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Pre-Trial Inspection of Prosecution's Evidence by Defendant

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PRE-TRIAL INSPECTION OF PROSECUTION'S EVIDENCE BY DEFENDANT

May the State be compelled to allow the accused to see its evidence before trial?

At one time this question could be answered negatively in the most emphatic fashion. In *Rex. v. Holland,*[1] apparently the first reported case, it was said by Lord Kenyon, C. J.:

> "There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the entire system of criminal law."

and by Grose, J.:

> "It is clear that neither at common law, or under any of the statutes is the defendant entitled as a matter of right to have his application granted. 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."

Can the law be stated in such a dogmatic manner today?

In Pennsylvania our appellate courts have not had to deal with the problem. It is proposed in this note to determine the present status of this issue by an examination of the position taken by the various states, and thereby to determine the view which the Pennsylvania courts should adopt.

In analyzing the cases, several important distinctions must be made:

(1) Did the court in granting or denying the request predicate the rule on the presence or absence of a right or base its holding on a discretionary power in the trial court?

(2) The nature of the subject matter which the defendant wanted to see; particularly as regards its admissibility as evidence.

(3) The bases of the decision; that is, was it founded on common law or a statute?

There are approximately ninety appellate decisions, all but a few within the past thirty years. The highest courts of sixteen of the states have not passed on the question.[2] Two thirds of the remaining states have less than four decisions; many of these but one. The opinions which fully discuss the problem are few.[3]

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1 4 Durn & E. 961, 100 Eng. Reprint 1248 (1792). N. B., Buller, J., in a concurring opinion cited Rex. v. Purnell, 1 Wills 239 (1748), as authority, but it concerned the right of the prosecution to examine certain statutes and archives of Oxford in regard to prosecuting a Vice-Chancellor of Oxford for misconduct in office. A careful reading of it discloses no holding or dicta applicable to the present question.

2 Alabama, Arizona, Georgia, Maine, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Wyoming.

3 For a discussion, see particularly: State ex. rel. Wagner v. Circuit Court of Minnehaha County et al., 60 S. D. 115, 244 N. W. 100 (1932); People ex. rel. Lemon v. Supreme Court of New York et al., 245 N. Y. 24, 156 N. W. 84 (1924), also 52 ALR 207 and J. Crim. L. 38:249-55, S-O, '47.

Due to this and the above distinctions, classification and generalization are attended with more than usual difficulties. Nevertheless, certain broad categories do suggest themselves. Consideration will first be given to the decisions based on the common law.

There is no dispute that originally at common law the defendant had no right and the court had no discretion to allow him to see the prosecution's evidence. Nor does it appear that any consideration was given to the materiality or admissibility of the evidence.[4]

In the first classification are those jurisdictions which adhere closely to the early common law and hold that the accused has no right to see the prosecution's evidence before trial. This group comprises the states of Delaware,[5] Michigan,[6] Minnesota,[7] New Mexico,[8] Texas,[9] Virginia,[10] and Wisconsin.[11] Although positive in their denial of a right, none expressly exclude a discretionary power and the problem is to determine whether such could be implied. In Delaware and New Mexico, the issue was dismissed in a sentence, the former court saying, "The granting of the application would be contrary to all practice and would lead to dangerous results,"[12] and the latter, "We know of no statute and the ruling of the trial judge is sustained,"[13] thus making any inferences impossible. The Minnesota case[14] and the later holdings of Michigan[15] and Virginia[16] could possibly support an inference of a discretionary power, as might the holding in Wisconsin, particularly in view of the *Steensland* case.[17] Texas has a number of cases but none actually goes into the problem. Several contain hints of a discretion in the trial court.[18] None of these opinions discusses the evidential value of the things the defendant wanted to inspect. In some cases the evidence was admissible[19] while in others it was not.[20]

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4 Supra, Note 1. Case concerned the report of an investigating body and would have been inadmissible as evidence for prosecution or defense.

5 State v. Kupis, 7 W. W. Harr. 27, 179 A. 640 (1935).

6 People v. Parisi, 270 Mich. 429, 259 N. W. 127 (1935); People v. Kuberocki, 310 Mich. 162, 16 N. W. 2d 703 (1945).

7 State v. Steele, 117 Minn. 384, 135 N. W. 1128 (1912).

8 Territory v. McFarland, 7 N. M. 421, 37 P. 1111 (1894).

9 Goode v. State, 57 Tex. Cr. R. 330, 123 S. W. 597 (1909); Taylor v. State, 87 Tex. Cr. R. 330, 221 S. W. 611 (1920); Leahy v. State, 111 Tex. Cr. R. 570, 13 S. W. 2d 874 (1929).

10 Com. v. Brown, 90 Va. 671, 19 S. E. 447 (1894); Abdell v. Com., 173 Va. 458, 2 S. E. 2d 293 (1939).

11 Santry v. State, 67 Wisc. 65, 30 N. W. 226 (1886); State v. Page, 206 Wisc. 611, 240 N. W. 173 (1932); Steensland et al. v. Happmann, 213 Wisc. 388, 252 N. W. 146 (1934).

12 Supra, Note 5.

13 Supra, Note 8.

14 Supra, Note 7.

15 People v. Kuberocki, 310 Mich. 162, 16 N. W. 2d 703 (1945).

16 Abdell v. Com., 173 Va. 458, 2 S. E. 2d 293 (1939).

17 Steensland et al. v. Happmann, 213 Wisc. 388, 252 N. W. 146 (1934).

18 Taylor v. State, 87 Tex. Cr. R. 330, 221 S. W. 611 (1920); May v. State, 129 Tex. Cr. R. 2, 83 S. E. 2d 874 (1929).

19 Supra, Note 16 (Notes and diary of defendant).

20 Currie v. State, 102 Tex. Cr. R. 653, 279 S. W. 834 (1926) (Statement of witnesses).

In the second group are those states which, though denying the defendant the right, contain strong implications of a discretionary power in the trial court. California,[21] Colorado,[22] Iowa,[23] Kentucky,[24] New York,[25] and Vermont[26] fall within this category. California and New York clearly limit the inference to instances where the evidence would be admissible.

The third division is comprised of the states which definitely hold that it is discretionary with the trial judge. Herein are found Massachusetts,[27] Nebraska,[28] Rhode Island,[29] South Dakota,[30] and Washington.[31] None actually limits the exercise of the discretion to instances where the evidence would be admissible but all the cases, except the Nebraska opinion, deal with evidence which was admissible at the trial. In *State* ex rel. *Wagner v. Circuit Court of Minnehaha County,* the lower court granted the request and the prosecution brought certiorari proceedings against the judge allowing it. The Supreme Court of South Dakota upheld the trial judge. In all of the other cases the lower courts denied the inspection and the appellate courts sustained them, holding there was no abuse of discretion.

The fourth category of states which has considered the problem without an applicable statute consists of those where any generalization would be misleading. Here it is best to avoid any attempt at grouping them. Arkansas, in its latest case, held that counsel for the defendant should have been allowed to see the defendant's confession but that it was not reversible error because "copying the confession would have furnished no evidence that it was not fully and voluntarily given."[32] Connecticut denied the accused the right,[33] while Mississippi held it error not to allow an inspection,[34] but in both cases the issue arose at trial. The Idaho decision concerned the inspection of the books of a third party.[35]

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21 People v. Fuski, 49 Cal. App. 4, 192 P. 552 (1920); People v. Meadows, 108 Cal. App. 67, 291 P. 226 (1930); People v. Santora, 51 Cal. App. 2d 707, 125 P. 2d 606 (1942).

22 Massie v. People, 82 Colo. 205, 258 P. 226 (1927); Silliman v. People, 114 Colo. 130, 162 P. 2d 793 (1945).

23 State v. Burres, 198 Iowa 1156, 198 N. W. 82 (1924); State v. Bittner, 209 Iowa 109, 227 N. W. 601 (1929).

24 Wendling v. Com., 143 Ky. 587, 137 S. W. 205 (1911); Payne v. Com., 274 Ky. 813, 120 S. W. 2d 649 (1938).

25 People ex. rel. Lemon v. Supreme Court of New York et al., 245 N. Y. 24, 156 N. E. 84 (1924).

26 State v. Truba, 88 Vt. 557, 93 A. 293 (1915).

27 Com. v. Jordon, 207 Mass. 259, 93 N. E. 809 (1911); Com. v. Bantolini, 299 Mass. 503, 13 N. E. 2d 825 (1948).

28 Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323 (1944); Mamyer v. State, 148 Neb. 798, 29 N. W. 2d 458 (1947).

29 State v. Di Noi, 59 R. I. 348, 195 A. 497 (1938).

30 State ex. rel. Wagner v. Circuit Court of Minnehaha County, 60 S. D. 115, 244 N. W. 100 (1932).

31 State v. Clark, 156 Wash. 543, 287 P. 18 (1930); State v. Morrison, 175 Wash. 543, 27 P. 2d 1065 (1934); State v. Payne, 25 Wash. 2d 407, 171 P. 2d 227 (1947).

32 Jones v. State, —Ark.—, 213 S. W. 2d 974 (1949).

33 State v. Zinnoruk, 128 Conn. 124, 20 A. 2d 613 (1941).

34 Sprinkle v. State, 137 Miss. 731, 102 So. 844 (1925).

35 Idaho Galena Mining Co. v. Judge of District Court, 47 Idaho 195, 273 P. 952 (1929).

Louisiana has allowed inspection when the defendant's confession was the document requested[36] but has denied it in all other instances.[37] In *People v. Gerald*,[38] the Illinois court held it to be reversible error to deny the defendant the right to examine impounded books of the city treasury. A later case involving the statement of a witness is contra.[39] Although not discussed, the nature of the evidence could distinguish the two cases. It would seem that in Kansas the defendant has the right provided the evidence is admissible.[40]

The decisions in Florida, Indiana, Maryland, Missouri, Montana, Ohio and Oregon have involved the interpretation of statutes. In Florida, it is provided that the court may order the state to allow inspection, copying, or photographing of "ballistics, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photos, objects or other tangible objects upon motion showing good cause thereof."[41] *Williams v. State*[42] held that the phrase "other tangible objects" did not apply to confessions, and in another case involving a witness's statement[43] the statute was not applied. In the light of earlier cases[44] it is believed that outside the scope of the statute the discretionary view would be followed. The statutes in Indiana and Ohio are to the effect that unless special provisions are made the rules of civil procedure apply in criminal cases.[45] The civil rules of these jurisdictions allow it as a matter of discretion and thus the criminal cases have applied the same rule.[46] Montana, Missouri, and Oregon, in interpreting their statutes, hold it to be discretionary if the evidence is admissible[47] or material.[48] Maryland, in *State v. Hass*,[49] held that the court had a discretionary power but the decision was predicated on an amendment to the state constitution giving the court the right to make rules in criminal cases.[50]

As regards the federal courts, it is provided by Rule 16 of the new rules of criminal procedure:

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the government to permit the defendant to inspect and copy or photograph designated books, papers, documents, or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a

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36 State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945).
37 State v. Lee, 173 La. 966, 139 So. 302 (1932); State v. Williams, 211 La. 782, 30 So. 2d 834 (1947).
38 265 Ill. 448, 107 N. E. 165 (1914).
39 People v. Fedele, 287 Ill. App. 444, 5 N. E. 2d 272 (1937).
40 State v. Furthmeyer, 128 Kan. 317, 277 P. 1019 (1929).
41 Laws 1939, c. 19554 sec. 154, F. S. A. 909.18.
42 143 Fla. 826, 197 So. 562 (1940).
43 McAden v. State, 155 Fla. 523, 21 So. 2d 33 (1945).
44 Newton v. State, 27 Fla. 53 (1884); Padgett v. State, 64 Fla. 389, 59 So. 946 (1912).
45 Indiana Burns Ann. St. §§ 2-1645, 9-2407; Ohio Gen. Code, §§ 11552, 13444-1.
46 Weer v. State, 219 Ind. 217, 36 N. E. 2d 787 (1941); State v. Cala, —Ohio—, 35 N. E. 2d 748 (1940).
47 State v. Hall, 55 Mont. 182, 175 P. 267 (1918) construing Rev. Codes, §§ 7138, 9279.
48 State ex. rel. Page v. Terte, 324 Mo. 925, 25 S. W. 2d 459 (1930) construing Rev. St. 1919 § 1378; State v. Yee Guck, 99 Ore. 231, 195 P. 363 (1921) construing Ore. L. § 533.
49 —Md.—, 51 A. 2d 647 (1947).
50 Art. 4, § 18A.

showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Two recent cases, in construing this rule, held that the phrase "by seizure or process" is a limitation on material subject to inspection, whether it was obtained from the defendant or from others, and thus refused to apply it where counsel wanted to examine statements made by the defendant[51] and reports of the F. B. I.[52]

Outside the orbit of Rule 16, the situation is not clear. It is believed that the majority would warrant an inference of a discretionary power if the evidence is material or admissible.[53]

We may conclude from this survey:

(1) That the weight of authority is to the effect that pre-trial inspection of the prosecution's evidence by the defendant is a matter of discretion with the trial court.

(2) That the majority so holding qualify this position by insisting that the evidence be material or admissible.

(3) That most states reaching this decision have done so without invoking statutory aid.

Turning now from the holdings of the various states, an inquiry into the rationale is pertinent in determining what the law of Pennsylvania should be.

In denying the defendant's request it was said by the Virginia court,

"A different rule would tend to subject the attorney for the Commonwealth to great annoyance, to the probable destruction or loss of material evidence, and to compel the Commonwealth not only to furnish the accused with a full bill of particulars, but to supply the accused with the physical evidence it intends to introduce upon the trial. Such a rule. . .would in our opinion, subvert the whole system of criminal law."[54]

Other cases have refused inspection on the grounds that the documents are not public but are the District Attorney's private papers,[55] that it would expose the prosecution to a fishing expedition[56] and that the state should not be required to lay bare its case in advance of trial, particularly where it has no reciprocal right.[57]

Contrariwise it was said in *State v. Dorsey*,[58]

"It is the policy of the law to give to every man accused of a crime a reasonable opportunity to prepare and present his defense. The State

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51 U. S. v. Chandler, D. C. Mass., 7 F. R. D. 365 (1947).

52 U. S. v. Block, D. C. Ind., 6 F. R. D. 270 (1946).

53 Goldman v. U. S., 316 U. S. 129, 62 S. C. 973 (1942); U. S. v. Muraskin et al., 99 F. 2d 815, C. C. A. 2d (1938).

54 Supra. Note 16.

55 Leahy v. State, 111 Tex. Cr. R. 570, 13 S. W. 2d 874 (1929).

56 State v. Blankson, 165 La. 1082, 116 So. 565 (1928).

57 Supra. Note 47.

58 Supra. Note 36.

> of Louisiana does not want to secure convictions by an unfair concealment or surprise. It is the duty of the state to concern itself as much in having the innocent acquitted as in securing the conviction of the guilty. . .to permit such an inspection is nothing less than is required by fairness to a defendant under the presumption of innocence."

The Missouri court had this to say, "That it is desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than a judicial process."[59] In other opinions, the avoidance of delay at trial[60] and general principles of fairness and justice[61] have been advanced as reasons.

In evaluating the theories on which the decisions are based, the type of evidence to be inspected is the primary factor. Nearly all the opinions reveal some fact that clearly justifies the conclusion reached by the court. If the defendant's request is for all the state's evidence, the courts are properly justified in talking about "fishing expeditions" and annoying and hampering the District Attorney. When the subject matter is documentary, the defendant is likely to be met by the argument that such papers are the private property of the District Attorney. The point is well taken when the evidence consists of a transcript of the statements of certain witnesses, notes which may have been taken in interviewing witnesses, and dying declarations. The reduction to writing of these things is merely for the convenience of the prosecution. A dying declaration is admissible in evidence whether oral or written. Why should a mere change in form compel the District Attorney to disclose this evidence to the defendant in advance of trial? The inspection of physical evidence seems to depend on the particular facts of the case. In *People v. Gerald*[62] the defendant, a city treasurer, was accused of withholding funds from his successor. His counsel asked to see the city books which had been impounded by the state because the accounts on which the charges were made were complicated and he could not properly investigate them if he had to wait for trial. The request was denied. At the trial it developed that due to a lack of time the defendant was unable to obtain certain evidence essential to his defense. The Supreme Court of Illinois held that the refusal under such circumstances constituted reversible error. On the other hand, in *May v. State*,[63] the defendant wanted to see certain parts of a truck on which blood was found. The appellate courts upheld the trial court's refusal, pointing out that the facts disclosed that the defendant had in his possession other parts of the truck with the same substance on it.

The danger of loss or destruction of the evidence could easily be overcome by proper procedural precautions.[64]

When mention is made of the "dangerous results" and of "subverting the entire system of law" the courts are approaching what appears to be the under-

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59 State v. Tippett, 317 Mo. 319, 296 S. W. 132 (1927).
60 Supra. Note 30.
61 State v. Naething, 318 Mo. 531, 300 S. W. 829 (1928).
62 265 Ill. 448, 107 N. E. 165 (1914).
63 129 Tex. Cr. R. 2, 83 S. W. 2d 338 (1935).
64 Note procedure in Rule 16 of the new Federal Rules of Criminal Procedure.

lying reason for the reluctance to allow an inspection—the fear that the guilty defendant will escape conviction by manufacturing refutations and falsifying alibis. The desire of those favoring an enlargement of the defendant's rights to eliminate the competitive aspect of criminal trials is, of course, a meritorious one, but such trials are hardly amicable. Some adversary character is necessary. It must be remembered that the District Attorney is under a duty to see that the evidence gathered by the various investigating bodies is properly presented; having due regard for the interest of the general public. This, by no stretch of the imagination, carries with it the duty of offering defenses to the accused. The defendant always has the right to be represented by counsel.

The various preliminary hearings should protect the defendant from being surprised at trial. If he is not present at these hearings, he may obtain a Bill of Particulars.

The arguments of fairness, extending the presumption of innocence, and giving the defendant every opportunity to prepare a defense are in themselves sound principles and fully in accord with our basic theory that it is better that one hundred guilty escape than one innocent man be convicted. However, their application to the situation under discussion can be questioned. The robe of innocence with which the accused is metaphorically garbed must not become a suit of armor which the sword of justice cannot pierce. The citizens of the state are a party in interest in every criminal trial. Protection must be afforded to them. Compelling the commonwealth to let the defense see its case prior to trial adds measureably to the already heavy burden of the state. The presence in society of the proverbial one hundred guilty is hardly conducive to the general welfare.

The foregoing discussion has concerned itself with the position of the various states and the theories in support thereof. Although our higher courts have not dealt directly with the problem, several opinions do contain statements which may be indicative of their attitude. In *Commonwealth v. Buccieri*[65] the accused was denied a Bill of Particulars and in upholding the trial court, it was said, "If by a Bill of Particulars was meant a specification of the evidence to be adduced by the Commonwealth, this the prisoner had no right to ask nor the court any right to direct." And in *Logan v. Penna. R. Co.*:[66] "A Bill of Discovery will not be entertained in equity to aid the promotion or defense of any suit which is not purely of a civil nature." In *Commonwealth v. Jennings*[67] the defendant was charged with participating in the bombing of an automobile. He asserted that he was being framed and to corroborate this defense requested that the commonwealth produce the itemized account of the expenses of a special investigator. The request was denied and the Superior Court held this to be reversible error, saying, "this itemized account was not, in our opinion, a private paper of the District Attorney. . .It was a County record which Jennings was

[65] 153 Pa. 535, 26 A. 228 (1893).
[66] 132 Pa. 403, 19 A. 137 (1890).
[67] 129 Pa. Super. 584, 196 A. 598 (1938).

entitled to have access to." However, it is not clear from the opinion when the request was made or whether the court meant that the defendant should have been allowed to see the account at the trial or beforehand. There are two lower court decisions squarely on the point. *Commonwealth v. McQuiston*[68] concerns the request of the defendant for a copy of his signed statement. The court denied the request, citing Wigmore[69] and Wharton[70] as authority for the proposition that at common law the general rule is that the accused has no right to disclosure or inspection of evidence in possession of the prosecution. The opinion was brief and the judge relied solely on these authorities; although the court did say that the defendant had found no statute and referred to no case to support his proposition. The Dauphin County Court in *Commonwealth v. Smith*[71] was asked to allow the defendant to inspect and make copies of all written statements of the defendant and his wife and of an alleged dying declaration of the decedent. The defendant did not assert that he was entitled to the disclosure as a matter of right but contended that the court had the power, in the exercise of its discretion, to grant him his request. In an able opinion by Judge Paul J. Smith, the court said:

> "However, until there is specific statutory authority to the contrary, this Court is of the opinion that the rule enunciated in the *McQuiston* case, *supra,* supported by the authorities therein cited, is here controlling. In so holding we cannot see how the defendant will be deprived of a fair and impartial trial. Admittedly, the Rules of Civil Procedure relating to discovery do not apply to criminal actions. The statement made by the defendant to the State Police should be a matter peculiarly within his own knowledge. The statements made by the defendant's wife to the State Police cannot be introduced as a part of the Commonwealth's case, in chief. It can only be used to attack her credibility, should she be called as a witness for the defendant. As to the two alleged dying declarations, the mere fact that they may have been committed to writing does not give the defendant the right to inspect the same or to make copies thereof. These declarations are merely evidence which the District Attorney may or may not introduce at the trial. And since this evidence could not be secured by the defendant on a Bill of Particulars, we hold that it cannot be secured in this proceeding."

To conclude, it is submitted that the law of Pennsylvania, both on principle and authority, should be that the defendant has no right to a pre-trial inspection of the prosecution's evidence. However, it is conceivable that under unusual circumstances an occasion may arise where a strict adherence to the rule would produce unjust results. In such a situation it should be within the sound discretion of the trial judge to relax the rigor of the rule to an extent sufficient to give the defendant a reasonably fair opportunity to prepare his defense. Any further extension should be made by the legislature rather than the judiciary.

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68 53 D. & C. 533 (1946).
69 6 WIGMORE, § 1859g.
70 2 WHARTON'S CRIMINAL EVIDENCE 1311, 1312, 1354.
71 Com. v. Smith, —Dauphin Co. Rep.— (1949).