Louisiana Law Review

Volume 43 | Number 6
July 1983

Discovery of the State's Witnesses: State v. Walters

Sandra L. Edwards

NOTES

DISCOVERY OF THE STATE'S WITNESSES: *State v. Walters*

Defendant, a New Orleans Police Department patrolman dressed in civilian clothes, was assigned to the "lost children" detail along the Canal Street portion of the Krewe of Bacchus Mardi Gras parade route. He fired one shot from his revolver and injured two people in a marching band. Defendant was indicted and charged with two counts of negligent injury. The trial judge granted defendant's motion seeking to discover the names and addresses of the state's witnesses. Noting that defense counsel would be unable to find the names and addresses of witnesses through "normal investigative means," the Louisiana Supreme Court *held* that the trial judge had the discretion to order the disclosure of the state's actual and potential witnesses and that this discretion had not been abused. *State v. Walters*, 408 So. 2d 1337 (La. 1982).

Defendant's pretrial discovery of the names and addresses of prosecution witnesses is a subject of considerable debate. Although model discovery provisions favor such disclosure[1] and several states have enacted statutes that provide the defense with a list of the state's witnesses,[2] neither the Louisiana Code of Criminal Procredure[3] nor the Federal Rules of Criminal Procedure[4] expressly provide for this disclosure. Protection of witnesses from physical harm or threats, and protection of witnesses from pressure to change their testimony, have been primary reasons for nondisclosure.[5] Proponents of disclosure em-

---

1. 2 ABA STANDARDS FOR CRIMINAL JUSTICE § 11-2.1(a)(1) (1980); UNIF. RULES OF CRIMINAL PROCEDURE § 421(a) (1974).

2. For discovery statutes authorizing such disclosure, *see* FLA. R. CRIM. P. 3.220(a)(1)(i) (West 1975); ILL. ANN. STAT. ch. 38, § 114-9 (Smith-Hurd 1971). Some statutes require the state to list its witnesses on the indictment or bill of information. ARK. STAT. ANN. § 43-1004 (1947); IDAHO CODE § 19-1404 (1948); IND. CODE ANN. § 35-3.1-1-2(6)(c) (Burns 1979).

3. LA. CODE CRIM. P. arts. 716-729.6.

4. A proposed revision to FED. R. CRIM. P. 16, which would have required the government, upon request, to furnish the defense with a written list of those witnesses it planned to call at trial was rejected by Congress. H.R. 6799, 94th Cong., 1st Sess. § 3 (1975); *see* Federal Rules of Criminal Procedure Amendment Act of 1975, 89 Stat. 370 (1975). See also 18 U.S.C. § 3432 (1976), which requires a prosecutor in a capital case to provide the defense with a list of the prosecution witnesses at least three days before trial.

5. *See* Discovery in Criminal Cases, 44 F.R.D. 481, 499-500 (1967); Ratnoff, *The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?* 19 CASE W. RES. L. REV. 279, 284 (1968); *see also* H. CONF. REP. NO. 94-414, 94th Cong., 1st Sess. 9, 12, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 713, 716 (indicates that such concerns were responsible for the rejection of the 1975 proposed revisions to FED. R. CRIM. P. 16, discussed in note 4, *supra*).

The threat of market retaliation against a witness in a criminal antitrust case

phasize that trial is a truth-seeking process and that protective orders[6] and motions to allow the perpetuation of testimony for use at trial dissipate the concerns of opponents. The latter option (motions to allow the perpetuation of testimony) gives the defense needed materials while minimizing the incentive to improperly force a state witness's absence or change in testimony.[7]

The disclosure of the identity of prosecution witnesses prior to trial is a significant departure from past Louisiana jurisprudence. Both before and after the enactment of the Louisiana discovery articles,[8] courts have been consistent in holding that the defense is not entitled to a list of the government's witnesses.[9] Motions to produce such lists, in the absence of statutory or jurisprudential authority for disclosure, generally have been dismissed.[10]

In the instant case, the court based its holding upon statutory and constitutional grounds, emphasizing its deference to the trial court in pretrial matters. The court analyzed the Louisiana discovery articles and found no statutory prohibition of the disclosure of names and addresses of the state's witnesses. In addition, the court found that forcing the defendant to prepare for trial without the requested list of witnesses violated fundamental fairness. Disclosure was therefore constitutionally mandated under the special circumstances of the case.

---

is another illustration of the adverse effect of disclosure. *See* Bergen Drug Co. v. Parke Davis & Co., 307 F.2d 725 (3d Cir. 1962); House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962).

6. Ratnoff, *supra* note 5, at 286; LA. CODE CRIM. P. art. 729.1(B); FED. R. CRIM. P. 16(d)(1).

7. J. MOORE, FEDERAL PRACTICE RULES PAMPHLET pt. 3, § 16-3 at 217 (1982). *See* FED. R. CRIM. P. 15. In Louisiana, the protective order is limited to demanding an appearance bond, LA. R.S. 15:257; in default of such, a deposition may be taken at the witness's request, LA. R.S. 15:258 & 15:259.

8. LA. CODE CRIM. P. arts. 716-729.6 (enacted 1977).

9. State v. Hennigan, 404 So. 2d 222 (La. 1981); State v. Jackson, 362 So. 2d 1082 (La. 1978); State v. Yates, 350 So. 2d 1169 (La. 1977); State v. Breston, 304 So. 2d 313 (La. 1974); State v. Brewer, 263 La. 113, 267 So. 2d 541 (1972); State v. Jones, 249 La. 324, 186 So. 2d 608 (1966); State v. Blackman, 39 La. Ann. 847, 2 So. 588 (1887).

10. *See* cases cited in note 9, *supra*. In State v. Rogers, 375 So. 2d 1304 (La. 1979), however, the Louisiana Supreme Court held that a defendant charged with conspiracy was entitled to learn by a bill of particulars the names of any alleged coconspirators, even though they might be witnesses for the state. The court reasoned that the principle that otherwise discoverable information need not be specified in a bill of particulars if the defendant is aware of the *facts he requested* did not support the contention that a defendant charged with conspiracy should know with whom he conspired. Such an argument assumes the defendant's guilt and is not permissible in view of the constitutional presumption of innocence. *Id.* at 1313. *Rogers* is distinguishable because of a constitutional presumption of innocence, and it has been characterized as a "limited exception" to the general rule that criminal discovery does not enable a defendant to discover the state's witnesses. *See* State v. Hennigan, 404 So. 2d 222, 227 (La. 1981).

In analyzing the pertinent statutes, as previously mentioned, the court noted that the Louisiana discovery articles do not prohibit a court from ordering the prosecution to provide the defense counsel with the names and addresses of actual and potential state witnesses.[11] The court analyzed article 723 of the Code of Criminal Procedure[12] and determined that "this codal disclaimer relative to *statements* of state witnesses, and the absence of provisions relative to *names and addresses* of state witnesses, does not statutorily prohibit the discovery of a list of the state's witnesses."[13] The absence of a pertinent provision relative to the names of state witnesses was contrasted with article 728, which "specifically provides that the chapter does not authorize the discovery of the *names*, as well as the statements of defense witnesses."[14] The court concluded that article 728 is an intentional legislative disclaimer to the discovery of the names of defense witnesses which is not paralleled in the discovery of the names of prosecution witnesses.[15] Therefore, the court held that since the disclosure of the names and addresses of state witnesses is not statutorily prohibited, the trial judge had discretion to grant the defendant's request for such a list,[16] as sanctioned by article 3 of the Code of Criminal Procedure.[17]

The court noted that its construction of the Louisiana discovery

---

11. 408 So. 2d at 1339 (citing LA. CODE CRIM. P. arts. 723 & 728).

12. LA. CODE CRIM. P. art. 723 provides:

> Except as provided in Articles 716, 718, 721, and 722, this Chapter does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state.

13. 408 So. 2d at 1338.

14. 408 So. 2d at 1340. LA. CODE CRIM. P. art. 728 provides:

> Except as to scientific or medical reports, this Chapter does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case; or of statements made by the defendant, or by witnesses or prospective witnesses to the defendant, his agents or attorneys; or of the names of defense witnesses or prospective defense witnesses.

15. 408 So. 2d at 1340.

16. *Id.*

17. LA. CODE CRIM. P. art. 3 provides: "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." The court may have based the decision on its inherent authority to establish procedural rules "not in conflict with law." LA. CONST. art. V, § 5(a) provides: "The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court."

articles was essentially the same as that of the federal courts in dealing with similar articles of the Federal Rules of Criminal Procedure, the "source provisions for the Louisiana discovery articles."[18] A survey of the federal jurisprudence reveals that in noncapital cases,[19] the government is not required to disclose the names of its witnesses.[20] However, it is within the trial court's discretion to grant a defendant's request for a list of the witnesses whom the government intends to call at trial.[21] Although the origin of this discretion is subject to some disagreement,[22] the premise upon which it generally is based is that 18 U.S.C. § 3432, requiring that a defendant in a capital case be furnished with a list of the witnesses the government intends to call at trial, merely sets a minimum standard of disclosure in capital cases, under the maxim *inclusio unius est exclusio alterius.*[23] Therefore, although the federal rules were intended to be a comprehensive pro-

18. 408 So. 2d at 1339. FED. R. CRIM. P. 16(a)(2) provides: "[t]his rule does not authorize the discovery . . . of statements made by government witnesses or prospective government witnesses." *Compare* FED. R. CRIM. P. 16(a)(2) *with* LA. CRIM. P. art. 723 (quoted in note 14, *supra*). FED. R. CRIM. P. 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." *Compare* FED. R. CRIM. P. 57(b) *with* LA. CODE CRIM. P. art. 3 (quoted in note 17, *supra*).

19. *See* 18 U.S.C. § 3432 (described in note 4, *supra*).

20. United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980); United States v. Dark, 597 F.2d 1097 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979); United States v. Pelton, 578 F.2d 701 (8th Cir. 1978); United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); United States v. Boffa, 513 F. Supp. 444 (D. Del. 1980); United States v. Bremer, 482 F. Supp. 821 (W.D. Okla. 1979); United States v. Brown, 477 F. Supp. 492 (D. Or. 1979); United States v. Munsey, 457 F. Supp. 1 (E.D. Tenn. 1978); United States v. Hall, 424 F. Supp. 508 (W.D. Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976).

21. United States v. Kendricks, 623 F.2d 1165 (6th Cir. 1980); United States v. John Bernard Indus. Inc., 589 F.2d 1353 (8th Cir. 1979); United States v. Sclamo, 578 F.2d 888 (1st Cir. 1978); United States v. Krohn, 558 F.2d 390 (8th Cir.), *cert. denied*, 434 U.S. 868 (1977); United States v. Clardy, 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); United States v. Cannone, 528 F.2d 296 (2d Cir. 1975); United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); United States v. Holman, 490 F. Supp. 755 (E.D. Pa. 1980); United States v. Climatemp, Inc., 482 F. Supp. 376 (N.D. Ill. 1979).

22. *See* 8 J. MOORE, *supra* note 7, at 221. Moore believes the disclosure of witnesses may be sanctioned by FED. R. CRIM. P. 16. He bases his conclusion upon the Advisory Committee's Note to subdivision (D)(1), which states: "Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed." If names of witnesses were not to be disclosed, Moore reasons, the committee would not have cited this as an appropriate occasion to issue a protective order. See United States v. Moceri, 359 F. Supp. 431, 434 (N.D. Ohio 1973) for the principle that FED. R. CRIM. P. 57(b) (quoted in note 18, *supra*) provides the authority for such an order because it allows the courts to proceed in any lawful manner not inconsistent with the rules.

23. *See* United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); United States v. Richter, 488 F.2d 170 (9th Cir. 1973).

cedural code, they do not set the outer limits of a trial court's power. Furthermore, in *Will v. United States*,[24] the United States Supreme Court observed, "[I]t is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial."[25]

In addition to its statutory construction of the Louisiana discovery articles, the Louisiana Supreme Court indicated that the disclosure ordered by the trial judge was constitutionally mandated, based on the "concepts of fundamental fairness, due process and the constitutional right to counsel [which requires] that a defendant and his attorney [must be allowed] the opportunity to prepare adequately for trial."[26] The trial judge, according to the court, granted the defendant's motion in order to give the defendant and his attorney an opportunity to prepare adequately for trial. In approving this action, the supreme court stated that "there is authority in the trial judge under the due process clauses of the federal and state constitutions to order pre-trial discovery where he considers that fundamental fairness requires it."[27] The court believed that the defendant's contention that he could not prepare an adequate defense without the requested disclosure was not an unplausible one.[28]

The limits of the trial court's discretion may differ depending upon whether the controlling rationale is statutorily or constitutionally based. The fact that defense counsel, through "normal investigative means," could not locate witnesses to the incident is significant under either rationale.

If the controlling rationale of this decision is statutorily based, Louisiana courts could look to the standards of review developed by the federal courts to define the limits of the trial court's discretion. The *Walters* court emphasized the similarity between the federal discovery articles and the Louisiana discovery articles. Several standards, such as a showing that disclosure is reasonable and necessary in order to prepare for trial[29] or that the list of potential witnesses is material in the preparation of the defense,[30] have been used by the federal courts to determine whether a trial judge should invoke his discretion and order the government to disclose its list of potential witnesses. A majority of the courts require a specific showing of need

24. 389 U.S. 90 (1967).
25. *Id.* at 99.
26. 408 So. 2d at 1340.
27. *Id.* at 1338.
28. *Id.* at 1339.
29. United States v. Richter, 488 F.2d 170 (9th Cir. 1973).
30. United States v. Cafaro, 480 F. Supp. 511 (S.D.N.Y. 1979).

for disclosure that outweighs a specific government showing of need for concealment.[31] A general need to prepare for cross-examination is not sufficient,[32] especially where the government has made a showing that justice requires suppression of witness identities until trial.[33]

The interests of both the state and the defendant could be adequately served by limiting the discretion of the trial judge to order disclosure to those cases in which the defendant has made a particularized showing of need that outweighs the state's need for concealment. The defendant would have access to information for which he had demonstrated a need, and the state, in addition to being allowed the chance to prevent disclosure by showing a greater need to conceal the identities of its witnesses, could request that the order be conditioned so as to minimize any adverse effects.[34] If this standard had been applied in *Walters*, the fact that the defense attorney, through "normal investigative means," could not locate witnesses would have been a major factor in the court's determination that the defendant had made a particularized showing of need that outweighed the state's need for concealment.

---

31. In United States v. Brown, 477 F. Supp. 492 (D. Or. 1979), disclosure was ordered because of a possibility of precipitous withdrawal of defense counsel late in proceedings as a result of potential conflicts. However, disclosure was conditioned upon counsel not divulging names to their clients and only using the names to check client records and determine whether any potential conflict of interest could be foreseen. In United States v. Price, 448 F. Supp. 503 (D. Colo. 1978), defendant's mother tongue was Ute and his command of the English language was very limited; therefore, he would be able to provide information to counsel only in response to declarative or leading questions. For this and other reasons, the court ordered disclosure. In United States v. Greater Syracuse Bd. of Realtors, 438 F. Supp. 376 (N.D.N.Y. 1977), disclosure was ordered upon recognition that the case would be complex (violation of Sherman Antitrust Act) and involve a large number of witnesses. Also, the probability of witness harassment and attempts to suborn witness perjury would be less than in the average criminal case. In United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1975), disclosure was denied because the defendant was unable to substantiate her claim of a limited ability to remember and relate critical events surrounding the alleged commission of the crime. *See also* United States v. Cannone, 528 F.2d 296, 302 (2d Cir. 1975); United States v. Goldman, 439 F. Supp. 337, 350 (S.D.N.Y. 1977).

32. United States v. Sclamo, 578 F.2d 888 (1st Cir. 1978); United States v. Sherman, 426 F. Supp. 85 (S.D.N.Y. 1976); United States v. Pastor, 419 F. Supp. 1318 (S.D.N.Y. 1976).

33. In United States v. Clardy, 540 F.2d 439 (9th Cir. 1976), denial of defendant's request was due to a clear possibility that disclosure of names and exact whereabouts of inmates who planned to testify against the defendant in a prison homicide trial might have endangered those witnesses. In United States v. Cafaro, 480 F. Supp. 511 (S.D.N.Y. 1979), the request for the names of all witnesses involved in a witness protection program would have defeated the purpose of the program.

34. See LA. CODE CRIM. P. art. 729.1(B), which provides "[u]pon a sufficient showing by either party, the court may at any time vacate, restrict or defer an order for discovery, or make such other order as is appropriate." *See also Walters*, 408 So. 2d at 1340 n.4.

However, if the controlling rationale of *Walters* is constitutionally based, the limits of the trial judge's discretion would seem to be "to order pre-trial discovery where he considers that fundamental fairness requires it."[35] The discretionary function thus is defined in terms of whether denial of discovery would be a violation of "fundamental fairness." Once such a determination is affirmatively made, a trial court would be obligated to order discovery. Constitutionally mandated discovery would restrict the judge's authority, "[u]pon a sufficient showing by either party, . . . [to] vacate, restrict or defer an order for discovery."[36] If the discovery is mandated by fundamental fairness, the judge would be obligated to order it, despite a "sufficient showing" by the state that the witness would be in danger by such an order.

Although the *Walters* opinion seems to indicate that the constitutional basis is but one of two separate and distinct rationales for the decision, the later case of *State v. Washington*[37] apparently embraced the constitutional rationale as controlling in *Walters*. In *Washington*, the Louisiana Supreme Court reversed the trial court's order granting the defendant's motion to discover the names, addresses, and telephone numbers of the state's witnesses. Noting the trial judge's reliance on *Walters*, the per curiam opinion stated that "there was no determinations that there [existed] peculiar and distinctive reasons why fundamental fairness [dictated] discovery. Nor [did] the record reflect any such showing by the defendant."[38] *Walters* and *Washington* clearly indicate that a trial judge will not have abused his discretion in ordering the state to disclose a list of its witnesses when "fundamental fairness" dictates such discovery. The *Walters* court observed that "[i]t has long been a mainstay of . . . fundamental fairness . . . that a defendant and his attorney have the opportunity to prepare adequately for trial."[39] The inaccessibility of witnesses "through normal investigative means," *Walters* indicates, prevents a defendant and his attorney from having an opportunity to prepare adequately for trial.

Pretrial interviews of witnesses are advantageous for several reasons. In general, they allow the defense to prepare its case. A pretrial interview may alleviate surprise if the witness's testimony is unfavorable.[40] The most obvious advantage to interviewing a witness is finding that he has exculpatory information.

---

35. 408 So. 2d at 1338.
36. LA. CODE CRIM. P. art. 729.1(B).
37. 411 So. 2d 451 (La. 1982).
38. *Id.* at 451.
39. 408 So. 2d at 1340.
40. Hagen, *Interviewing Witnesses in Criminal Cases*, 28 BROOKLYN L. REV. 207, 209 (1962).

The United States Supreme Court, in *Brady v. Maryland*,[41] established the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[42] Under *Brady's* progeny,[43] exculpatory matter in the possession of the state must be disclosed to the defense, when specifically requested, if it might affect the outcome of the trial. If the defense makes no request or only a general request for such information, the exculpatory matter nevertheless must be disclosed if it is material to the issue of guilt or punishment.[44] Although many courts adhere to the view that *Brady* did not address pretrial discovery,[45] other courts have taken a more flexible approach. These latter courts reason that *Brady* requires that the defendant be treated with fundamental fairness and not hindered in the presentation of his defense. Therefore, in those cases where disclosure is required, it must be made at a time when it would be of use to the defendant, implying in some circumstances a constitutional duty to disclose before trial.[46]

In *State v. Migliore*,[47] the Louisiana Supreme Court held that a

41. 373 U.S. 83 (1963).

42. *Id.* at 87.

43. United States v. Agurs, 427 U.S. 97 (1976); Scurr v. Niccum, 620 F.2d 186 (8th Cir. 1980); United States v. Young, 618 F.2d 1281 (8th Cir. 1980); Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977).

44. United States v. Agurs, 427 U.S. 97 (1976).

45. United States v. McPartlin, 595 F.2d 1321, 1346 (7th Cir. 1979) ("The appropriate standard . . . is whether disclosure came so late as to prevent the defendant from receiving a fair trial."); United States v. Wolfson, 289 F. Supp. 903 (S.D.N.Y. 1968); United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968); United States v. Armantrout, 278 F. Supp. 517 (S.D.N.Y. 1968); United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965).

46. United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969) ("The importance of *Brady*, then, is its holding that the concept out of which the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect upon the jury's verdict."); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969); United States v. Cullen, 305 F. Supp. 695 (E.D. Wis. 1969); United States v. Curry, 278 F. Supp. 508 (N.D. Ill. 1967); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967). However, United States v. Agurs, 427 U.S. 97 (1976), does not support such a broad interpretation of *Brady*:

> It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence . . . . Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "*Brady* material" . . . . [T]hat standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense.

Id. at 112 n.20.

47. 261 La. 722, 260 So. 2d 682 (1972).

defendant had a right to pretrial inspection of a substance, if there was a sufficient amount, in cases where his guilt or innocence turned upon an analysis of that substance. The court, however, refused to hold that denial of the right to conduct an independent analysis would deprive the defendant of due process of law.[48] Thereafter, in *State v. Barnard*,[49] the court denied the defendant's motion to allow his own expert to inspect a murder weapon and bullet, reasoning that there was no showing under *Brady* that an independent inspection would have been favorable to the defendant. The Fifth Circuit effectively reversed this ruling, using a rationale, predicated on *Brady*, that suggests that a defendant must be afforded the opportunity to develop favorable evidence.[50] This rationale is consistent with *State v. Woodruff*,[51] in which the Louisiana Supreme Court held that it was error to deny the pretrial discovery of information about a weapon found near the victim when the defendant asserted a claim of self-defense, as this information might have facilitated proof of the defendant's claim.[52] An expansion of this doctrine to include discovery of information to facilitate general preparation of a defense seemed to have been precluded by the court's subsequent decision in *State v. Collins*,[53] a unanimous decision that specifically limited *Woodruff* to self-defense claims. However, *Walters* broadens the scope of *Woodruff* and *Migliore* to allow pretrial discovery of the names and addresses of state witnesses when the identification of these witnesses would not be available to the defense through "normal investigative means." This disclosure is not mandated by the defendant's need to "meet the state's evidence," a contention that has been rejected numerous times.[54] Rather, *Walters* recognizes a right to the opportunity to develop favorable evidence from these witnesses (since no others were available to the defense) and thereby preserve the constitutional right to prepare adequately for trial.[55]

Although great emphasis was placed upon the phrase "normal investigative means," the *Walters* court did not define it. The most com-

---

48. 261 La. at 743, 260 So. 2d at 689. *See* Joseph, *Work of the Louisiana Appellate Courts, 1971-1972 Term—Criminal Procedure I*, 33 LA. L. REV. 298 (1973).

49. 287 So. 2d 770 (La. 1973).

50. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). *See* Lamonica, *Work of the Louisiana Appellate Courts, 1974-1975 Term—Pre-Trial Criminal Procedure*, 36 LA. L. REV. 593 (1976).

51. 281 So. 2d 95 (La. 1973).

52. *Id.* at 98. *See also* Lamonica, *supra* note 50, at 596-97.

53. 308 So. 2d 263 (La. 1975).

54. Moore v. Illinois, 408 U.S. 786 (1971); State v. Johnson, 333 So. 2d 223 (La. 1976); State v. Peters, 302 So. 2d 888 (La. 1974), *cert. denied*, 423 U.S. 878 (1975).

55. The court stated, "To so allow [that a defendant and his attorney have the opportunity to prepare adequately for trial] under the special facts of this case, the trial judge in his discretion granted defendant's motion . . . ." 408 So. 2d at 1340.

mon method to locate a witness is to canvass the scene of the crime.[56] Much importance is placed upon the habitual nature of man, and therefore it is suggested that one should comb the area at the same time of day and the same day of the week that the crime occurred.[57] This method would be ineffective in *Walters*, however, because a Mardi Gras parade crowd is not an habitual one. It is a mass of people that gathers once a year, and as the court stated, many of the people are not residents of New Orleans or Louisiana.[58] A second method commonly used to locate witnesses is publication through newspapers or radio, asking potential witnesses to contact the attorney.[59] The effectiveness of this method also is diminished in the *Walters* situation, since the large number of nonresidents involved greatly reduces the likelihood of finding potential witnesses. Newspaper reporters and photographers sent to the scene of the crime also are regarded as reliable sources of information. Reporters usually interview persons at the scene of the crime, and they often can supply the names of witnesses. The identity of a bystander in a photograph may be ascertained if he is wearing a uniform or has some identifiable ensignia on his clothing.[60] Other methods, such as "informal" chats with the prosecutor, the prosecutorial staff, or policemen investigating the case,[61] depend heavily upon personal relationships in order to be effective. If these methods are considered "normal investigative means," the use of such means to search for witnesses in the *Walters* situation clearly would yield unproductive results. It is suggested. however, that there must be an objective determination of the inability to locate witnesses through "normal investigative means." The fact that a particular attorney is unable to locate witnesses should not be determinative. The test should focus upon whether the witnesses can be located through the methods discussed.

The decision in *Walters*, as apparently limited by *Washington*, stands for the proposition that when defense counsel has no opportunity to prepare adequately for trial through normal investigative means, disclosure of the identity of the state's witnesses is constitutionally mandated. A defendant has been deprived of the opportunity to prepare adequately for trial if he has no opportunity to develop favorable evidence. Precluding the defendant from developing favorable evidence from witnesses to the incident unavailable to him through "normal investigative means" is a violation of fundamental

56. 1 AM. JUR. TR. 2d *Investigating the Civil Case* § 74 (1964).

57. *Id.*

58. 408 So. 2d at 1338.

59. F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES—FEDERAL AND STATE 29-30 (1970).

60. *Id. See also* 2 AM. JUR. TR. 2d *Locating and Interviewing Witnesses* § 17 (1964).

61. F. BAILEY & H. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY 53 (1974).

fairness. The Louisiana discovery articles contemplate this fundamental fairness by allowing discovery of tangible objects that the state intends to use as evidence at trial.[62] *Walters* provides a remedy with regard to the discovery of witnesses when denial would be a violation of fundamental fairness. The burden on the defendant who seeks relief apparently will be much greater in the state courts than in the federal courts, where the standard is a particularized need for disclosure that outweighs the government's need for concealment.[63] Although the federal standard might make discovery more readily available than the Louisiana standard, requiring a violation of fundamental fairness, the supreme court may have been hesitant to grant such an expansive remedy in view of legislative inaction on the subject.

Sandra L. Edwards

62. LA. CODE CRIM. P. art. 718.
63. See text at note 31, *supra*.