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ARTICLES

PRE-TRIAL DISCOVERY OF GRAND JURY TESTIMONY IN CRIMINAL CASES

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The recognition of a defendant's right to pre-trial inspection of grand jury testimony is of recent origin. At common law, a defendant had no right to learn what went on before the grand jury, or to see a record of the evidence produced against him before that body. The penalties for disclosure by a member of the grand inquest to the accused of the evidence produced against him were severe. If the crime for which the defendant had been indicted were a felony, the grand juror who violated his oath of secrecy could be held as an accessory. If the offense were treason, the juror could be held as a principal. Later such conduct was denounced as a high misprision.[1] This harshness was in keeping with the general reluctance of the common law to afford the prisoner any discovery in a criminal case. He had no right to a copy of the indictment, and it was only because of statutory mandate, in cases of treason, that he was served with a copy of the indictment and a list of witnesses.[2]

The rigor of the common law was mitigated in the nineteenth century in England by various acts of Parliament. The most important of these, The Indictable Offenses Act,[3] provided for the preliminary examination of the accused before a committing magistrate, and gave the accused the right to obtain copies of the depositions of the prosecution witnesses upon whose testimony the prisoner had been committed for trial. This enabled the defendant to obtain full discovery of the testimonial evidence in the hands of the prosecutor prior to the trial of the indictment, and at the same time limited the Crown to the proofs adduced at the preliminary hearing. In time, the magistrate's hearing and depositions rendered the grand jury obsolete, and in 1933 the grand jury was abolished in England.[4]

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1. See Goodman v. United States, 108 F.2d 516 (9th Cir. 1939); Comment, *The Impact of Jencks v. United States and Subsequent Legislation on the Secrecy of Grand Jury Minutes*, 27 FORD. L. REV. 244 (1958).

2. See 6 WIGMORE, EVIDENCE § 1859g (3d ed. 1940); The King v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (K.B. 1792); Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

3. 1848, 11 & 12 Vict. c. 42, §§ 1, 27.

4. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1.

In this country, the right to indictment by grand jury has been preserved by our federal constitution,[5] and by law in many states.[6] In federal prosecutions, the accused has the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[7] Also, Rule 6(e) of the *Federal Rules of Criminal Procedure*, effective in 1946,[8] modified the federal practice and permitted a disclosure of grand jury testimony by court order preliminary to or in connection with a judicial proceeding, or on a motion to dismiss the indictment because of matters occurring before the grand jury.

In the states, the common law rule that restricted the defendant's right to pre-trial discovery was dominant.[9] Where the indictment was so general that it did not convey sufficient information to enable defendant to prepare his defense, the court, on motion and in its discretion, could order the prosecutor to furnish the defendant with a bill of particulars of the allegations of the indictment.[10] Except for the movement in the western states to circumvent the grand jury indictment by an information and preliminary hearing, there was little to change the common law rule of restrictive discovery.[11] In several states,[12] statutes were adopted which gave the defendant a right to a copy of the stenographic record of the testimony heard before the grand jury, but this was an innovation.[13]

It was not until the United States Supreme Court decision in *Jencks v. United States*[14] that pre-trial discovery in criminal cases was given serious consideration.[15] In the *Jencks* case, the Government's principal witnesses were Matusow and Ford, Communist Party members who had been paid by the Federal Bureau of Investigation to make reports of party activities in which they had participated. Jencks had been convicted in the trial court and,

5. U.S. CONST. amend. V.

6. Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290 (1959).

7. U.S. CONST. amend. VI.

8. See Norris v. United States, 190 F.2d 186 (5th Cir. 1951).

9. Note, *Pretrial Inspection of Prosecution's Evidence by Defendant*, 53 DICK. L. REV. 301 (1949).

10. See, *e.g.*, People v. Westrup, 372 Ill. 517, 25 N.E.2d 16 (1939); People v. Gerold, 265 Ill. 448, 107 N.E. 165 (1914); State v. Pennsylvania R.R., 84 N.J.L. 550, 87 Atl. 86 (Sup. Ct. 1913); N.C. GEN. STAT. § 15-143 (1953).

11. See Comment, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746 (1956); Watts, *supra* note 6; Hurtado v. California, 110 U.S. 516 (1884).

12. See KY. REV. STAT. tit. 6, ch. 1, § 110 (App. 1959) (to be superseded by KY. R.. CRIM. P. 5.16, effective Jan. 1, 1963); IOWA CODE ANN. tit. 36, § 772.4 (1950); CAL. PEN. CODE §§ 925, 938.1 (1959); MINN. STAT. ANN. § 628.04 (1947); Turk v. Martin, 323 Ky. 479, 23 S.W.2d 937 (1930).

13. See Kinder v. Kentucky, 279 S.W.2d 782 (Ky. Ct. App. 1955).

14. 353 U.S. 657 (1957).

15. Comment, *supra* note 1.

on appeal, the Supreme Court reversed the conviction on the ground that the trial court had refused to direct the Government to produce the prior reports by Matusow and Ford for use in their cross-examination. The Court held that a preliminary foundation of inconsistency between the contents of the report and the testimony of the witnesses was not required to obtain the order for the Government to produce the FBI report. This language was soon construed to mean that a defendant could have a copy of the grand jury testimony of a government witness, at the trial, without a previous examination by the trial court for inconsistency in testimony.[16] As a result, Congress passed an act, commonly known as the "Jencks statute,"[17] which modified the *Jencks* rule and limited its application to statements made to government agents.[18] The *Jencks* case was not to apply to grand jury minutes.[19]

Under the statute, the statement of a witness to a government agent cannot be produced until the witness has testified on direct examination. If the United States claims that the statement contains matter which does not relate to the subject matter of the testimony, the court may order the Government to produce the statement to the court for inspection in chambers. The court then determines what portions of the statement may be used on cross-examination. Thus the Jencks statute contemplates an *in camera* screening of the witness' statement in the event of an objection by the Government.[20] The same procedure is followed, in effect, with respect to grand jury testimony to be used to impeach or contradict a witness for the Government, except that the latter is regulated by Rule 6(e) of the *Federal Rules of Criminal Procedure*.[21]

It is in the realm of state court decisions that the *Jencks* case has had its greatest influence. Although not binding upon the state courts, because it did not involve a constitutional question and was concerned with federal procedure, the case nonetheless has been accorded great weight.[22] It has been frequently cited as authority for the more liberal approach to the problem of pre-trial discovery, not only as to grand jury testimony, but also with respect to statements of prosecuting witnesses, as well as the inspection of confessions, documents, records and tangible physical objects.

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16. United States v. Rosenberg, 245 F.2d 870 (3d Cir. 1957).

17. 18 U.S.C. § 3500 (1958).

18. See Comment, *Right of the Defendant to Inspect Statements of Witnesses in the Hands of the Prosecution*, 1961 U. ILL. L.F. 187 (1961).

19. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

20. Palermo v. United States, 360 U.S. 343 (1959). If the Government does not object and claim that the statement contains unrelated matter, the defendant is entitled to have the complete statement. See People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960).

21. See note 19 *supra*.

22. See, *e.g.*, State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); People v. Wolff, *supra* note 20.

TRADITIONAL SECRECY OF GRAND JURY PROCEEDINGS

As shown above, the *Jencks* case and statute deal with the right to inspect the statements of witnesses for the purposes of impeachment at the trial, under the supervision of the court, and Rule 6(e) permits a similar right as to grand jury testimony. If this can be done at the trial, why should the defendant not have this right in advance of trial, so that he can prepare in advance his cross-examination and other aspects of his defense? The principal obstacle is the traditional secrecy of grand jury proceedings.

Grand juries exist in all the states, although indictment by grand jury is essential only for serious crimes in about half the states. In the latter, waiver of indictment is often allowed, except in capital cases.[23] Alaska and Hawaii, the two newly admitted states, also provide for indictment by grand jury.[24] In at least two states, Kansas[25] and Wyoming,[26] grand juries are seldom convened. Criminal prosecution by information, instead of by grand jury indictment, is the usual procedure in many of the western states.[27] The information usually follows the preliminary hearing before a magistrate after the defendant has been committed for trial.[28] This preliminary hearing, like all preliminary hearings before magistrates in this country, is merely for the purpose of establishing a prima facie case or "probable cause" of guilt, and is not intended to disclose any more of the evidence in the hands of the prosecutor than is necessary to hold the defendant for further proceedings. There has been no attempt made in this country to adopt the English system, and to make the preliminary hearing the all-inclusive discovery device that permits a defendant and his counsel to learn the nature and extent of the evidence against him.[29]

In those jurisdictions where the information is used more frequently than an indictment by grand jury, it would seem that there is less reason for secrecy than in those jurisdictions where grand jury indictment is the usual course. Nevertheless, all jurisdictions, either by statute, common law, or rule

23. Goldstein, *supra* note 2, at 1169; Watts, *supra* note 6; Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P.S. 26 (1955); Comment, *supra* note 11, at 747.

24. ALASKA COMP. LAWS ANN. tit. 66, § 8-2 (Supp. 1958), § 8-51 (1949); REV. LAWS HAWAII §§ 258-3, 279-1 (1955).

25. In Kansas, a grand jury can be summoned only by petition signed by taxpayers and addressed to the court. KAN. GEN. STAT. § 62-901 (1949); *Ex parte* Frye, 173 Kan. 392, 246 P.2d 313 (1952). Prosecution may be by indictment or information. KAN. GEN. STAT. § 62-801 (1949).

26. In Wyoming, a grand jury must be ordered by the district court. WYO. STAT. tit. 7, § 92 (1959). Prosecution may be by indictment or information. WYO. STAT. tit. 7, § 118 (1959).

27. See authorities cited note 23 *supra*. For a history of the attempt to abolish grand juries in this country see Watts, *supra* note 6, and Younger, *supra* note 23.

28. Goldstein, *supra* note 2, at 1183.

29. *Ibid.*

of court, have preserved in one way or another the rule of secrecy of grand jury proceedings.[30] The principal reasons for the rule are summarized in the case of *United States v. Rose*,[31] as follows: (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect an innocent accused who is exonerated, from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.

But the rule of secrecy has not been considered an absolute mandate in this country. By statute in some states, grand jury testimony is permitted at the trial of an indictment for perjury, to impeach a witness, and on order of the court where the disclosure would promote justice.[32] The rule of secrecy has been held in some jurisdictions not to apply to witnesses who testified before the grand jury. Their testimony given before the grand jury would not be privileged from disclosure, and inconsistent statements made to the grand jury are admissible at the trial to impeach or discredit the witnesses.[33] The practice sometimes resorted to is to call the clerk of the grand jury to testify at the trial to what the witness said before the grand jury, in order to contradict the witness' testimony at the trial.[34]

A tactic often employed by counsel for the defendant to determine whether there is an inconsistency in a witness' testimony with that given before the grand jury is to ask the witness whether he testified before the grand jury and whether his testimony at the trial is contradictory thereof.[35]

The fear of violation of secrecy is no longer a valid reason for denying the examination of the transcript of the testimony when the indictment is returned and the accused is in custody. The accused cannot flee, and the grand jury is no longer susceptible to outside pressure. As to the possibility

30. See list of jurisdictions in Note, 46 VA. L. REV. 1002, 1003 (1960).

31. 215 F.2d 617, 628-29 (3d Cir. 1954).

32. See Note, *supra* note 30, at 1004; see also MICH. STAT. ANN. ch. 287, § 28.959 (1954); IND. ANN. STAT. ch. 8, § 9-817 (1956).

33. *In re* Hearings Before the Committee, 19 F.R.D. 410 (N.D. Ill. 1956); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943); State v. Goldman, 14 N.J. Misc. 463, 185 Atl. 505 (Sup. Ct. 1936).

34. See, *e.g.*, People v. Goldberg, 302 Ill. 559, 135 N.E. 84 (1922); State v. Archibald, 204 Iowa 406, 215 N.W. 258 (1927); State v. Bovino, 89 N.J.L. 586, 99 Atl. 313 (Ct. Err. & App. 1916); State v. Harries, 118 Utah 260, 221 P.2d 605 (1950).

35. See, *e.g.*, Costello v. United States, 350 U.S. 359, 361 (1956); State v. Graziani, 60 N.J. Super. 1, 158 A.2d 375 (App. Div. 1959).

that the accused may resort to perjured rebuttal testimony, the answer usually given is that the defendant is entitled to the presumption of innocence until the contrary is established.[36] These seem to be the rationales behind the statutes and cases which permit pre-trial inspection of grand jury testimony.

Right to Grand Jury Testimony by Statute

Several state statutes require the state to furnish the defendant with a copy of grand jury testimony prior to trial. In California, when an indictment is found against a defendant, the reporter certifies and files with the county clerk an original transcript, and as many copies as there are defendants, of his shorthand notes of the testimony given before the grand jury. The reporter must complete such certification and filing within ten days after the indictment is found, unless the time is extended by court order. The county clerk delivers the original transcript to the district attorney immediately upon receipt and transmits a copy thereof to each of the defendants or his attorney.[37]

In Kentucky, any person indicted by the grand jury has the right to procure a copy of the stenographic record of the testimony heard before the grand jury by paying the prescribed fee for such report,[38] notwithstanding that under the *Kentucky Criminal Code* every grand juror is required to keep secret whatever he or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted on matters before them.[39] It is recognized by the Kentucky cases that the grand jury transcript may be of assistance to defense counsel in the preparation of his case, and that it may also be used in contradicting witnesses at the trial.[40]

By Iowa statute,[41] a defendant has a right to disclosure of the grand jury minutes after the indictment is returned.[42] The clerk of the court must, within two days after demand made, furnish the defendant or his counsel with a copy of the minutes of evidence before the grand jury, without charge, or permit the defendant's counsel to take a copy.

Minnesota requires that a copy of the testimony of each witness examined before the grand jury be filed with the clerk of the court. After the arrest of the defendant, the clerk, within two days after demand by the defendant, and

36. See Note, *supra* note 30, at 1006.

37. Cal. Pen. Code tit. 4, §§ 925, 938.1 (1959); People v. Cowen, 41 Cal. App. 2d 824, 107 P.2d 659 (Dist. Ct. App. 1940). The transcript of testimony is not required to contain a copy of the exhibits introduced before the grand jury. Stern v. Superior Court, 78 Cal. App. 2d 9, 177 P.2d 308 (Dist. Ct. App. 1947).

38. Ky. Rev. Stat. tit. 6, ch. 1, § 110 (App. 1959) (to be superseded by Ky. R. Crim. P. 5.16, effective Jan. 1, 1963); Turk v. Martin, *supra* note 12.

39. Ky. Rev. Stat. tit. 6, ch. 1, § 112 (App. 1959) (to be superseded by Ky. R. Crim. P. 5.24, effective Jan. 1, 1963); Turk v. Martin, *supra* note 12.

40. Chinn v. Commonwealth, 310 S.W.2d 65 (Ky. Ct. App. 1957).

41. Iowa Code Ann. tit. 36, § 772.4 (1950).

42. See Comment, 44 Iowa L. Rev. 803 (1959).

upon payment of his fees, must furnish a copy of the testimony so filed to the defendant or his counsel.[43]

Florida gives the accused in a prosecution for perjury or subornation of perjury allegedly committed before the grand jury, the right in advance of trial to inspect the transcript of testimony of the witnesses upon whose evidence the charge is based, in order to prepare his defense.[44] The Georgia Constitution[45] gives a defendant the right upon demand to have, together with a copy of the accusation, a list of the witnesses whose testimony gave rise to the charge.[46]

In New York, under the criminal code,[47] the court in its discretion may permit an inspection of grand jury minutes by an indicted defendant for the purpose of making a motion to dismiss the indictment.[48]

Right to Grand Jury Testimony by Court Decisions

In the absence of a statute or rule of court expressly permitting an examination of grand jury testimony, the allowance of such inspection, either before or during the trial, is a matter resting within the sound discretion of the trial court, and is granted only upon good cause shown. This seems to be the rule in both federal and state courts.

In the federal courts, the right is governed by Rule 6(e) of the *Federal Rules of Criminal Procedure,* since the *Jencks* case, as modified by statute, does not apply to grand jury minutes in the federal courts.[49] In the state courts, the right to such inspection before trial, absent a rule or statute, is always within the discretion of the court; whereas, during the trial, the policy of the *Jencks* case and statute has generally influenced the state court procedure and has often been applied as well to grand jury minutes.[50]

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43. Minn. Stat. Ann. pt. 5, § 628.04 (1947).

44. Fla. Stat. Ann. tit. 45, § 905.27 (1951); Minton v. State, 113 So. 2d 361 (Fla. 1959); Gordon v. State, 104 So. 2d 524 (Fla. 1958).

45. Ga. Const. art. 1, para. 5.

46. Knowlton, *Criminal Law and Procedure,* 9 Rutgers L. Rev. 108 (1954-55).

47. N.Y. Code Crim. Proc. tit. 14, § 952-t (1958).

48. People v. Logan, 206 N.Y.S.2d 271 (Sup. Ct. 1959); People v. Pankow, 17 Misc. 2d 143, 186 N.Y.S.2d 116 (Erie County Ct. 1959); People v. Teetsel, 12 Misc. 2d 835, 177 N.Y.S.2d 612 (Ulster County Ct. 1958). The opinion in People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927), which was written by Cardoza, C.J., has often been quoted as authority for limiting the right to pre-trial discovery in criminal cases. In that case, the defendant had inspected the minutes of the grand jury pursuant to court order, but an order prohibiting the enforcement of a second order permitting further examination of statements and autopsies in the hands of the district attorney was affirmed.

49. Pittsburgh Plate Glass Co. v. United States, *supra* note 19; United States v. Consolidated Laundries Corp., 159 F. Supp. 860 (S.D.N.Y. 1958).

50. Authorities cited notes 1 and 22 *supra*; see, *e.g.*, State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957).

In the Federal Courts

Under Rule 6(e), disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the attorneys for the Government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court, at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. The rule also provides that no obligation of secrecy may be imposed upon any person except in accordance with the rule. The rule has been construed as vesting discretionary power in the federal courts to grant an inspection of grand jury testimony.[51]

The use of grand jury minutes in support of a motion to dismiss the indictment is not generally favored by the federal courts because of their desire to preserve the traditional secrecy of grand jury proceedings.[52] An application for examination of such minutes must be made by properly verified pleadings showing that proper grounds exist for the motion to dismiss because of matters occurring before the grand jury.[53]

Disclosure of grand jury minutes has been held proper when the ends of justice require it.[54] For example, the federal courts have on several occasions granted a defendant, charged with perjury before the grand jury, permission to examine and make a copy of his testimony before that body.[55]

Inspection of testimony of witnesses for the Government has not been so readily granted. Most of the cases dealing with such testimony hold that, until the trial, the defendant may not call for the grand jury minutes of a witness for the purpose of impeachment or contradiction, and then the trial court must examine the minutes *in camera* to determine whether there is any inconsistency.[56] In *United States v. McKeever*,[57] the court, following *United States v. Zborowski*,[58] declared the procedure in the Second Circuit to be that after a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may

51. Pittsburgh Plate Glass Co. v. United States, *supra* note 19.
52. United States v. Geller, 154 F. Supp. 727 (S.D.N.Y. 1957), United States v. Sugarman, 139 F. Supp. 878 (D.R.I. 1956).
53. *Ibid.*
54. Pittsburgh Plate Glass Co. v. United States, *supra* note 19; Costello v. United States, 255 F.2d 389 (8th Cir. 1958); United States v. Byoir, 147 F.2d 336 (5th Cir. 1945).
55. United States v. Rose, *supra* note 31; United States v. Remington, 191 F.2d 246 (2d Cir. 1951); United States v. White, 104 F. Supp. 120 (D.N.J. 1952).
56. United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959).
57. 271 F.2d 669 (2d Cir. 1959).
58. *Supra* note 56.

be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, the relevant part of the minutes is made available to the defendant.[59]

The court in the *McKeever* case, referring to the obligation of the United States Attorney in cases where the defendant seeks to use grand jury minutes to contradict or impeach a witness, suggested that the Government should be prepared to advise the trial judge regarding possible discrepancies between the trial and grand jury testimony, and that it is the duty of the prosecutor to consent to make such testimony available when there is a reasonable basis for believing that the testimony differs on matters which are not immaterial.[60]

Later cases in other circuits have indicated that, to be effective, the request must be made for the trial court to examine the testimony *in camera*[61] and that defendant must show that a "particularized need" exists for the minutes which outweighs the policy of secrecy of the grand jury.[62] However, where the trial judge *in camera* examines the minutes and finds no inconsistency with the testimony of the witness at the trial, he properly may refuse to permit defense counsel to inspect the testimony.[63] It is not necessary that defendant show a possible inconsistency before the trial court may honor his request that the court inspect the testimony,[64] but the trial judge, in exercising his discretion, would nevertheless be bound to consider evidence suggesting the possibility of such inconsistencies.[65]

How the "particularized need" or suggested inconsistency is to be shown is not pointed out by the decisions.[66] Perhaps the practice recommended in the New Jersey case of *State v. Graziani*[67] may be followed, since witnesses before the grand jury in many jurisdictions are not bound by the oath of secrecy taken by the grand jurors themselves, and defense counsel at the trial may inquire of the witnesses whether they appeared before the grand jury and whether their testimony at the trial is contradictory with that given before the grand jury.[68] However, the admissibility of grand jury minutes in state courts, as distinguished from the federal courts, in the last few years has been marked by a more liberal development.

59. See also United States v. Hernandez, 282 F.2d 71 (2d Cir. 1960); United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958).

60. United States v. McKeever, *supra* note 57, at 672 n.2.

61. United States v. Coduto, 284 F.2d 464 (7th Cir. 1960).

62. *Ibid.*; Berry v. United States, 295 F.2d 192 (8th Cir. 1961); Bary v. United States, 292 F.2d 53 (10th Cir. 1961).

63. United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).

64. United States v. Giampa, 290 F.2d 83 (2d Cir. 1961).

65. De Binder v. United States, 292 F.2d 737 (D.C. Cir. 1961).

66. See State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960).

67. *Supra* note 35.

68. See Costello v. United States, *supra* note 35; Comment, 27 FORD. L. REV. 244, 252 (1958). In the federal courts, the secrecy rule does not apply as to witnesses who appeared before the grand jury. *In re* Hearings Before the Committee, *supra* note 33.

In the State Courts

At the Trial

In some jurisdictions it has been held that at the trial of a criminal indictment a defendant is entitled to inspect the grand jury testimony of the state's witnesses where the prosecutor, in examining the witnesses at the trial, uses the transcript of their grand jury testimony as a basis for direct examination. This right to inspect such testimony is asserted for the purpose of determining whether there is impeaching or contradictory evidence to be offered to the jury.[69]

The practice followed in New York is that if the district attorney uses the grand jury minutes during the trial, the defendant will be permitted to inspect them, the extent of the examination being determined by the court according to the circumstances of each case. The defendant is allowed to examine only the testimony of the witnesses he wishes to cross-examine.[70] Where the district attorney does not use the minutes at trial, it would also seem that the defendant may request the grand jury testimony, but the trial court must find that it contains material at variance with the testimony given by the particular witness on the stand before the minutes can be made available to defense counsel for cross-examination.[71] Pre-trial inspection of grand jury testimony has not as yet been accepted as common procedure in New York.[72]

In Florida, the rule of secrecy is balanced by the necessity for disclosure to meet the ends of justice, and at trial, where there appears to be a need for the transcript of grand jury testimony, an application may be made to the court, before cross-examination, for the issuance of a *subpoena duces tecum* directed to the official court reporter to produce the transcript of the witness for use on cross-examination. But when the testimony is produced by the court stenographer in answer to such subpoena, the trial court must examine the minutes to determine their materiality before permitting the defendant to have access to the transcript.[73] Mandamus has been held to be the proper

69. State v. Morgan, *supra* note 66; Trafficante v. State, 92 So. 2d 811 (Fla. 1957).

70. People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931); People v. Nicoll, 158 N.Y.S.2d 279 (App. Div. 1956). See State v. Morgan, *supra* note 66.

71. See People v. Dales, 309 N.Y. 97, 127 N.E.2d 829 (1955).

72. People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881 (1961); People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933); People v. Giles, 31 Misc. 2d 354, 220 N.Y.S.2d 905 (Erie County Ct. 1961). Where the defendant is indicted for perjury before the grand jury, the court in a proper case may order the district attorney to furnish him with a copy of relevant portions of his testimony before that body. People v. Calandrillo, 29 Misc. 2d 495, 215 N.Y.S.2d 364 (Suffolk County Ct. 1961); see People v. Kresel, 142 Misc. 88, 254 N.Y.S. 193 (Sup. Ct. 1931).

73. Trafficante v. State, *supra* note 69; see FLA. STAT. ANN. tit. 45, § 905.27 (Supp. 1961).

remedy against the court that refuses to permit the production of the grand jury transcript pursuant to a *subpoena duces tecum.*[74]

In Illinois, it has been held that the accused has no right to be furnished with minutes of testimony given before the grand jury.[75] However, at the trial, if the prosecutor uses any portion of such testimony in his examination, the accused is entitled to access to such portions of the transcript so employed, but he is not entitled to see the entire record.[76]

Before Trial

Within the last few years there seems to have occurred a change in the concept of the right to examine grand jury testimony before the trial. In recent decisions in Missouri,[77] Utah [78] and New Jersey,[79] an unmistakable trend in the direction of a more liberal pre-trial discovery and inspection of such testimony has become apparent. All of these cases base the right on good cause shown to promote the ends of justice, and all of them make clear that the right rests within the discretion of the trial court.

Under the Missouri statutes,[80] proceedings before the grand jury are required to be kept secret. However, there is a provision[81] that members of the grand jury may be required by any court to testify as to whether the testimony of a witness examined before such jury is consistent with the testimony given by the witness before the court, and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offense. But, until the decision in *State ex rel. Clagett v. James,*[82] a defendant had no right to pre-trial inspection of grand jury testimony.[83] He could impeach a witness only by calling a member of the grand inquest to testify to what the witness had said at the session. In the discretion of the court, he might have the inspection for some special reason as where he sought to move against the indictment.[84] The *Clagett* decision changed this and permitted pre-trial examination of the grand jury testimony of witnesses for the state.

In the *Clagett* case, an indictment had been returned charging a de-

74. State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936).
75. Cannon v. People, 141 Ill. 270, 30 N.E. 1027 (1892).
76. People v. Moretti, 6 Ill. 2d 494, 129 N.E.2d 709 (1955); see Grady, *Discovery in Criminal Cases,* 1959 U. ILL. L.F. 827 (1959).
77. State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959).
78. State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959).
79. State v. Moffa, *supra* note 50.
80. Mo. REV. STAT. tit. 37, §§ 540.310-.320 (1959).
81. Mo. REV. STAT. tit. 37, § 540.300 (1959).
82. *Supra* note 77.
83. State v. McDonald, 342 Mo. 998, 119 S.W.2d 286 (1938). The Missouri statute also allows the accused to take depositions including the depositions of parties appearing before the grand jury. *Ibid.*
84. *Ibid.*

fendant with soliciting a bribe and committing perjury. The names of the witnesses were endorsed on the indictment as required by statute. Defendant obtained an order of the trial court permitting an inspection of the minutes of the grand jury insofar as they related to the testimony of the named witnesses, the defendant and all proceedings which transpired during the course of their presence before the session. Defendant alleged in his application that he had reason to believe that unauthorized persons were permitted to be present in the grand jury room, that the evidence before the grand jury was insufficient, and that he required the testimony for a motion to dismiss the indictment. Clagett, the special prosecuting attorney, brought a writ of prohibition against Judge James of the circuit court to prevent the enforcement of the order permitting the inspection. The Missouri Supreme Court held that the respondent had jurisdiction to make orders for inspection of the transcript of the testimony of the witnesses and defendant, or such parts thereof as he deemed proper to meet the ends of justice, but that the orders were too broad in authorizing inspection as to "all proceedings which transpired during the course of their presence [defendant and the witnesses] in the grand jury room, or in connection with their testimony before the grand jury." On rehearing,[85] the court, two judges dissenting, reaffirmed the power of the trial court to exercise its discretion and held that inspection should be limited to testimony of only those witnesses who testify at trial and to such parts of the transcript of their testimony as would be admissible in evidence and would be necessary to meet the ends of justice under all the circumstances shown. The court agreed with the relator that the matter should be regulated by rule of court, and announced that it was adopting a rule[86] to provide guides and standards in the granting of such inspection. The court closed with a note of warning that the inspection of a grand jury transcript was not to be permitted for purposes of discovery or as a substitute for taking depositions of witnesses endorsed on an indictment (as provided by Missouri law), but only to the extent necessary to meet the ends of justice.[87]

85. State *ex rel.* Clagett v. James, *supra* note 77, at 289.

86. Mo. R. CRIM. P. 24.24 (effective May 1, 1960). This rule assures the secrecy of grand jury proceedings, provides that a transcript of testimony of witnesses may be made available to the prosecuting attorneys, and otherwise, that disclosure may be made only when directed by the court upon a finding of necessity to meet the ends of justice, preliminary to or in connection with a judicial proceeding either civil or criminal or when permitted by the court upon a particularized showing by defendant that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; further, that disclosure shall not be permitted by inspection of transcripts of testimony for purposes of discovery or as a substitute for taking depositions of witnesses endorsed on an indictment, and no inspection of clerks' minutes shall be permitted; further, that if inspection of a transcript, or any part thereof, is permitted, it shall not include disclosure of deliberations, and shall not include disclosure of facts or testimony that would not be admissible in evidence at the trial.

87. State *ex rel.* Clagett v. James, *supra* note 77, at 290.

In Utah, prior to the decision in *State v. Faux*,[88] the supreme court had held that a defendant under indictment could not have a pre-trial inspection of the testimony given by witnesses before the grand jury.[89] Only when at trial, after the witness had testified, could the defendant have access to such testimony for impeachment purposes. The *Faux* decision extended this prior right to include pre-trial inspection in order that defendant could determine at the trial whether there was any inconsistency in the testimony.

In the *Faux* case, the district court had issued an order allowing counsel for a city commissioner facing trial on an indictment for misconduct in office to examine the transcript of testimony of witnesses listed on the indictment. The district attorney sought and obtained from the supreme court an alternative writ prohibiting such inspection. The district attorney contended that, under the statute, the transcript was available only to him, and that furnishing it to defense counsel would destroy the secrecy of the grand jury proceedings and hamper its effectiveness. The contention of the parties centered on two sections of the Utah statutes, one[90] of which provided that the testimony of witnesses before the grand jury should be taken by a reporter and a transcript furnished the county clerk and district attorney, and that no person to whom a transcript was delivered should exhibit the transcript to any person except upon an order of the court, but that the prosecutor could use the transcript to impeach the testimony of a witness at a criminal trial or a person being tried for perjury. The other section[91] provided that no member of the grand jury, or person present at any session thereof, shall disclose what he or any other grand juror or person may have said at such session, except that such person may be required by the court to disclose the testimony of a witness for the purpose of ascertaining whether it is consistent with that given by the witness before the court or to disclose the testimony given before the grand jury by any person charged with perjury. The trial court permitted the pre-trial examination, but required the screening of the testimony by the district attorney in the presence of counsel for the defendant. On appeal, the Supreme Court of Utah recalled the writ of prohibition and held that the defendant was entitled to examine the transcript before trial, but that the "screening" of the transcript of testimony would have to be done by the trial court and not by the district attorney.

In the majority opinion by Chief Justice Crockett, the Utah Supreme Court reasoned that since the language of the statute[92] made it clear that the

88. *Supra* note 78. See Note, *supra* note 30, at 1005-06; Note, 39 ORE. L. REV. 298 (1960).
89. State v. Harries, 118 Utah 260, 221 P.2d 605 (1950).
90. UTAH CODE ANN. tit. 77, § 77-19-9 (1953).
91. UTAH CODE ANN. tit. 77, § 77-19-10 (1953).
92. UTAH CODE ANN. tit. 77, §§ 77-19-9,-10 (1953).

provision for secrecy is qualified by the exception that the testimony given by witnesses before the grand jury may be disclosed for the purpose of impeaching such witnesses in the event of trial,[93] it would be cumbersome and difficult for counsel for the defendant to be compelled to wait until each witness had testified upon direct examination, before being permitted to procure the transcript and thereafter to determine whether impeachment of the witness should be pursued. It was also his view that the defense cannot know whether the prior testimony of the witness was inconsistent with the testimony given at the trial unless it knows what the testimony before the grand jury contained.[94] For these reasons it was held that pre-trial examination of the testimony should be permitted.

The court in the *Faux* case recognized the necessity for secrecy, but pointed out that once an indictment is found, the statute[95] requires that the names of witnesses who testified before the grand jury in the case be listed upon the indictment, and thereafter the subject matter of the indictment and the identity of the witnesses can no longer be secret. However, the court did state that the right to pre-trial discovery is a matter resting within the discretion of the trial judge because he is close to the litigation and aware of the exigencies of the case.

Two justices dissented. Justice Callister, upholding the principle of secrecy, quoted Justice Parker of the New Jersey Supreme Court in *State v. Borg*,[96] who held that the obligation of maintaining the secrecy of the grand jury was not fully effected when the indictment was found, and if at that juncture the grand jury proceedings were thrown wide open, the possible damage to the interests of the public by way of aiding the accused would be incalculable.[97] The majority in *State v. Faux*, however, were of the opinion that under the more modern concepts of the administration of criminal law, the fundamental purpose of a criminal trial is not solely to convict the accused—it is to seek the truth and administer justice; and although secrecy may be justified at certain stages of the proceedings, ultimately the full truth should be revealed to the court and jury.[98]

It can be seen from the decision of Justice Parker in the case of *State v. Borg*[99] that the defendant in New Jersey would have no right to a transcript

93. State v. Harries, *supra* note 89.
94. State v. Faux, *supra* note 78, at 354, 345 P.2d at 188.
95. UTAH CODE ANN. tit. 77, § 77-20-3 (1953).
96. 8 N.J. Misc. 349, 150 Atl. 189 (Sup. Ct. 1930).
97. *Id.* at 352, 150 Atl. at 191.
98. State v. Faux, *supra* note 78, at 354-55, 345 P.2d at 188-89. In this connection, the language in People v. Walsh, *supra* note 72, at 150, 186 N.E. at 425, is apropos: "When, however, it does appear that there is evidence in the possession or control of the prosecution favorable to the defendant, a right sense of justice demands that it should be available, unless there are strong reasons otherwise."
99. *Supra*, note 96.

of the testimony of witnesses before the grand inquest. *State v. Moffa*[100] modified this former rule.

In the *Moffa* case, the defendant was indicted for subornation of false swearing. The indictment charged that defendant had persuaded one Blevins to swear falsely in his testimony before the grand jury. Although there is no statute or rule in New Jersey requiring the names of witnesses to be endorsed on the indictment, the indictment against the defendant mentioned Blevins as the witness and recited that part of his testimony which the indictment alleged constituted the false swearing of the subornation charged.[101]

Counsel for the defendant, in advance of trial, made a motion for leave to inspect the grand jury minutes of the state's chief witness, Blevins, and for leave to inspect his statements made to the prosecutor. The ground for the motion was that the testimony was necessary to the defendant to "prepare his defense," to determine whether or not the witness made any inconsistent statements, to provide the defendant with a basis for cross-examination at the trial, and to "provide defendant an equal opportunity for a full and fair presentation of the available evidence which is now unilaterally available to the State."[102]

The trial court granted the motion to inspect the testimony of Blevins in advance of trial, but denied the motion to inspect his written statements given to the prosecutor.[103] In granting the pre-trial inspection of the transcript of the testimony, the trial court held that it was within the discretion of the court, particularly under the federal decisions, to grant an inspection of the minutes, and that since Blevins was the principal witness and the state was obliged to produce him at the trial or its case would fail, the defendant was entitled to an opportunity to inspect the testimony.[104]

On appeal, the New Jersey Supreme Court, by a four-to-two decision, affirmed the court below.[105] Chief Justice Weintraub, speaking for the majority, held that since the state, to maintain its case against the defendant, would have to prove not only that he asked Blevins to swear falsely, but also that Blevins did in fact do so, the defendant stood in the shoes of Blevins with respect to so much of the indictment as alleged that the witness swore falsely; and, since the defendant in New Jersey may have pre-trial inspection of his confession if he needs it to prepare for trial unless the state shows such disclosure would hamper the prosecution,[106] that the defendant was entitled to an inspection of the testimony given by Blevins before the grand jury. From

100. 36 N.J. 219, 176 A.2d 1 (1961).
101. Brief for Appellant, pp. 1a-3a, State v. Moffa, *supra* note 100.
102. *Id.* pp. 3a-5a.
103. *Id.* p. 6a.
104. State v. Moffa, 64 N.J. Super. 69, 165 A.2d 219 (Law Div. 1960).
105. State v. Moffa, *supra* note 100, at 232, 176 A.2d at 4.
106. State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958).

the cases in the federal courts which hold that one charged with perjury before the grand jury is entitled to pre-trial inspection of his testimony,[107] the majority reasoned that the need of the alleged suborner is still more evident, since he was not present when the offense was allegedly committed, and could hardly know what factual or legal issues an inspection might reveal until he has obtained it. Further, the court said, a defendant cannot be confined to so much of the scene as the state believes to be relevant, and if there is no outweighing cause, he should have the view before the trial, the better to prepare for that event.[108] As to the state's argument that the secrecy of the grand jury must be preserved,[109] the majority held that if this policy barred disclosure before trial, it would bar it as well at the trial itself, that nothing suggests the invasion would be less at one time than at the other, and that the question is whether the policy in favor of secrecy outweighs the demand that guilt be adjudged upon the whole truth. The court further noted that if a policy issue were involved, it was resolved when the prosecution was started, and that the state thereby lifted the veil so that it might not limit the trial to a glimpse of what happened—that everything relevant must be revealed.[110] The court also held that inspection of the testimony is a matter of discretion with the trial judge.

As for the fear expressed that to reveal all the testimony of the witness before the grand jury would enable a defendant to "tamper" with him and that the policy of secrecy was designed to guard against that possibility, the majority held that that could not bar the right to see the testimony, since the possibility of tampering would be the same whether the witness made his statement before a grand jury or elsewhere. The court reasoned that if "tamper" means "intimidate" or worse, the answer is that the witness' identity had already been revealed; or, if "tamper" means that defendant might induce the witness to change the portion of his testimony charged in the indictment to be false, that much of his testimony had already been disclosed in the indictment. Finally, the court said that if "tamper" were meant to imply that the witness might be persuaded falsely to explain away something in the balance of his testimony, that possibility was too conjectural to outweigh the need for a fair opportunity to investigate whether the criminal event did occur in fact and in law.[111]

Two justices dissented in the *Moffa* case.[112] Justice Proctor argued that

107. United States v. Rose, 215 F.2d 617 (3d Cir. 1954); United States v. Remington, 191 F.2d 246 (2d Cir. 1951); United States v. White, 104 F. Supp. 120 (D.N.J. 1952).

108. State v. Moffa, *supra* note 100, at 222, 176 A.2d at 2.

109. See N.J. RULES 3:3-7.

110. State v. Moffa, *supra* note 100, at 222-23, 176 A.2d at 3.

111. *Id.* at 224, 176 A.2d at 4.

112. *Id.* at 225, 228, 176 A.2d at 4, 6.

the case came under reason (3) of the *Rose* case,[113] *i.e.*, that secrecy must be maintained to prevent subornation of perjury or tampering with the witness, and advocated that inspection of grand jury testimony be made only at the trial for the purpose of impeaching the witness, with an adjournment of the trial to allow defense counsel time to examine the testimony. Justice Hall, however, was of the opinion that the concept of the majority would automatically result in a great expansion of criminal pre-trial discovery and that further enlargement was fraught with the possibility of grave damage to the public interest in too many cases and not necessary for fair treatment of the criminal defendant in most situations. He was also fearful that permitting a defendant to examine the testimony on the grounds advanced by the defendant, *i.e.*, in order "to prepare his defense" and "to provide defendant an equal opportunity for a full and fair presentation of the available evidence which is now unilaterally available to the State," would open the door to pre-trial discovery of all grand jury testimony, and that this did not differ in substance from the inspection of statements given by witnesses to the prosecutor. The justice further saw the effect of the decision as placing the burden upon the prosecutor to show that defendant had not demonstrated a "particularized need" for the pre-trial inspection, since the accused could almost invariably show that some factual or legal defense might be developed from the testimony given, that the decision seemed to foreshadow a trend in that direction, and that this would remove the matter from the discretion of the trial judge.[114]

It is apparent from the dissenting opinions that *State v. Moffa* projects a more liberal trend in criminal discovery proceedings not only in New Jersey, but elsewhere in the states.

Comparison with the English System of Pre-Trial Discovery

Since the adoption of the Indictable Offenses Act in 1848[115] the accused in England has had access to all the testimony of the witnesses against him. Grand juries have been abolished in England, and bills of indictment charging an indictable offense may be preferred by any person before the proper court.[116] The testimony against the accused is presented before the committing magistrate,[117] and depositions of these witnesses are made available to the prisoner.

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113. United States v. Rose, *supra* note 107.

114. State v. Moffa, *supra* note 100, at 229-30, 176 A.2d at 6-7.

115. 11 & 12 Vict. c. 42, § 1, 27, discussed note 3 *supra*.

116. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1, discussed note 4 *supra*.

117. The procedure before the committing magistrate is governed by the Indictable Offenses Act, 1848, 11 & 12 Vict. c. 42; the Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55; the Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, and related statutes, as well as by the Magistrates' Courts Rules, 1952.

A defendant charged with an indictable offense is brought before the magistrate by summons or warrant based on an information.[118] The court then holds an examination, the object of which is not to determine the guilt or innocence of the accused,[119] but whether he should be committed for trial.[120] Evidence of the prosecuting witnesses before the examining magistrate must be given in the presence of the accused, who may cross-examine the witnesses.[121] The prosecutor or person making the charge must appear in person or by attorney. The police or a private prosecutor may proceed with the prosecution, except where the Director of Public Prosecutions takes over the proceedings.[122] The accused has the right to counsel or a solicitor at the preliminary hearing.[123]

The proceedings before the examining magistrate are opened by calling the accused and reading the charges against him. He is not asked to plead, but the case of the prosecution is commenced at once. No objection can be taken to any formal defect in the information or process unless it has misled the defendant; if this is shown, the court on application of the defendant must adjourn the hearing; however, the objection is waived if not taken before the evidence is given.[124] If the examining magistrate permits it, the prosecutor's counsel or solicitor may make an opening speech outlining his case. The evidence is then adduced on oath or affirmation. The attendance of witnesses and production of documents may be secured by summons or warrant issued by the magistrates.[125]

As soon as the evidence for the prosecution has been given, the court, unless it decides not to commit the accused for trial, must explain the charge in ordinary language and caution the prisoner that anything he says may be given in evidence against him at the trial, and must then ask the defendant if he wishes to say anything in answer to the charge. Any statement made by the accused in answer to the charge is put in writing, read to him and signed by one of the examining justices and by the accused if he consents. Such statement may be used as evidence against the defendant at his trial.[126] At the preliminary hearing the accused must be given an opportunity to testify in his own behalf and to call witnesses, and his attorney must be heard on his behalf, either before or after the evidence for the defense is taken. Counsel

118. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 1(1).
119. Regina v. Carden, 5 Q.B.D. 1, 6 (1879).
120. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55 § 2(3).
121. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 4(3).
122. 10 HALSBURY L. ENG. § 657 n. (1) (3d ed. 1955).
123. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 99.
124. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 100; Regina v. Hughes, 4 Q.B.D. 614, 628, 633 (1879).
125. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 77(1); 10 HALSBURY, *op. cit. supra* note 122, §§ 658-59.
126. MAGISTRATES' COURTS RULES, 1952, S.I. 1952 No. 2190, r. 5 (3), (4).

or the solicitor for the prosecution is then entitled to be heard in reply. The examining magistrates rule on questions of evidence. If the accused does not present his witnesses at the preliminary hearing, but offers them for the first time at trial, this creates considerable suspicion, in absence of an explanation.[127]

The examining magistrates cause the testimony of each witness, except character witnesses, and including the testimony of the accused, to be reduced to writing in the form of depositions, to be read in the presence of the accused, and to be signed by the witnesses. All witnesses are then bound over to the trial unless their attendance is unnecessary or their evidence is merely formal, in which case they may be bound over conditionally, *i.e.*, on notice being given to them to appear as witnesses at the trial. One of the examining magistrates must sign the depositions which are required to contain all evidence material to the case, including any statement by the accused.[128] Depositions of a person too ill to appear may be taken at the residence of the witness, on notice, with opportunity to cross-examine, which depositions may be used as evidence at the trial, if signed by the justice before whom taken and if the court is satisfied that the witness who made the statement is dead or unable to travel or give evidence in court.[129]

When the accused is committed for trial, a bill of indictment is preferred and signed by the proper officer,[130] and the person having custody of the depositions on which he has been committed must, as soon as practicable after application is made to him by or on behalf of the accused, and after payment of a fee, supply to the accused copies of the depositions and of the information if it is in writing.[131] The magistrates' court which committed the defendant for trial must then send to the trial court the depositions, all statements made by the accused before the magistrates' court, and a list of exhibits.[132]

When the indictment is preferred and signed by the proper officer of the court, the names of all the witnesses who testified and deposed before the committing magistrate are endorsed on the back of the indictment.[133] Defendant receives a copy of the indictment.[134] He is then arraigned, pleads

127. 10 HALSBURY, *op. cit. supra* note 122, §§ 662-63.

128. *Id.* §§ 660, 669; Indictable Offenses Act, 1848, 11 & 12 Vict. c. 42, § 17; Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, §§ 12-13.

129. 10 HALSBURY, *op. cit. supra* note 122, §§ 686, 768; Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, § 13; Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 41; The Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35, § 6; see The King v. Bros., *Ex parte* Hardy, [1911] 1 K.B. 159 (1910).

130. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 2; ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE 64 (33d ed. 1954).

131. MAGISTRATES' COURTS RULES, 1952, S.I. 1952 No. 2190, r. 13.

132. 10 HALSBURY, *op. cit. supra* note 122, § 670.

133. *Id.* § 764.

134. INDICTMENTS RULES, 1915, r. 13(1), (3); ARCHBOLD, *op. cit. supra* note 130, at 67.

to the indictment, and is tried before the court to which he has been committed.

At the trial the prosecutor calls the witnesses whose names are on the back of the indictment. Counsel for the defendant may then cross-examine the witnesses, followed by re-examination by counsel for the prosecution. The court rules on evidence and is not bound by the rulings of the magistrates' court.[135] The prosecution may call witnesses who were not examined before the committing justices and whose names are not on the back of the indictment, but notice of intention to call such witnesses should be given the defendant, and copies of their proofs should be supplied to the defendant and to the court. Failure to give such notice and copies does not render the additional evidence inadmissible, but is ground for postponement of the trial. When the prosecutor decides not to call a witness from whom he has taken a statement, he must make the witness available to the defense, but need not supply the defendant with a copy of the statement.[136]

Depositions of a witness taken before the examining magistrate may be read into evidence without further proof where the deposition is of an unnecessary witness or of a witness who is dead, insane, too ill to travel, or prevented from appearing by the accused or by another on his behalf. It must be established at trial, however, that the depositions were signed by the justice before whom taken, and that they were taken in the presence of the accused with full opportunity for cross-examination. Such depositions are admissible whether the accused is tried for the offense for which he has been committed or for any offense arising out of the same transaction or set of circumstances.[137]

It is apparent from all this that the problem of the right to examine testimony of witnesses before the grand jury cannot arise in England. While the law there is to the effect that, except in a few cases,[138] neither party in a criminal case can obtain evidence from the opposite side by means of interrogatories or discovery, there is little necessity for such discovery, since the prosecution's entire case is disclosed at the preliminary hearing. Documents or articles introduced in evidence at the preliminary hearing become known to defense counsel so that the discovery methods resorted to in this country would be of little use.

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135. 10 HALSBURY, *op. cit. supra* note 122, § 663.

136. *Id.* §§ 761-62, 764-65; ARCHBOLD, *op. cit. supra note* 130, at 188-197.

137. 10 HALSBURY, *op. cit. supra* note 122, § 766; see also 6 WIGMORE, EVIDENCE § 1850 (3d ed. 1940); Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, § 13.

138. *E.g.*, under the Bankers' Books Evidence Act, 1879, 42 & 43 Vict., c. 11, §§ 7, 10, the prosecution may examine the bank records of the defendant on order of the court. On occasions, the court has made an order permitting inspection of letters seized under a search warrant and in the hands of the prosecution. The prosecutor may also serve a notice to produce upon defendant to lay a foundation for secondary evidence. See 10 HALSBURY, *op. cit. supra* note 122, §§ 837, 839 n. (e); WIGMORE, *op. cit. supra* note 137, § 1850 at 395.

SUMMARY OF DISCOVERY METHODS IN CRIMINAL CASES

Thus far, we have considered the right of the defendant to a pre-trial examination of the grand jury testimony of witnesses for the state. In those jurisdictions where the information has replaced the indictment, this right is not so important or so feasible as in those jurisdictions requiring indictment by grand jury. In some jurisdictions the right is assured by statute[139] in all cases. In others, the statutes give the right to inspection in perjury indictments or on an application to dismiss the indictment.[140] Elsewhere the right exists for impeachment purposes at the trial,[141] and, by recent decisions in other states, in advance of trial for purposes of impeachment and preparation of the defense.[142]

This, however, does not reach the other areas of discovery available to a defendant in a criminal case. In preparing his defense, counsel for the defendant has a number of well-defined areas which he can explore in addition to the motion for inspection of grand jury testimony.[143] These include pre-trial examination of (1) "tangible" or physical evidence, such as the murder weapon and fatal bullet,[144] an object allegedly bearing defendant's fingerprints,[145] and recordings of defendant's conversation with a police officer posing as an accomplice;[146] (2) documents or records such as autopsy reports,[147] FBI reports,[148] reformatory and penitentiary records,[149] photographs,[150] engineers reports[151] and records of a former prosecutor charged with non-feasance in office;[152] (3) confessions of the defendant;[153] and, (4) in

139. See text accompanying and authorities cited notes 37-43 *supra*.
140. See text accompanying and authorities cited notes 44-48 *supra*.
141. See text accompanying and authorities cited notes 69-76 *supra*.
142. See text accompanying and authorities cited notes 77-114 *supra*.
143. See generally Notes, 53 DICK. L. REV. 301 (1949), 6 UTAH L. REV. 531 (1959).
144. State v. Bunk, 63 A.2d 842 (Essex County Ct., N.J. 1949); Di Joseph Petition, 394 Pa. 19, 145 A.2d 187 (1958).
145. United States v. Rich, 6 Alaska 670 (3d Div. Anchorage 1922).
146. Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); see Vance v. Superior Court, 51 Cal. 2d 92, 330 P.2d 773 (1958).
147. Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (Dist. Ct. App. 1957); People v. Stokes, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (N.Y. County Ct. 1960); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).
148. State v. Lackey, 319 P.2d 610 (Okla. Crim. Ct. App. 1957); State v. Thompson, *supra* note 147.
149. State v. Bunk, *supra* note 144.
150. Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (Dist. Ct. App. 1959).
151. Layman v. State, 355 P.2d 444 (Okla. Crim. Ct. App. 1960).
152. State v. Winne, 27 N.J. Super. 304, 99 A.2d 368 (App. Div. 1953).
153. State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945); State v. Haas, 188 Md. 63, 51 A.2d 647 (1947); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, *supra* note 106. The trial court has discretionary power to grant defendant's motion for inspection of a confession. Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956); People v. D'Andrea, 20 Misc. 2d 1070, 195 N.Y.S.2d 542 (Kings County Ct. 1960); State v. Leland, 190 Ore. 598, 227 P.2d 785 (1951).

a few states, statements of witnesses for the prosecution given to the district attorney.[154] But some jurisdictions follow the common law strictly and will not permit a defendant to have pre-trial discovery of evidence in the hands of the prosecutor.[155] An increasing number of other states permit such inspection in the discretion of the trial court.[156] Most jurisdictions will allow an inspection of "tangible" or physical evidence. Few will allow an examination of statements of witnesses to the prosecutor in advance of trial, although many follow the *Jencks* rule and permit the use of such statements at the trial for impeachment purposes.[157]

Only California allows liberal discovery in all areas, within the discretion of the court.[158] It can be said that under the liberal procedure afforded in California, a defendant may have as complete a disclosure of the state's case as any party may have in a civil proceeding, provided the defendant in the criminal case satisfies the court that he has good cause and that the ends of justice require it. This is in keeping with the liberal proceedings of our courts, and the modern concept of the administration of criminal justice.

CONCLUSION

There is a definite trend toward a more liberal procedure on the criminal side of our courts. We have come a long way since the defendant was denied the right to counsel and the judge acted as his advocate, but, while the right to discovery in civil cases has been extended considerably, the right to discovery in criminal cases has not been so readily accepted.

A number of reasons have been advanced for denying the right to the same discovery in criminal cases. It is said that the defendant is likely to commit perjury. This fear was expressed when full discovery was first proposed in civil cases. Experience has not borne out that fear. Another reason urged against pre-trial discovery in criminal cases is that defendant

154. Notes, 6 UTAH L. REV. 531 (1959), 21 MONT. L. REV. 189 (1960). In California, the granting of permission rests within the discretion of the court upon good cause shown. Cash v. Superior Court, *supra* note 146; Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Vance v. Superior Court, *supra* note 146. Such inspection is granted only with respect to matters within such statements relating to the witness' testimony at the preliminary hearing. Funk v. Superior Court, *supra*; People v. Estrada, 54 Cal. 2d 713, 355 P.2d 641 (1960) (dictum). A blanket request that the prosecutor turn over to the defendant all such statements will be denied. People v. Cooper, 53 Cal. 2d 755, 349 P.2d 964 (1960). New Jersey, one of the more liberal discovery states, has refused to permit pre-trial examination by the defendant of witnesses' statements given to the prosecutor, until more experience has been had with the practical operation of the decision of State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958), where a detective who took a statement from the accused was required to produce it at trial. State v. Johnson, *supra* note 106.

155. See generally Notes, *supra* note 143.

156. *Ibid.*

157. See, *e.g.*, People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958).

158. People v. Estrada, *supra* note 154.

might "tamper" with or intimidate the witnesses. To this it is reasoned that the court should not bar a pre-trial investigation of the criminal event itself because of a speculative fear that the fact-finding process will be overwhelmed by criminal activity. Moreover, the statement or the fact is already a matter of record which no amount of "tampering" can change. Finally, it is stated that there is inequality in that the state may not have pre-trial discovery of a defendant. In respect of this it should be noted that the state is better equipped to prepare its case than is the defendant. The prosecutor's office has its representatives immediately upon the scene of the crime. The defendant is seldom in a position to have investigators at that stage, and an innocent and impecunious defendant, who has assigned counsel, gets virtually no opportunity to develop the facts first hand.[159]

What must eventually happen to afford a defendant equal opportunity with the state is a development of our preliminary hearing along the lines of the English procedure, where all the evidence by the prosecution is presented before the committing magistrates, and a copy of the depositions is furnished the defendant. The interests of the state would be amply protected under this procedure since the depositions could be used at the trial in the event the witness became unavailable. Since the truth is best revealed by a decent opportunity to prepare in advance of trial, no harm can come to the state from a full disclosure of the facts. If the evidence is overwhelmingly against the defendant, his counsel would be in a position to advise a plea of guilty or "no contest," which would result in a considerable saving of the courts' time and the public revenue. If the discovery disclosed that the state had a weak case or no case at all, the prosecutor might very well move to dismiss the proceedings.

There may be instances where complete discovery would not be in the best interests of the government. It may be that confidential sources of information or matters of state should not be disclosed. However, these instances would not be common, and the court's discretion would be ample safeguard against an unwarranted disclosure. In the greater number of cases, a fuller pre-trial discovery of grand jury testimony, as well as of other evidence in the hands of the prosecutor, might well ensure a more impartial administration of criminal justice.

159. See, *e.g.*, State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961); State v. Johnson, *supra* note 157.