its possession of Government witnesses touching on the subject matter of their testimony at trial.³¹ Furthermore, the Court held that a defendant is not required to lay a prior foundation of inconsistency between the reports and testimony of the witnesses.³²

27. See Fletcher, *supra* note 26. But see Pulaski, *Criminal Trials: A "Search for Truth" or Something Else?*, 16 CRIM. L. BULL. 41 (1980). Professor Pulaski posits that the perception of a criminal trial as a search for truth is misguided. He suggests that the criminal trial should be thought of as a "guilt determining process." *Id.* at 45.

28. See, e.g., Pye, *supra* note 25; Zagel & Carr, *supra* note 13.

29. See Zagel & Carr, *supra* note 13.

30. 353 U.S. 657 (1957).

31. *Id.* at 668. Justice Clark, in dissent, warned that the *Jencks* majority had opened the files of the United States intelligence agencies, affording the criminal "a Roman holiday for rummaging through confidential information as well as vital national secrets." *Id.* at 681-82.

32. *Id.* at 666-68. "Foundation" in this context refers to a demonstration to the court that material within the documents in the Government's possession is inconsistent with the trial testimony of the witness. *Id.* The Court stated that sufficient foundation was established by the Government witnesses' (undercover agents for the F.B.I.) testimony that their reports concerned matters about which they had testified. *Id.* at 666.

The Court disapproved of the practice of production of Government documents to the trial judge for his determination of their relevancy and materiality for impeachment purposes, stating that the defense alone is capable of determining what use may be made of such documents. *Id.* at 668-69. The Court stated that the trial judge's admissibility determinations should be made only after inspection by the accused. *Id.* at 669.

The *Jencks* decision, however, failed to delimit the scope of the discovery right accorded to criminal defendants.³³ Absent Supreme Court guidance, lower courts rendered conflicting opinions on the scope and timing of production.³⁴ In response, the 85th Congress enacted the Jencks Act,³⁵ to prevent abuses it feared would result from expansive interpretations of *Jencks*.³⁶ Congress intended the Act to protect both the rights of the criminally accused and confidential information in the Government's possession.³⁷ The Act rigidly prescribes the time at which the accused may obtain relevant matter: discovery, upon motion of the defendant,³⁸ is allowed only after the witness has testified upon direct examination.³⁹ Congress expressly provided for discretionary postponement of trial proceedings subsequent to disclosure of a witness statement, to afford defense counsel an opportunity to examine the statement for possible use during trial.⁴⁰

The timing provision of the Jencks Act may be criticized on several grounds. The most effective witness impeachment occurs when cross-examination immediately follows direct examination.⁴¹ Production of

33. See *Palermo v. United States*, 360 U.S. 343, 346-47 (1959).

34. A majority of these courts limited production of prosecution witness statements until after direct testimony of the witness at trial. See, e.g., *United States v. Grado*, 154 F. Supp. 878 (W.D. Mo. 1957); *United States v. Grossman*, 154 F. Supp. 813 (D.N.J. 1957); *United States v. Anderson*, 154 F. Supp. 374 (E.D. Mo. 1957), *aff'd*, 262 F.2d 764 (8th Cir.), *cert. denied*, 360 U.S. 929 (1959); *United States v. Palermo*, 21 F.R.D. 11 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 397 (2d Cir. 1958), *aff'd*, 360 U.S. 343 (1959). In many cases, however, the defense relied on *Jencks* to justify demands for pretrial production of government files. *United States v. Palermo*, 360 U.S. 343, 346. For a discussion of problematic cases in the lower federal courts after *Jencks*, see H. REP. NO. 700, 85th Cong., 1st Sess. 11 (1957) (statement of Attorney General Brownell) and S. REP. NO. 981, 85th Cong., 1st Sess. (1957).

35. 18 U.S.C. § 3500 (1976). See *supra* note 3.

36. The fear of abuses and the need for congressional action was first expressed by Justice Clark in his dissent in *Jencks*. 353 U.S. at 681-82. A student author, however, has advocated that "the prosecutor's entire file should, except in special cases, be open to defense inspection." 40 U. CHI. L. REV. 112, 113 (1972). For a full discussion of the Jencks legislation, its legislative history, and congressional intent, see 11 STAN. L. REV. 297 (1959); 67 YALE L.J. 674 (1958).

37. S. REP. NO. 569, 85th Cong., 1st Sess. 2-3 (1957). The Jencks Act is premised on the desire of Congress to protect potential witnesses from threats of bribery or coercion and to protect government files against unwarranted and excessive intrusions. See, e.g., *United States v. Walk*, 533 F.2d 417 (9th Cir. 1975); *United States v. Feinberg*, 502 F.2d 1180 (7th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1976).

38. 18 U.S.C. § 3500(b) (1976).

39. 18 U.S.C. § 3500(a) (1976). See *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977) for an example of early disclosure of Jencks Act materials ordered by the trial court.

40. 18 U.S.C. § 3500(c) (1976).

41. See 6 J. WIGMORE, EVIDENCE § 1884 (Chadbourn rev. 1976):

The cross-examination, or examination by the party not calling the witness, follows im-

prior statements under the Jencks Act after direct examination followed by a recess, however, may deprive the defendant of maximum benefit from cross-examination.⁴² Pretrial discovery, in contrast, would provide the defense with more time to examine the witness statements, and knowledge of their content prior to direct examination would aid in recognition of inconsistencies as they develop.⁴³ Moreover, recesses inherent in the Jencks Act timing requirement result in trial delays and wasted court time.⁴⁴

B. United States v. Algie

In *United States v. Algie*,⁴⁵ the Eastern District of Kentucky relaxed the literal time requirements of the Jencks Act⁴⁶ and ordered pre-direct testimony disclosure of Government witness statements.⁴⁷ Although the Sixth Circuit Court of Appeals reversed the order of the district court,⁴⁸ District Judge Bertelsman's lengthy opinion provides a useful analysis of the shortcomings of the Jencks Act timing requirement.⁴⁹

The district court reasoned that the Jencks Act, adopted in 1959, must be read *in pari materia* with the Federal Rules of Evidence⁵⁰ and

mediately the direct examination, in the customary order prescribed by the common law

Since the purpose of this immediate sequence is to furnish the tribunal with the means of fixing the net significance of the witness' testimony while the tenor of his direct testimony is fresh in their minds, it seems proper enough to hold that *the opponent is entitled to this immediate sequence*, in order to expose without delay the weak points of the testimony against him. (emphasis in original).

42. See generally 67 YALE L.J. 674 (1958).

43. *Id.* at 696-97.

44. See *infra* note 70 and accompanying text.

45. 503 F. Supp. 783 (E.D. Ky. 1980), *rev'd*, 667 F.2d 569 (6th Cir. 1982). *Algie* involved an alleged interstate gambling conspiracy with "voluminous documentary evidence" to be interpreted by Government witnesses. 503 F. Supp. at 785 n.2.

46. See *supra* note 3 for text of 18 U.S.C. § 3500(a) (1976).

47. The prosecutor was required to produce Jencks Act statements of government agents and police officials five days prior to the beginning of trial, and statements of other witnesses the night before they were scheduled to testify. 503 F. Supp. at 789-90.

48. 667 F.2d 569 (6th Cir. 1982).

49. For other cases in which the trial court ordered early disclosure of Jencks Act materials, see *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977); *United States v. Fine*, 413 F. Supp. 740 (W.D. Wis. 1976).

50. 503 F. Supp. at 795-96. The court focused on Federal Rules of Evidence 102, 403, and 611(a) which read as follows:

Rule 102. Purpose and Construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

other subsequent acts of Congress, including the Speedy Trial Act of 1974.⁵¹ According to the *Algie* court, Congress, in adopting the Rules of Evidence, accorded the federal district courts broad discretion to manage their dockets.⁵² Such discretion, reasoned the court, included the freedom to relax the literal time requirements of the Jencks Act.⁵³ The court characterized the Speedy Trial Act as a congressional directive that courts, in managing their dockets, use all necessary means to dispose of the cases before them.⁵⁴ Judge Bertelsman noted that in 1959, Congress undoubtedly was aware of the Code of Judicial Conduct which requires a judge to insist that court officials, litigants, and their lawyers cooperate with the judge in handling the court's business promptly.⁵⁵ Judge Bertelsman concluded that in light of these enactments, the Jencks Act must be read⁵⁶ as permitting courts to exercise discretion to adjust the time limitations of the Act. Otherwise, he argued, courts would be precluded from discharging their obligations in complex criminal cases such as *Algie*.⁵⁷

The *Algie* court also noted that the United States Attorney previously had agreed to early production of Jencks Act statements in order

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 611(a). Control by Court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The court stated that when construed according to standard rules of statutory construction the Federal Rules of Evidence, enacted by special act of Congress, Act of January 2, 1975, Pub. L. 93-595, 88 Stat. 1926, supercede or implicitly amend previous enactments contrary to them. 503 F. Supp. at 791.

51. 18 U.S.C. § 3161 (1976).

52. 503 F. Supp. at 796.

53. *Id.*

54. *Id.* at 796-97.

55. *Id.* at 797.

56. For the court's discussion of its application of accepted rules of statutory construction, see *id.* at 796 n.41.

57. *Id.* at 797. Judge Bertelsman concluded that "[i]nasmuch as the drastic sanction of exclusion of the evidence is expressly provided for in Rule 403, the less drastic sanction of compelling compliance with conditions to remove or alleviate the prejudicial or time-wasting aspects of the introduction of the evidence is also authorized." *Id.* at 793. See *supra* note 50 for the text of Rule 403.

to expedite criminal cases.⁵⁸ Early production shortened trials by an average of one-third to one-half.⁵⁹ In addition, although the parties did not plea bargain, many cases resulted in guilty pleas.⁶⁰

In summary, in rendering its decision, the trial court in *Algie* considered the following factors: its responsibility to dispose of its business within a reasonable time,⁶¹ a criminal defendant's right to effective assistance of counsel⁶² and due process of law,⁶³ and the danger of witness intimidation.⁶⁴ Although the Sixth Circuit Court of Appeals reversed the district court order,⁶⁵ it strongly endorsed voluntary early disclosure of Jencks Act materials in the interest of expeditious disposition of criminal cases.⁶⁶ Thus, the Sixth Circuit recognized that the

58. 503 F. Supp. at 786.

59. *Id.* at 787. At the oral argument in *Algie*, the United States Attorney admitted that 20 to 40 minute recesses at the conclusion of the direct examination of each witness are frequently necessary when Jencks Act timing is literally complied with. *Id.* The court stated that an attorney cannot adequately prepare the cross-examination of an expert on a complicated matter during a trial recess. *Id.* at 788. Indeed, argued the court, such a situation may result in the denial of effective assistance of counsel and due process of law. *Id.* at 789.

60. *Id.* at 787.

61. *Id.* at 797. The *Algie* court discussed the serious docket backlog that existed in the Eastern District of Kentucky. *Id.* at 786.

62. *Id.* at 789 (denial of effective assistance of counsel would result if attorney for the defense was expected to analyze Jencks Act statements during recess).

63. The *Algie* court quoted with approval from *United States v. Narcisco*, 446 F. Supp. 252, 270 (E.D. Mich. 1977):

Courts have long recognized that they have inherent power *not limited by statute or rule* to insure that due process of law is provided and that criminal trials are fair and efficient. *U.S. v. Jackson*, 508 F.2d 1001 (7th Cir. 1975); *U.S. v. Cammisano*, 413 F. Supp. 886 (W.D. Mo. 1976); *U.S. v. Germain*, 411 F. Supp. 719 (S.D. Ohio 1975); *U.S. v. Winchester*, 407 F. Supp. 261 (D. Del. 1975).

503 F. Supp. at 798 (emphasis in original).

64. *Id.* at 785. The court made clear that it was prepared to make exceptions to its order for early production of Jencks Act statements if the United States Attorney could demonstrate the presence of such a danger as witness intimidation. *Id.* at 785, 789.

65. 667 F.2d 569 (6th Cir. 1982).

66. Although compelled to reverse the district court's order by the imperative language of the Jencks Act, the Sixth Circuit Court of Appeals expressly approved of the district court's objectives:

We emphasize that we heartily approve of the District Judge's objectives in seeking to bring about the disposition of his crowded docket, and applaud his efforts in this regard. We hope that will continue and that he will succeed in securing the maximum cooperation with his trial plans that it is possible to achieve from such voluntary cooperation as may be had from the United States Attorney.

Id. at 571. The court further commented that:

[f]or the reasons so ably spelled out by the District Judge in this case, we trust that that option [early disclosure of Jencks Act materials] will be used freely by the United States Attorneys in this circuit in all instances where there is not substantial reason for the prosecution to hold its cards as tightly to its chest as the Jencks Act clearly authorizes it to do.

stringent time limitation of the Jencks Act is not necessary in all cases and may result in needless delays in many cases.

C. State Enactments

Several states have statutes and procedural rules governing discovery of prosecution witness statements patterned after the Jencks Act.⁶⁷ When confronted with questions requiring the interpretation of such statutes and rules, those states frequently look to federal case law for guidance.⁶⁸

Id. at 572.

67. Rule 16(i) of the North Dakota Rules of Criminal Procedure (Allen Smith, 1981 Supp.) governs discovery and inspection. The rule is representative of state statutes patterned after the Jencks Act. Section (i) pertains to demands for production of statements and reports of witnesses:

(1) In any criminal prosecution, no statement or report in the possession of the prosecution which was made by a prosecution witness or prospective prosecution witness (other than the defendant) to an agent of the prosecution is subject to subpoena, discovery, or inspection until the witness has testified on direct examination.

(2) After a witness called by the prosecuting attorney has testified on direct examination, the court, on motion of the defendant, shall order the prosecuting attorney to produce any statement (as hereinafter defined) of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified.

(5) the term "statement," as used in paragraphs (2), (3) and (4) in relation to any witness called by the prosecuting attorney, means:

- (i) a written statement made by the witness and signed or otherwise adopted by him; or
- (ii) a stenographic, mechanical, electrical, or other record, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the prosecution and recorded contemporaneously with the making of the oral statement.

Note that in contrast with the federal statute, the North Dakota definition of "statement" does not encompass a statement made to a grand jury.

The following rules and statutes have Jencks-type provisions: ALASKA STAT. §§ 12.45.050-060, 12.45.160 (1980); ARK. STAT. ANN. § 43-2011.3 (1977); CONN. GEN. STAT. § 54-86b (1981); HAWAII R. CRIM. P. 17; KAN. CRIM. PROC. CODE ANN. § 22-3213 (Vernon 1974); S.D. CODIFIED LAWS ANN. §§ 23A-13-6 to -10 (1979); TENN. R. CRIM. P. 16; WYO. R. CRIM. P. 18.

For cases applying these statutes, see *Putnam v. State*, 629 P.2d 35 (Alaska 1980); *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980); *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978); *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977); *State v. Gilbert*, 36 Conn. Supp. 129, 414 A.2d 496 (1979); *State v. Maluia*, 56 Hawaii 428, 539 P.2d 1200 (1975); *State v. Kahinu*, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973); *State v. Campbell*, 217 Kan. 756, 539 P.2d 329, *cert. denied sub nom. Docking v. Kansas*, 423 U.S. 1017 (1975); *State v. Humphrey*, 217 Kan. 352, 537 P.2d 155 (1975); *State v. Kelly*, 216 Kan. 31, 531 P.2d 60 (1975); *State v. Hager*, 271 N.W.2d 476 (N.D. 1978); *State v. Serl*, 269 N.W.2d 785 (S.D. 1978); *Janklow v. Talbott*, 89 S.D. 179, 231 N.W.2d 837 (1975); *State v. Robinson*, 618 S.W.2d 754 (Tenn. Crim. App. 1981); *State v. Wright*, 618 S.W.2d 310 (Tenn. Crim. App. 1981); *Jones v. State*, 568 P.2d 837 (Wyo. 1977); *Deluna v. State*, 501 P.2d 1021 (Wyo. 1972).

68. *See, e.g., Wright v. State*, 501 P.2d 1360 (Alaska 1972) *cited in Putnam v. State*, 629 P.2d

Jencks-type state statutes are subject to the same criticisms that the court identified in *United States v. Algie*.⁶⁹ Assuming that the defense is entitled to a recess to examine the contents of prior statements before cross-examination, Jencks-type timing of discovery inevitably will lengthen the trial.⁷⁰ This results in less than optimal use of valuable court time.⁷¹ Moreover, such recesses may provide insufficient time for preparation of adequate cross-examination, especially when the case involves statements of expert witnesses dealing with complex matters.⁷² This in turn portends potential deprivations of effective assistance of counsel.⁷³ Finally, recesses following production of Jencks material

35, 43 n.15 (Alaska 1980); *State v. Gilbert*, 36 Conn. Supp. 129, 414 A.2d 496 (1979); *State v. Kahinu*, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973); *State v. Hager*, 271 N.W.2d 476 (N.D. 1978); *Jones v. State*, 568 P.2d 837 (Wyo. 1977).

69. See *supra* notes 45-64 and accompanying text.

70. The *Algie* court, for example, found that trials were shortened by an average of one-third to one-half as a result of early production of Jencks Act statements. 503 F. Supp. at 787, *rev'd*, *United States v. Algie*, 667 F.2d 569 (6th Cir. 1982). See also *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977). In *Narcisco*, the district court ordered early production of Jencks Act statements in order to avoid the many delays that would be occasioned by recesses following normal production of such statements. The court stated that such recesses would "seriously hamper the efficient, orderly and fair conduct of the trial. The subject of the trial will be difficult enough for the parties, the Court and jurors to assimilate without the added hindrance of numerous delays." 446 F. Supp. at 270. See also *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House of Representatives Comm. on the Judiciary*, 96th Cong., 2d Sess. 115 (1980) (summary of testimony of the Federal Public and Community Defenders) ("The Jencks Act is a tremendous obstacle to trial continuity and efficiency. Recesses, mini-hearings and adjournments are regular results of the Act.")

71. See, e.g., *United States v. Goldberg*, 336 F. Supp. 1 (E.D. Pa. 1971). The *Goldberg* court noted that the pressure to expedite the disposition of criminal cases should be regarded as applying to prosecutors as well as to judges. Given this consideration the court posited that "[t]he mere fact that the Jencks Act precludes the Court from ordering disclosure of a witness' statement until after the witness has testified does not mean that in every case Government counsel should be unwilling to expedite matters by making these statements available at such times as will eliminate trial delays. . . ." *Id.* at 2 (emphasis added). In *Goldberg*, the statements were furnished in advance of the trial. *Id.* at 1.

72. See, e.g., *United States v. Algie*, 503 F. Supp. at 788 (An attorney cannot be expected to prepare the cross-examination of an expert on a complicated matter during a trial recess).

73. The Arkansas statute, for example, like the Jencks Act, provides that prosecution witness statements shall not be disclosed until the witness has testified on direct examination. See ARK. STAT. ANN. § 43-2011.3 (1977). Notwithstanding the imperative language of that statute, the Supreme Court of Arkansas, in 1978, held that Rules 17.1 and 19.4 of the Arkansas Rules of Criminal Procedure call for pretrial disclosure of prosecution witness statements to reduce delays during trial by allowing defense counsel to plan cross-examination. *Williamson v. State*, 263 Ark. 401, 404, 565 S.W.2d 415, 417-18 (1978).

ARK. R. CRIM. P. 17.1 provides:

may diminish substantially the effectiveness of defense counsel's cross-examination of prosecution witnesses.⁷⁴

Connecticut, pursuant to a Jencks-type statute,⁷⁵ allows production of prior witness statements only to the extent that such statements directly relate to the actual issues or events about which the witness has testified.⁷⁶ Thus, Connecticut affords the defendant access to prosecution witnesses' prior statements only if the defendant can demonstrate that the witness previously made a statement inconsistent with his trial testimony.

A witness' prior statement that does not directly relate to trial testimony, however, may be a valuable source upon which to build effective cross-examination. For example, cross-examination tending to show bias, dishonest character, or defects in a witness' capacity to observe, remember or recount the matters about which he has testified may im-

(a) Subject to the provisions of Rules 17.5 and 19.4 the prosecuting attorney shall disclose to defense counsel, *upon timely request*. . . .

. . . .

(d) Subject to the provisions of Rule 19.4 the prosecuting attorney shall . . . disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant. . . .

ARK. R. CRIM. P. 19.4 requires that all "information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use therefore."

The statements involved in *Williamson* were descriptions of the assailant in a robbery given to police officers by the victim and a witness. 263 Ark. at 404, 565 S.W.2d at 416-17. At trial, defense counsel was denied access to these statements before and after direct testimony. *Id.* at 404, 565 S.W.2d at 416-17. The victim testified that she had not given any description to the police, the Sheriff admitted that the victim had given him a description, and the witness gave a conflicting description. *Id.* at 404, 565 S.W.2d at 417. The impeachment value of prior statements given this sort of testimony is apparent. With respect to the timing of disclosure, the court stated that "[i]t seems clear that disclosure in advance of trial does not create any risks for the state inasmuch as any improper use of the disclosed material is virtually impossible." *Id.* at 405, 565 S.W.2d at 418.

74. *See supra* notes 41 & 43 and accompanying text.

75. CONN. GEN. STAT. § 54-86b (1981).

76. *See, e.g., State v. Gilbert*, 36 Conn. Supp. 129, 414 A.2d 496 (1979). The *Gilbert* court rejected the defendant's contention that the "subject matter" of the witness' testimony as defined in § 752 of the 1978 Connecticut Practice Book included any and all out-of-court utterances the witness may have made "concerning the case." *Id.* at 497. Judge Levine held that under § 752 of the Practice Book a defendant is not entitled to statements that are merely "incidental" or "collateral." *Id.* (citing *United States v. Birnbaum*, 337 F.2d 490, 497 (2d Cir. 1964)).

But cf. State v. Hager, 271 N.W.2d 476 (N.D. 1978) (holding that statements of a witness demonstrating bias, interest, or lack of clarity in recollecting events testified to are producible under North Dakota Rule of Criminal Procedure 16). The language of the North Dakota Rule is virtually identical to that of CONN. GEN. STAT. § 54-86b (1981). For the pertinent test of North Dakota Rule of Criminal Procedure 16, *see supra* note 67.

peach a witness.⁷⁷ Yet, witness statements demonstrating such impeaching characteristics frequently do not relate to the actual trial issues.⁷⁸ A Connecticut defendant, therefore, may be deprived of a valuable and legitimate means of discrediting state witnesses.

Ohio and Oklahoma statutes, like the Jencks Act, prohibit disclosure of witnesses' written or recorded statements until after the witness has completed direct examination at trial. Both states, however, have enacted additional limitations.⁷⁹ Ohio allows delivery of a witness' statement to the defense attorney only if an *in camera* inspection of the witness' statement, in the presence of both the defense attorney and the prosecuting attorney, reveals inconsistencies between the testimony of the witness and the prior statement.⁸⁰ If the court determines that inconsistencies do not exist, the statement is not disclosed to the defense attorney and he is not permitted to cross-examine or comment upon it.⁸¹ The Oklahoma statute⁸² does not allow defense discovery of wit-

77. See J. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 33 (2d ed. 1972).

78. See, e.g., *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977). The *Hamm* court noted that a witness may be impeached through means other than by a demonstration of inconsistencies between prior statements and trial testimony. Such additional "lines of attack" have the potential of completely discrediting a . . . witness, yet may not relate to matters about which a witness has testified on direct examination." *Id.* at 500-01, 378 A.2d at 1226. The court therefore held that "upon request at trial, the defense is entitled to examine in their entirety the prior statements of Commonwealth witnesses which the Commonwealth has in its possession." *Id.* The court further stated that "[u]pon a showing of good cause by the Commonwealth, the trial court may issue a protective order limiting the defense right to examine [such] statements. . . ." *Id.*

79. See OHIO R. CRIM. P. 16(B)(1)(g); OKLA. STAT. ANN. tit. 12, § 2613 (West 1980).

80. OHIO R. CRIM. P. 16(B)(1)(g) provides:

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an *in camera* inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

. . . .
If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

81. See, e.g., *State v. Ellis*, 46 Ohio App. 2d 102, 105, 345 N.E.2d 616, 618 (1975) (defendant entitled to benefits of Crim. R. 16(B)(1)(g) "whether [his] inquiry discloses the existence of a witness statement *immediately* upon the completion of the direct examination or *at any other time* during the cross-examination") (emphasis in original); *State v. Greer*, 17 Ohio Op. 3d 316, 324 (1980) ("patently one cannot participate in a discussion of inconsistencies without being afforded the opportunity to examine the document in question.").

82. OKLA. STAT. ANN. tit. 12, § 2613 (West 1980) provides: "In examining a witness concerning a prior statement made by him whether written or not, the statement . . . shall be shown or disclosed to opposing counsel just prior to cross-examination of the witness."

ness statements until “just prior to the cross-examination of the witness.”⁸³

The Ohio-type *in camera* inspection rule⁸⁴ may be insufficient to safeguard the defendant’s right to cross-examine state witnesses. The *Jencks* Court rejected the practice of producing statements to the trial judge for his determination of relevancy and materiality.⁸⁵ The Court stated that the defense alone is capable of determining the value of prior prosecution witness statements for impeaching Government witnesses.⁸⁶ Unlike the practice disapproved of in *Jencks*, however, Ohio provides for *in camera* inspection “with the defense attorney and prosecuting attorney present and participating.”⁸⁷ Nonetheless, the defense may not cross-examine or comment on a witness’ prior statement if the court determines that there are no inconsistencies between the statement and the witness’ trial testimony.⁸⁸ A prior statement that demonstrates bias, for example, is unavailable to the defense for impeachment purposes if the court finds the statement not to be inconsistent with the witness’ trial testimony. The Ohio defendant may thus be hindered in discrediting a state witness.⁸⁹

The Oklahoma rule⁹⁰ may deny the defense an adequate opportunity to prepare for cross-examination if the prior statements are indeed delivered “just prior to cross-examination.”⁹¹ Although a recess following production would afford the defense time to prepare for cross-examination, it would result in trial delay⁹² and consequent diminished

83. See, e.g., *Stafford v. District Court*, 595 P.2d 797, 799 (Okla. Crim. 1979) (defendant entitled to receive any sworn statement and a copy of any report used by witness to refresh recollection).

84. See *supra* note 80 for the pertinent text of OHIO R. CRIM. P. 16(B)(1)(g).

85. 353 U.S. at 669.

86. *Id.* at 668-69. Justice Brennan noted that “[j]ustice requires no less.” *Id.* at 669. As the United States Supreme Court observed in *Alderman v. United States*, 394 U.S. 165 (1969):

An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts of an accused’s life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. . . . [T]he task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court. . . .

Id. at 182.

87. OHIO R. CRIM. P. 16(B)(1)(g).

88. *Id.*

89. See *supra* note 77 and accompanying text.

90. See *supra* notes 82-83 and accompanying text.

91. For the pertinent text of OKLA. STAT. ANN. tit. 12 § 2613 (West 1980), see *supra* note 82.

92. See *supra* notes 59, 70 & 71 and accompanying text.

effectiveness of the defendant's cross-examination.⁹³

III. DISCOVERY BEFORE DIRECT TESTIMONY

A. *Pretrial Discovery as a Matter of Right*

Several professional associations have published standards for reform in the area of criminal discovery.⁹⁴ The American Bar Association Standards, for example, identify the objectives and characteristics of pretrial procedures.⁹⁵ The ABA Standards suggest that pretrial procedures should promote expeditious and fair disposition of cases, provide the accused with sufficient information to make an informed plea, permit thorough trial preparation and minimize surprise at trial, reduce interruptions and complications during trial, avoid unnecessary and repetitious trials, minimize inequities among similarly situated defendants, and effect economies in time, money, judicial resources and professional skills.⁹⁶ The ABA Standards conclude that these needs can best be served by full and free discovery, simpler and more efficient procedures, and procedural pressures to expedite processing of cases.⁹⁷

In keeping with these objectives, the ABA Standards provide that upon request,⁹⁸ the prosecutor must disclose to defense counsel, among other items, the names and addresses of witnesses, together with their written or recorded statements.⁹⁹ The ABA notes that experience with

93. See *supra* notes 41 & 43 and accompanying text.

94. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) [hereinafter cited as ABA STANDARDS]; NAT'L DISTRICT ATTORNEYS ASS'N NATIONAL PROSECUTION STANDARDS (1977) [hereinafter cited as NATIONAL PROSECUTION STANDARDS]; NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS UNIFORM RULES OF CRIMINAL PROCEDURE [hereinafter cited as UNIFORM RULES OF CRIMINAL PROCEDURE].

95. ABA STANDARDS, *supra* note 94, at Standard 11-1.1(a). By 1975, 22 states had substantially implemented the ABA Standards through formal court rules, legislation, or judicial citation of the highest state court. Robinson, *The ABA Standards for Criminal Justice: What They Mean to the Criminal Defense Lawyer*, 1 NAT'L J. CRIM. DEF. 3, 19 app. (1975).

96. ABA STANDARDS, *supra* note 94, at 11-1.1(a).

97. *Id.* at 11-1.1(b).

98. The defendant must make a request for prosecution witness statements. The request requirement, which mandates that the defendant particularize the information he desires, avoids wasteful collection of information by the prosecutor. See ABA STANDARDS, *supra* note 94, at 11-2.1(a) commentary at 18.

99. *Id.* at 11-2.1(a)(1). The commentary to Standard 11-2.1(a) enunciates the justifications for the shift to open file disclosure, which include the changing attitude toward broader discovery and the availability of protective orders in cases in which the prosecution demonstrates that pretrial disclosure may jeopardize persons, evidence or the integrity of the case. See *infra* note 101 and accompanying text. In addition, the commentary points out that open file disclosure expe-

broad discovery indicates that in the majority of cases, discovery does not jeopardize victims, witnesses or evidence.¹⁰⁰ Thus, the availability of protective orders provides a sufficient safeguard in cases in which pretrial disclosures will endanger persons or evidence.¹⁰¹ Moreover, the ABA Standards provide for open file disclosure upon defense request, thereby obviating the need for motions to the court supported by briefs.¹⁰² This alone effects a substantial economy in both judicial and professional time, resources, and skills.¹⁰³

Similarly, thirteen states allow the defendant access to prosecution witness statements prior to trial.¹⁰⁴ The length of time within which the prosecutor must disclose such statements before trial, however, varies among these states.¹⁰⁵ For example, while Colorado provides for ac-

ditions the processing of cases by eliminating the delays that accompany motion practice and disagreements over the discoverability of particular items. Finally, the commentary argues that open file disclosure is likely to result in increased finality of convictions due to the reduction of error which results from inadequate information. UNIFORM RULES OF CRIMINAL PROCEDURE, *supra* note 94, at Rule 421(a) and NATIONAL PROSECUTION STANDARDS, *supra* note 94, at Standard 13.2(A)(1) also provide for disclosure of prosecution witnesses' prior statements.

100. The commentary to ABA Standard 11-2.1(a) cites the comments of the United States Attorney for the Southern District of California, HOUSE COMMITTEE ON THE JUDICIARY, FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT, H.R. REP. NO. 247, 94th Cong., 1st Sess. 12.14 (1975), *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 674, 686. ABA STANDARDS, *supra* note 94, at 11-2.1(a) commentary at 17 n.7.

101. ABA STANDARDS, *supra* note 94, at 11-4.4 authorizes the court, upon a showing of cause, to order that disclosures be restricted, conditioned, or deferred, provided that such disclosures be made in time to permit the defense adequately to prepare his case.

102. ABA STANDARDS, *supra* note 94, at 11-2.1(a).

103. The commentary to ABA Standard 11-2.1(a) cites rule 2.04 of the Local Rules of the United States District Court for the Northern District of Illinois as "an excellent example of a discovery plan that obviates much of the need for judicial intervention." 7TH CIR. N. DIST. ILL. R. 2.04. (Discovery initiated by oral or written request by defense attorney to prosecutor within five days after arraignment.) The commentary notes that the successful operation of the Illinois rule has caused several other districts to adopt similar rules. ABA STANDARDS, *supra* note 94, at 11-2.1(a) commentary at 17, n.9.

104. *See* ARIZ. R. CRIM. P. 15.1; COLO. R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; IDAHO CRIM. R. 16; ILL. ANN. STAT. ch. 110A, § 412 (Smith-Hurd 1976); MINN. R. CRIM. P. 9.01; MO. R. CRIM. P. 25.03; N.J.R. 3:13-3; N.M.R. CRIM. P. 27; OR. REV. STAT. § 135.815 (1979); R.I.R. CRIM. P. 16; VT. R. CRIM. P. 16; WASH. SUPER. CT. CRIM. R. 4.7.

Cases applying these statutes include: *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974); *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1980); *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980); *People v. Dunigan*, 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1981); *People v. Childs*, 95 Ill. App. 3d 606, 420 N.E.2d 513 (1981); *People v. Ingram*, 91 Ill. App. 3d 1074, 415 N.E.2d 569 (1980); *State v. Zeimet*, 310 N.W.2d 552 (Minn. 1981); *State v. Pietraszewski*, 283 N.W.2d 887 (Minn. 1979); *State v. Hartfield*, 290 Or. 583, 624 P.2d 588 (1981).

105. Arizona: no later than 10 days after arraignment; Colorado: as soon as practicable following the filing of charges against the accused; Florida: after filing of indictment, within fifteen

cess as soon as practicable following the filing of charges,¹⁰⁶ New Jersey requires production by the prosecutor within ten days after a defense request, which in turn must be made within ten days of the defendant's entry of his plea.¹⁰⁷

Among the states with statutory provisions for pretrial discovery of witness statements, only Illinois requires a motion on behalf of the defense.¹⁰⁸ The other twelve states allow the defendant to request discovery directly from the prosecutor,¹⁰⁹ thus relieving the defense of the necessity of filing motions for discovery supported by briefs.¹¹⁰ This in turn relieves the court of the necessity of reading and ruling on routine discovery motions. The need for judicial supervision of basic discovery is thereby minimized, effecting reduced expenditure of judicial and professional time and energy.¹¹¹

All of these states except Florida and Vermont provide for discovery of statements of witnesses whom the prosecutor expects or intends to call at trial.¹¹² The Florida rule, in contrast, requires the State to disclose to the defense the names and addresses of all persons known to the prosecutor to have information that may be relevant to the offense charged and to any defense.¹¹³ The Florida rule also mandates that the

days after written demand by defendant; Idaho: at any time following the filing of charges, upon written request by defendant; Illinois: as soon as practicable following the filing of a motion by defense counsel; Minnesota: before the date set for omnibus hearing; Missouri: within ten days after service of request from defendant made not later than twenty days after arraignment; New Jersey: within ten days after defendant request made within ten days of entry of plea; New Mexico: within ten days after arraignment or date of filing waiver of arraignment; Oregon: as soon as practicable following filing of indictment or information; Rhode Island: within fifteen days after service of request made within twenty-one days after arraignment; Vermont: upon plea of not guilty upon request of defendant in writing or in open court at his appearance under rule 5 or any time thereafter; Washington: no later than omnibus hearing. For applicable rule and statutory section numbers, see *supra* note 104.

106. COLO. R. CRIM. P. 16.

107. N.J.R. 3:13-3.

108. See ILL. ANN. STAT. ch. 110A, § 412 (Smith-Hurd 1976).

109. See *supra* notes 104-05.

110. The ABA Standards posit the request requirement as a means of "responding to the increasing pressure to expedite procedures for processing cases in order to comply with speedy trial requirements." ABA STANDARDS, *supra* note 94, at 11-2.1(a) commentary at 17.

111. See *supra* notes 102-03 and accompanying text.

112. See *supra* note 104.

113. FLA. R. CRIM. P. 3.220(a)(1)(i). The Florida rule requires an interpretation of the meaning of "relevant." In *Jackson v. Wainright*, 390 F.2d 288 (5th Cir. 1968), the Court of Appeals for the Fifth Circuit defined "relevant" broadly to include exculpatory evidence (habeas corpus proceeding by party convicted in state court of rape). The Florida District Court of Appeals in *State v. Johnson*, 285 So. 2d 53 (Fla. Dist. Ct. App. 1973), *cert. denied*, 289 So. 2d 9 (Fla. 1974), for-

prosecutor disclose the prior statement of any such person.¹¹⁴ The Vermont rule similarly requires disclosure of the names and addresses of all witnesses known to the prosecutor as well as all relevant written or recorded witness statements within the prosecutor's possession or control.¹¹⁵

B. Pretrial Discovery Within Discretion of Court

Seven states, by statute or procedural rule, expressly leave criminal discovery of prosecution witness statements to the discretion of the trial courts, pursuant to some very general guidelines.¹¹⁶ Unless the State establishes a paramount interest in nondisclosure, the defendant normally will be afforded discovery if he sufficiently designates the items

warded a much narrower view, requiring that the witness have knowledge about the defendant's guilt or an available defense in order to be considered a person having "relevant" information. *Id.* at 55-56. The *Johnson* court seemed to place the burden of establishing relevancy justifying disclosure on the defense. *Id.* The court held that knowledge affecting only possible impeachment or credibility of the substantive witness does not come within the meaning of "relevant." *Id.* at 56. Although the *Johnson* court applied former rule 3.220(e) in reaching its holding, the Florida legislature adopted the same language in its enactment of present rule 3.220(a)(1)(i). *Id.* at 55. See generally FLA. R. CRIM. P. 3.220 comment.

114. *Id.* 3.220(a)(1)(ii). The Committee note to the original Florida Rules of Criminal Procedure, reprinted in *In re Florida Rules of Criminal Procedure*, 196 So. 2d 124, 151-55 (Fla. 1967), explains the rationale behind the creation of the rule, as well as its anticipated limitations.

115. VT. R. CRIM. P. 16(a)(1).

116. See IOWA CODE ANN. § 813.2 rule 13(2)(b)(1) (West 1979) (upon motion of defendant demonstrating materiality to preparation of defense, or intended for use by state as evidence at trial); ME. R. CRIM. P. 16(c) (upon motion to court showing may be material to preparation of defense, exhaustion of informal discovery procedures, request reasonable); MD. R. 728 (upon motion of defendant, material to preparation of defense, request reasonable); MASS. R. CRIM. P. 14(a)(2) (upon motion of defendant, material, relevant); MONT. REV. CODE ANN. § 46-15-302 (1981) (upon motion of defendant, good cause, material, relevant, necessary to preparation of defendant's case); PA. R. CRIM. P. 305(a) (upon motion by defendant, material to preparation of defense, request reasonable); UTAH R. CRIM. P. 16 (upon request once court determines good cause, needed for adequate preparation of defense). For examples of cases where the court exercised its discretion regarding defendant access to prosecution witness statements, see *State v. Gates*, 306 N.W.2d 720 (Iowa 1981); *State v. Mark*, 286 N.W.2d 396 (Iowa 1979); *Powell v. State*, 23 Md. App. 666, 329 A.2d 413 (1974); *Mayson v. State*, 238 Md. 283, 208 A.2d 599 (1965); *Commonwealth v. Wilson*, 1980 Mass. Adv. Sh. 1627, 407 N.E.2d 1229 (1980).

Effective October 7, 1982, South Carolina Rules of Criminal Procedure in the Circuit Court include rule 103 entitled "Disclosure in Criminal Cases." Rule 103(a)(2) provides, "The court shall, on motion of the defendant order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. . . ." The rule further provides, however, that "the court may upon a *sufficient showing* require the production of any [prosecution witness] statement prior to the time such witness testifies." See R. PRAC. FOR CIR. CT. S.C. 103 (emphasis added).

he seeks and demonstrates the materiality of these items.¹¹⁷ For example, “dragnet” requests, which typically ask for production of all files for inspection by the defendant for exculpatory, impeaching or inconsistent evidence, customarily are denied.¹¹⁸ Specification of the items sought avoids wasteful collection of information by the prosecutor.¹¹⁹ In addition, the court may deny, restrict or defer discovery if, for example, the State demonstrates that disclosure would result in danger to witnesses or evidence.¹²⁰

Because discovery decisions in these states are subject only to the abuse-of-discretion standard on appeal, courts frequently dispose of discovery issues without articulating the factors they consider in exercising their discretion.¹²¹ Thus, a trial court may deny requests for disclosure simply by stating that discovery is within its discretion.¹²²

C. *Discovery Before Direct Testimony*

Wisconsin, Kentucky, and New York allow discovery of prosecution witness statements before direct testimony but not before trial.¹²³ The 1969 Wisconsin statute, which codified pre-existing case law, mandates disclosure of prosecution witness statements before the witness testifies on direct examination.¹²⁴ The defendant, however, is not allowed access to such statements before trial.¹²⁵

117. *See supra* note 116.

118. *See, e.g.*, *State v. Mark*, 286 N.W.2d 396, 402 (Iowa 1979).

119. *See supra* note 98.

120. *See* rules cited *supra* note 116.

121. *See, e.g.*, *Veney v. State*, 251 Md. 159, 246 A.2d 608 (1968). The defendant's motion for discovery and inspection requested, among other items, the reports of any experts whom the state intended to call at trial. *Id.* at 166, 246 A.2d at 613. The court noted that a demand for production of documents or statements in the possession or control of the state is within the sound discretion of the trial court. *Id.* at 165, 246 A.2d at 612. The court summarily disposed of the discovery issue by stating that because the Maryland rules do not require such disclosure, the lower court did not abuse its discretion by denying the defendant's discovery motion. *Id.* at 166, 246 A.2d at 613.

122. *See supra* note 121.

123. *See* KY. R. CRIM. P. 7.26 (before direct testimony); N.Y. CRIM. PROC. § 240.45(1)(a) (Consol. Supp. 1982) (after jury sworn and before prosecutor's opening address); WIS. STAT. ANN. § 971.24 (West 1970) (at trial before witness testifies).

124. *See* WIS. STAT. ANN. § 971.24 (West 1970).

125. *See, e.g.*, *Sanders v. State*, 69 Wis. 2d 242, 263-64, 230 N.W.2d 845, 857 (1975) (affirming denial of motion for pretrial discovery and distinguishing between pretrial discovery and compulsory production of prior statements of a witness during trial) (citing *State ex rel. Byrne v. Circuit Court*, 16 Wis. 2d 197, 114 N.E.2d 114 (1962)).

In *State ex rel. Byrne v. Circuit Court*, 16 Wis. 2d 197, 114 N.W.2d 114 (1962), Justice Gordon

Prior to its amendment, the timing provision of the Kentucky rule¹²⁶ was identical to that of the Jencks Act.¹²⁷ Pursuant to a 1981 statute, however, the defendant in a Kentucky criminal trial is entitled to discovery of a prosecution witness' statement before the witness' direct testimony.¹²⁸

Effective January, 1980, the New York criminal defendant is entitled to discovery of prosecution witnesses' prior statements after the jury has been sworn and before the prosecutor's opening address.¹²⁹ In a nonjury trial, disclosure occurs prior to the presentation of evidence.¹³⁰ Before the enactment of the 1980 statute, a New York defendant was not provided access to prior statements of prosecution witnesses until the witness had testified at trial.¹³¹ The new timing provision was intended to avoid delays at trial necessitated by postponement of disclosure until after the witness' direct testimony, followed by a recess to allow the defense adequate time to examine the statements.¹³²

filed a dissenting opinion noting the absence of a valid basis for distinguishing between discovery within the trial judge's discretion at the time of the trial and discovery before trial. *Id.* at 198, 114 N.W.2d at 115. Justice Gordon observed that precluding discovery until the trial is underway results in interruptions to permit the judge to inspect the statements and the defense to examine them and to compose questions for cross-examination. *Id.* at 199, 114 N.W.2d at 115. In *Byrne*, the defendant sought the statement of the prosecuting witness in a statutory rape case. Because there was little doubt that that witness would be called to testify, the Jencks argument against pretrial discovery—that statements should be sought only from persons who will be offered as witnesses and that the identity of those persons is generally not ascertainable until the trial—was not applicable in *Byrne*. *Id.* In Justice Gordon's opinion, pretrial discovery would do no disservice to the prosecution and would encourage an orderly trial. *Id.*

126. KY. R. CRIM. P. 7.26.

127. 18 U.S.C. § 3500(b) (1976). For statutory text, see *supra* note 3.

128. KY. R. CRIM. P. 7.26.

129. N.Y. CRIM. PROC. § 240.45(1)(a) (Consol. Supp. 1980). See, e.g., *People v. Gonzalez*, 74 A.D.2d 763, 425 N.Y.S.2d 601 (1980); *In re John M.*, 104 Misc. 2d 725, 430 N.Y.S.2d 198 (N.Y. Fam. Ct. 1980).

130. N.Y. CRIM. PROC. § 240.45 (Consol. Supp. 1980).

131. *Id.* § 240.10(3)(b) (McKinney 1971) (repealed 1979). The original article 240 exempted statements of witnesses and prospective witnesses from pretrial discovery. The New York Court of Appeals adopted the Jencks Act timing of discovery of prosecution witness statements after direct testimony in *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450, *cert. denied*, 368 U.S. 866 (1961).

For a discussion comparing original article 240 and new article 240, which became effective January 1, 1980, see Comment, *Criminal Discovery in New York: The Effect of the New Article 240*, 8 FORDHAM URB. L.J. 731 (1980).

132. See, e.g., *In re John M.*, 104 Misc. 2d 725, 430 N.Y.S.2d (N.Y. Fam. Ct. 1980).

IV. DISCOVERY OF WITNESS STATEMENTS GOVERNED BY CASE LAW

Discovery of prosecution witness statements is governed primarily by case law in three states¹³³ and exclusively by case law in twelve states.¹³⁴

In Nevada, North Carolina, and Texas, statements made by state witnesses are expressly excluded from statutory provisions authorizing pretrial discovery upon motion of the defendant.¹³⁵ Discovery at trial in both North Carolina and Nevada, however, is within the discretion of the trial court.¹³⁶ The Court of Appeals of North Carolina in *State v. McDougald*,¹³⁷ for example, held that the trial court's denial of the defendant's motion to compel production of any written statements made by witnesses for the State was not error because the defendant had no statutory right to the material requested.¹³⁸ The court stated that questions concerning discovery of prior statements of State witnesses must be resolved by reference to due process principles.¹³⁹

133. Nevada, North Carolina, and Texas each have statutes prohibiting court ordered pretrial discovery of prosecution witness statements. See *infra* note 135 and accompanying text. Access to such statements at trial, however, is governed by case law. See *infra* notes 136-43 and accompanying text.

134. See *infra* notes 141-71 and accompanying text.

135. See NEV. REV. STAT. § 174.245 (1979); N.C. GEN. STAT. § 15A-904(a) (1978); TEX. CRIM. PROC. CODE ANN. art. 39.14 (Vernon 1966). While these statutes prohibit court ordered pretrial disclosure, the prosecutor, is free to make voluntary disclosure.

136. See, e.g., *Riddle v. State*, 96 Nev. 589, 613 P.2d 1031 (1980) (discovery of materials in possession of state within discretion of trial court); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (G.S. § 15A-904(a) is an express restriction on pretrial discovery of witness statements that trial judge has no authority to exceed in discovery order, but subsection (a) does not bar discovery of such statements at trial); *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977) (absence of discovery as matter of right does not necessarily preclude trial judge from exercising discretion to order discovery); *State v. Miller*, 37 N.C. App. 163, 245 S.E.2d 561 (same), *cert. denied*, 295 N.C. 651, 248 S.E.2d 255 (1978).

137. 38 N.C. App. 244, 248 S.E.2d 72 (1978), *appeal dismissed*, 296 N.C. 413, 251 S.E.2d 472 (1979).

138. *Id.* at 254-55, 248 S.E.2d 81.

139. *Id.* at 254, 248 S.E.2d at 81. The court characterized due process concerns as centering around the issue of whether the undisclosed information might have affected the outcome of the trial. *Id.* (citing *United States v. Agurs*, 427 U.S. 97 (1976)). Defense counsel had received summaries of statements made by the State's witnesses. The defendant contended that those summaries were not adequate because they were neither signed nor initialed by the witnesses. *Id.* at 255, 248 S.E.2d at 81. The court, however, deemed them sufficient to provide the defendant with all the material testimony expected from each witness and to alert the defendant to any prior statements that might be inconsistent with the witnesses' trial testimony. *Id.* In reaching its holding,

Texas courts, on the other hand, have adopted the "Gaskin rule."¹⁴⁰ Like the Jencks Act,¹⁴¹ this rule mandates that when a prosecution witness has made a report or statement prior to testifying, the defendant, pursuant to timely motion or request, is entitled to inspect and use such prior statement for purposes of impeachment on cross-examination.¹⁴²

Delaware courts customarily follow the *Jencks* rule, looking to federal court decisions construing the Jencks Act for guidance.¹⁴³

Louisiana courts require the defense to lay a prior foundation for impeachment similar to that rejected in *Jencks*.¹⁴⁴ The Louisiana defendant is not entitled to production of pretrial statements of State witnesses unless he establishes a proper foundation by demonstrating that the statements sought contradict the sworn testimony of the witness.¹⁴⁵ In addition, the defense is entitled to disclosure if the witness denies having made the statement.¹⁴⁶

In *Funk v. Superior Court*, the California Supreme Court held categorically that a criminal defendant is entitled to discover, prior to trial,

the court noted that there had been no showing of a reasonable likelihood that the addition of signatures to the statements would have influenced the outcome of the trial. *Id.*

140. *Pinson v. State*, 598 S.W.2d 299, 300-01 (Tex. Crim. App. 1980); *Gaskin v. State*, 172 Tex. Crim. 7, 353 S.W.2d 467 (Tex. Crim. App. 1961).

141. For text of Jencks Act, see *supra* note 3.

142. Additional cases applying the Gaskin rule include *Texas Dept. Corrections v. Dalehite*, 623 S.W.2d 420 (Tex. Crim. App. 1981); *Crawford v. State*, 617 S.W.2d 925 (Tex. Crim. App. 1980), *cert. denied*, 101 S. Ct. 3067 (1981); *Hoffman v. State*, 514 S.W.2d 248 (Tex. Crim. App. 1974); *Gilbreath v. State*, 500 S.W.2d 527 (Tex. Crim. App. 1973).

143. See, e.g., *Hooks v. State*, 416 A.2d 189, 200 (Del. 1980) (Supreme Court of Delaware affirmed trial court's conclusion that *Jencks* rule did not compel State to produce summary of State's witness' prior statement in that summary did not qualify as a "statement" discoverable under *Jencks*).

144. See *supra* note 132 and accompanying text describing the foundation requirement disapproved in *Jencks*.

145. See, e.g., *State v. Lane*, 302 So. 2d 880, 886 (La. 1974) (copy of report that police officer-witness consulted prior to trial not available to defendant absent evidence that report was contradictory to officer's sworn testimony); *State v. Simon*, 131 La. 520, 523-24, 59 So. 975, 976 (1912) (when witness testified on cross examination that he had testified on two prior occasions and that his prior testimony had been the same as at trial, defendant not entitled to production of prior statement for purpose of impeachment because unable to demonstrate any inconsistencies).

146. See, e.g., *State v. Lovett*, 359 So. 2d 163, 168 (La. 1978) (witness admitted giving prior statement to police in which he omitted a fact to which he testified at trial, thus defendant not entitled to production of prior statement); *State v. Adams*, 302 So. 2d 599, 604 (La. 1974) (defendant not entitled to production of pretrial written statement of a State witness unless witness denies making statement or defendant shows one or more of material statements therein are contrary to sworn testimony).

the statements of prosecution witnesses who will be called at trial.¹⁴⁷ The court reasoned that there is no sound basis for distinguishing discovery of statements before trial from discovery as a matter of right during trial.¹⁴⁸

Mississippi courts leave discovery of prior witness statements within the trial court's discretion only after the defendant has demonstrated the materiality and relevance of the prior statement by laying a proper foundation of inconsistency with direct testimony.¹⁴⁹ Similarly, according to Alabama case law, discovery of witness statements is within the discretionary power of the trial judge, pursuant to a showing by the defense that the desired statements are essential for purposes of cross-examination.¹⁵⁰

Indiana,¹⁵¹ Michigan,¹⁵² Nebraska,¹⁵³ New Hampshire¹⁵⁴ and West Virginia¹⁵⁵ cases leave discovery of prosecution witness statements exclusively within the discretion of the trial court. In a 1974 case, the Indiana Supreme Court affirmed the authority of the trial court to issue an order requiring the State to produce statements of its witnesses

147. *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959).

148. *Id.* at 424, 340 P.2d at 594.

149. *See, e.g., Knowles v. State*, 341 So. 2d 913 (Miss. 1977); *Armstrong v. State*, 214 So. 2d 589 (Miss. 1968), *cert. denied*, 395 U.S. 965 (1969).

150. *See, e.g., Oliver v. State*, 399 So. 2d 941 (Ala. Crim. App. 1981); *Redus v. State*, 398 So. 2d 757 (Ala. Crim. App. 1981); *Johnson v. State*, 398 So. 2d 393 (Ala. Crim. App. 1981).

151. *Sexton v. State*, 257 Ind. 556, 276 N.E.2d 836 (1972), set forth the criteria for determining the extent of an Indiana defendant's right to discovery. First, stated the court, the defendant must sufficiently designate the items he seeks to discover. Second, the item sought must be material to the defense. Third, if the first two factors are satisfied, the trial court must grant the discovery motion unless the State makes a showing of paramount interest in nondisclosure. *Id.* at 558-60, 276 N.E.2d at 838-39. In order for a motion to meet the first criterion it must set forth the items with "reasonable particularity," thus enabling the State to identify what is being requested. *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387 (1971). Indiana courts generally hold that a criminal discovery order is within the discretionary power of the trial judge subject to review only for clear abuse of discretion. *See, e.g., Vaughn v. State*, 269 Ind. 142, 149, 378 N.E.2d 859, 864 (1978).

152. MICH. GEN. CT. R. 785.1(2) (1963) expressly excludes the application of discovery rules in criminal cases. A discovery motion, therefore, is addressed to the trial court's sound discretion. *See, e.g., People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1970) (discovery ordered when, in sound discretion of trial judge, the thing to be inspected is admissible in evidence, necessary to preparation of defense and in interests of fair trial); *People v. Browning*, 108 Mich. App. 281, 310 N.W.2d 365 (1980) (when defendant's motion for discovery requested all written statements taken from witnesses and other persons having knowledge, prosecutor not required to furnish taped interview with key prosecution witness).

153. *See infra* note 158 and accompanying text.

154. *See infra* notes 159-60 and accompanying text.

155. *See infra* notes 161-63 and accompanying notes.

before trial.¹⁵⁶ The Michigan defendant is entitled to pretrial discovery of prosecution witness statements if he can set forth specific facts showing that the statements are necessary to the preparation of his defense.¹⁵⁷ The Nebraska Supreme Court has consistently upheld trial court rulings denying defendants pretrial access to prior witness statements when the defense counsel obtained the statements at trial.¹⁵⁸ In New Hampshire, a criminal defendant's right to compel production of written statements and reports after indictment is "closely circumscribed,"¹⁵⁹ although the courts have discretion to require production to prevent manifest injustices.¹⁶⁰

In 1975, the Supreme Court of Appeals of West Virginia incorporated a portion of the Jencks Act policy into the common law of West Virginia.¹⁶¹ In *State v. Dudick*, the court held that once a prosecution witness has testified from notes used to refresh his recollection, the defense is absolutely entitled to examine those notes and must be afforded

156. *State ex rel. Keller v. Criminal Court*, 262 Ind. 420, 317 N.E.2d 433 (1974). See generally *Criminal Discovery in Indiana: Its Past and Future*, 11 IND. L. REV. 373 (1978).

157. See, e.g., *People v. Hayward*, 98 Mich. App. 332, 296 N.W.2d 250 (1980) (witnesses' statements material to preparation of defense, trial court failed to suppress evidence of statements where statements were not turned over to defense pursuant to pretrial order, reversible error); *People v. Nkomo*, 75 Mich. App. 71, 254 N.W.2d 657 (1977) (defense failed to convince court that requested discovery necessary before trial; trial court denied motion but provided for production at cross-examination, no abuse of discretion); *People v. Walton*, 71 Mich. App. 478, 247 N.W.2d 378 (1976) (statements especially important for trial preparation when question of credibility may be preeminent, *in camera* hearing ordered to determine what material relevant to defense).

158. The Nebraska Supreme Court in 1944 held that discovery by a criminal defendant of statements in the State's possession lies within the broad discretion of the trial court. *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944). See also *State v. Knaff*, 204 Neb. 712, 285 N.W.2d 115 (1979) (police report containing a recitation of the alleged facts of the crime by the victim to police officer given to defendant immediately following victim's testimony, report contained "no conflicts in information . . . as shown by the various witnesses," disclosure at trial did not violate pretrial disclosure order); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979) (no abuse of discretion in court's overruling of motion to produce prior statements of State witnesses before trial); *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976) (statements given to defense counsel at trial followed by recess to review, no abuse of discretion in denial of pretrial access).

159. See, e.g., *State ex rel. McCletchie v. District Court*, 106 N.H. 48, 205 A.2d 534 (1968) (citing *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 153 A.2d 403 (1959)).

160. See *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 229-30, 153 A.2d 403, 406-07 (1959). The New Hampshire Supreme Court stated that "[j]ustice might be thought to require that a [defendant] be permitted to inspect the corpse of a victim or an autopsy report [before trial]. Beyond such essential matters, the rights of the accused to inspection in advance of trial do not go." *Id.* at 230, 153 A.2d at 407. The chances for pretrial discovery of prosecution witnesses' statements in New Hampshire thus seem slim indeed.

161. *State v. Dudick*, 213 S.E.2d 458 (W. Va. 1975).

a reasonable opportunity to prepare his cross-examination.¹⁶² The court stated further, however, that pretrial discovery is within the sound discretion of the trial court.¹⁶³

The shortcomings of state decisions that leave defendant access to prosecution witness statements to the discretion of the trial courts are readily apparent. The absence of a statute or rule governing the defendant's discovery rights leaves open the possibility of disparate treatment of similarly situated defendants. Because the trial court's order will be subject to review only for abuse of discretion, both trial and appellate courts may resolve discovery issues without clearly articulating the factors considered.¹⁶⁴ Both defendants and prosecutors may thus be left without guiding precedent for future cases.

Neither Georgia nor Virginia case law provides for general disclosure of prosecution witness statements even after the witness' direct trial testimony. Georgia Code section 38-801(g)¹⁶⁵ allows a party to compel production of books, writings, or other documents in the possession of another party. In 1976, the Georgia Supreme Court declared section 38-801(g) applicable to criminal trials,¹⁶⁶ but subsequently declined an opportunity to establish that that section requires prior witness statements to be made generally available to the defense.¹⁶⁷ In

162. *Id.* at 464. *Accord* State v. Moran, 285 S.E.2d 450 (W. Va. 1975).

163. 213 S.E.2d at 463-64. The liberal discovery policy of *Dudick* was applied in State v. Sette, 242 S.E.2d 464 (W. Va. 1978). In State v. Grimm, 270 S.E.2d 173 (W. Va. 1980), the Supreme Court of Appeals of West Virginia held that once a trial court grants a pretrial discovery motion, "non-disclosure by the prosecution is fatal to the prosecution's case where the non-disclosure is prejudicial." *Id.* at 178. Nondisclosure is deemed prejudicial where the defense is "surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." *Id.*

164. *See supra* notes 121 & 122 and accompanying text.

165. GA. CODE ANN. § 38-801(g) (Supp. 1982).

166. *See* Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976).

167. *See* Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978), *cert. denied*, 449 U.S. 891 (1980). In *Stevens*, the witness made a prior statement to the police. The defendant sought discovery of that statement pursuant to GA. CODE ANN. § 38-801(g) (Supp. 1982). The State furnished the defendant with a summary of the statement. The trial court performed an *in camera* inspection of the prosecutor's files and found nothing exculpatory in the requested statement. The defendant's discovery request was denied, but the witness was subjected to full cross examination at trial. The court found no error in the State's failure to produce the statement, and concluded that *Brown* did not establish the general availability of witness statements under § 38-801(g). 242 Ga. at 36, 247 S.E.2d at 841. *Accord* Spain v. State, 243 Ga. 15, 252 S.E.2d 436 (1979); Odom v. State, 156 Ga. App. 119, 274 S.E.2d 117 (1980); Stanley v. State, 153 Ga. App. 42, 264 S.E.2d 533 (1980).

The only way to test whether Georgia defendants truly have no general right of access to prosecution witness statements would be to examine cases involving a requested writ of prohibition against a trial judge ordering disclosure. If such a writ were granted it would seem that defendant

Williams v. State,¹⁶⁸ the Georgia Court of Appeals upheld the trial court's refusal to require the prosecutor to produce witnesses' prior statements absent a showing that cross-examination based on those statements might have affected the outcome of the trial.¹⁶⁹

Virginia Supreme Court rule 3A:14 expressly excludes from pretrial discovery or inspection by the accused statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth.¹⁷⁰ Under rule 3A:14, only statements made by the accused are available.¹⁷¹ In *Belfield v. Commonwealth*,¹⁷² the Virginia Supreme Court declined to adopt the policy of the *Jencks* rule and concluded that the defendant had no right to discover written statements made by a prosecution witness to agents of the State for purposes of cross-examination and impeachment after the witness had testified for the prosecution.¹⁷³ Despite this broad language, however, it is noteworthy that the defense in *Belfield* made no attempt to show that the police notes involved were accurate, verbatim transcripts of the witness' statement to the police.¹⁷⁴ The result may have been different if such a showing had been made.¹⁷⁵

indeed had no right of access. Research has disclosed no such cases. Thus it seems reasonable to conclude that it is within the trial court's discretion to order or deny disclosure of prosecution witness statements.

168. 157 Ga. App. 295, 277 S.E.2d 291 (1981).

169. *Id.* at 296, 277 S.E.2d at 292.

170. VA. SUP. CT. R. 3A:14(b)(2).

171. *Id.* 3A:14(b)(1).

172. 215 Va. 303, 208 S.E.2d 771 (1974), *cert. denied*, 420 U.S. 965 (1975).

173. *Id.* at 307, 208 S.E.2d at 774. *Belfield*, however, involved police notes that the witness had never seen nor approved. *Id.* The court decided that to use such notes to impeach would be unfair to the witness. *Id.* The court stressed the importance of vigilance both in protecting the defendant's right to a fair trial and in maintaining the confidence of the citizens in the police and prosecuting officers, arguing that to allow discovery of such notes in this case would undermine that confidence and discourage the testimony of crime victims and "other public-spirited citizens," thereby hindering the fair and uniform enforcement of the criminal law. *Id.* See also *Hackman v. Commonwealth*, 220 Va. 710, 261 S.E.2d 555 (1980) (to be discoverable, the accused must give a statement rather than a witness who heard the accused speak).

174. 215 Va. at 307, 208 S.E.2d at 774.

175. The *Belfield* court summarized *Ossen v. Commonwealth*, 187 Va. 902, 48 S.E.2d 204 (1948), in which the trial court was held to have abused its discretion in refusing to require the production of a written statement signed by a prosecution witness where the Commonwealth had introduced a part of the statement that proved inconsistent with the witness' trial testimony. 215 Va. at 306, 208 S.E.2d at 773. This precedent suggests that *Belfield's* broad language may not be an entirely accurate characterization of Virginia's policy regarding disclosure of prior witness statements at trial.

V. CONCLUSION

In formulating a framework for defense discovery of prior statements of prosecution witnesses courts and legislatures must consider the following factors: the defendant's ability to make an informed plea,¹⁷⁶ the defendant's ability to thoroughly prepare for trial,¹⁷⁷ minimization of surprise at trial,¹⁷⁸ economical use of judicial and professional resources,¹⁷⁹ the defendant's right to effective assistance of counsel,¹⁸⁰ and protection of witnesses.¹⁸¹

Pretrial discovery of prosecution witness statements pursuant to defense request enhances expeditious and fair disposition of criminal cases.¹⁸² For example, pretrial discovery affords defense counsel time to examine relevant statements and to prepare cross-examination based on such statements. The defense may find it impossible to adequately prepare cross-examination during trial recesses, especially in complex criminal cases.¹⁸³ Pretrial discovery thus avoids the risk of cursory analysis of discovered materials and encourages thorough preparation for trial.

Moreover, early access to prior witness statements enables the defense to recognize inconsistencies as they may develop during the wit-

176. *See supra* note 96 and accompanying text.

177. *Id. See, e.g.,* State v. Williams, 121 Ariz. 218, 589 P.2d 461 (Ct. App. 1978); Carnivale v. State, 271 So. 2d 793 (Fla. Dist. Ct. App. 1973); Chandler v. State, 419 N.E.2d 142 (Ind. 1981); People v. Szabo, 55 Ill. App. 3d 866, 371 N.E.2d 117 (1977); People v. Goodman, 55 Ill. App. 3d 294, 371 N.E.2d 168 (1977); Mayson v. State, 238 Md. 283, 208 A.2d 599 (1965); Powell v. State, 23 Md. App. 666, 329 A.2d 413 (1974); Brunson v. State, 9 Md. App. 1, 261 A.2d 794 (1970); Jackson v. State, 8 Md. App. 260, 259 A.2d 587 (1969).

178. *See supra* note 96 and accompanying text.

179. *Id. See generally* United States v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980), *rev'd*, 667 F.2d 569 (6th Cir. 1982).

180. *See, e.g.,* United States v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980), *rev'd*, 667 F.2d 569 (6th Cir. 1982). In *Algie*, the trial court expressly found that criminal defendants "are denied effective assistance of counsel . . . where several defense attorneys are expected to analyze Jencks Act statements and reports during recesses." *Id.* at 789.

181. *See supra* notes 15 & 24-25 and accompanying text.

182. Late production of documents requested prior to direct testimony may so seriously impair the defendant's preparation or presentation of his defense as to prevent him from receiving his constitutionally guaranteed right to a fair trial, which may in turn require reversal of his conviction. *See, e.g.,* State v. McCoy, 100 Idaho 753, 605 P.2d 517 (1980) (document, although not exculpatory on its face, was exculpatory in light of the defense posed by defendant).

183. *See, e.g.,* United States v. Narcisco, 446 F. Supp. 252 (E.D. Mich. 1977) (The court noted that "[h]ighly unusual cases . . . are particularly appropriate for liberal discovery treatment"). *Id.* at 264.

ness' direct testimony.¹⁸⁴ In addition, it avoids delays that inevitably result from Jencks Act-type recesses¹⁸⁵ and that may diminish the effectiveness of cross-examination.¹⁸⁶

As part of a broader scheme of pretrial discovery, early discovery of prosecution witnesses' prior statements affords the defendant knowledge of the case against him needed to make an informed plea.¹⁸⁷ A guilty plea dispenses with the necessity of a trial, leaving the court free to hear cases in which the defendant's guilt is substantially at issue.¹⁸⁸

Defense requests directed to the prosecutor should replace formal motion practice. A request procedure economizes on the use of the judge's time in reading and ruling on motions as well as the attorney's time in preparing routine motions and supporting briefs.¹⁸⁹

In cases in which the prosecutor can show that disclosure of prior statements of a particular witness may result in economic harm, physical injury or other coercion, protective orders should be available. The trial court should be free to deny or restrict discovery of prior statements to protect the witness. In appropriate cases such protective orders provide adequate safeguards. Jencks Act prohibition of disclosure in all cases until after direct testimony is overbroad and results in unnecessary waste of court time when no danger to the prosecution's witnesses can be demonstrated.

Several states have adopted procedures such as the one outlined above.¹⁹⁰ The successful operation of such discovery procedures suggests that the rigid timing of the Jencks Act and its state counterparts is not necessary in all cases. Given the severely overcrowded criminal dockets of both federal and state courts across the country, pretrial or at least predirect testimony disclosure of prior statements of prosecu-

184. *See supra* note 43 and accompanying text.

185. *See supra* note 70 and accompanying text.

186. *See supra* notes 41-42 and accompanying text.

187. *See supra* note 96 and accompanying text.

188. *See generally* Traynor, *supra* note 9. Judge Traynor noted that "[s]ome federal prosecutors allow the defense extensive pretrial inspection of government evidence. They report that such inspection not only has expedited trials, but in some cases has convinced the defense of the strength of the prosecution's case and thereby induced a plea of guilty." *Id.* at 237 (citations omitted).

189. *See supra* notes 102-03 and accompanying text.

190. *See supra* notes 104-15 and accompanying text and the discovery plan described in note 100.

tion witnesses would yield a substantial and needed saving of court time.

Sharon Fleming

APPENDIX

State	Earliest Defendant Access to Prosecution Witness Statements*					
	Before Trial as of Right	Before Trial within Trial Court's Discretion	Before Direct Testimony but not Before Trial	At Trial within Trial Court's Discretion	After Direct Testimony	Discovery within Discretion of Trial Court
Alabama						✓
Alaska					✓	
Arizona	✓					
Arkansas					✓	
California	✓					
Colorado	✓					
Connecticut					✓	
Delaware					✓	
Florida	✓					
Georgia						✓
Hawaii					✓	
Idaho	✓					
Illinois	✓					
Indiana						✓
Iowa		✓				
Kansas					✓	
Kentucky			✓			
Louisiana					✓	
Maine		✓				
Maryland		✓				
Massachusetts		✓				
Michigan						✓
Minnesota	✓					
Mississippi						✓
Missouri	✓					
Montana		✓				
Nebraska						✓

State	Earliest Defendant Access to Prosecution Witness Statements*					
	Before Trial as of Right	Before Trial within Trial Court's Discretion	Before Direct Testimony but not Before Trial	At Trial within Trial Court's Discretion	After Direct Testimony	Discovery within Discretion of Trial Court
Nevada				√		
New Hampshire						√
New Jersey	√					
New Mexico	√					
New York			√			
North Carolina				√		
North Dakota					√	
Ohio					√	
Oklahoma					√	
Oregon	√					
Pennsylvania		√				
Rhode Island	√					
South Carolina		√				
South Dakota					√	
Tennessee					√	
Texas					√	
Utah		√				
Vermont	√					
Virginia				√		
Washington	√					
West Virginia						√
Wisconsin			√			
Wyoming					√	

* The prosecutor may disclose prior witness statements earlier on a voluntary basis.