CRIMINAL LAW—TRIAL DISCOVERY—PROSECUTOR'S RIGHT TO PRIOR STATEMENTS OF DEFENSE WITNESSES—*State v. Montague*, 55 N.J. 387, 262 A.2d 398 (1970).

Defendant was convicted of threatening the life of a police officer and of assault and battery on the officer.[1] He appealed, and the superior court, appellate division, reversed and remanded.[2] On review, the supreme court modified the decision of the appellate division and held that the prosecution is entitled to inspect the statement of a witness testifying for the defense and use it in cross-examining the witness. The reason given was that such a practice is permissible within trial discovery principles, and its use did not intrude on defense counsel's privacy or hinder the conduct of the defense.[3]

At common law, criminal discovery[4] was generally unavailable.[5] Litigants entered the courtroom in the dark and the trial developed

1 Defendant Ulysses Montague was indicted for assault and battery upon Newark Police Officer James Nance, in violation of N.J. STAT. ANN. § 2A:90-4 (1969), and for threatening the life of Officer Nance by pointing a revolver at him contrary to N.J. STAT. ANN. § 2A:113-8 (1969). Defendant was found guilty of both offenses and received consecutive prison sentences of 1-2 years on the threat to life charge and 2-3 years on the assault and battery charge. (The opinion of the trial court is unreported).

2 State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (App. Div. 1968). There the court reversed on the grounds that the trial judge committed reversible error in requiring defense counsel to produce a copy of the witness' unsigned statement and in permitting the prosecution to use the statement in cross-examining the witness. The appellate division described the statement as defense counsel's notes of his interview with the witness, found no specific court rule authorizing the trial judge's ruling that they be produced for purposes of the prosecutor's cross-examination, held that while *State v. Hunt*, 25 N.J. 514, 138 A.2d 1 (1958), permitted discovery of the notes of the state's witnesses, it was inapplicable to the notes of the defense witness taken by defense counsel, and concluded that they constituted work product within the principle against discovery in *Hickman v. Taylor*, 329 U.S. 495 (1947). The court recognized that *Hickman* was a civil case but felt its underlying motivations were "equally applicable to the setting of a criminal case." 101 N.J. Super. at 488, 244 A.2d at 702.

3 State v. Montague, 55 N.J. 387, 403, 262 A.2d 398, 406 (1970).

4 Traditionally, the term discovery has been held to include oral and written depositions of parties and witnesses, interrogatories to adverse parties, notices for inspection and copying, physical and mental examinations, and demands for admissions. However, discovery would be more realistically defined as embracing all available devices of fact ascertainment. Thus, in a criminal case, such things as the identity of witnesses' statements made at preliminary hearings, and scientific data collected by police laboratories, would be proper subjects for discovery. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 61 (1961).

5 *See, e.g.*, King v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (K.B. 1792). It would appear that the common law judges were unable to conceive of the granting of discovery in a criminal case, and deemed it unnecessary to give a principled justification for denial of requests for discovery by the defendant, other than saying that there was no precedent for so doing.

into a battle of legal wit and tactics rather than a search for truth.[6] The growth of discovery in contemporary systems of criminal procedure had been resisted on the grounds that it would further enhance the already disproportionate procedural advantages enjoyed by the defendant,[7] facilitate subornation of perjury and fabrication of evidence,[8] and enable the prosecution to encroach upon the defendant's privilege against self-incrimination.[9] New Jersey, too, had little criminal discovery until its judicial composition was revamped and equipped with rules embodying modern discovery principles.[10]

Since their adoption in 1948, New Jersey's civil practice rules have been liberally applied with an awareness that the interests of truth and justice are fostered by broad mutual discovery before trial.[11]

6 State v. Cook, 43 N.J. 560, 562, 206 A.2d 359, 360 (1965).

7 United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923). In the course of his opinion Judge Learned Hand said:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is at least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

Id. at 649.

8 State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953). Later decisions and rule changes have rejected the philosophy of the majority opinion in *Tune* and its holding is no longer law. *See* State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958). The argument that discovery leads to the facilitation of perjury appears to be, at best, questionable. The defendant who actually committed the crime charged will remain silent or rely on perjured testimony in any case. The argument also presupposes that the criminal sanctions against false testimony and tampering with witnesses are ineffective. The potential threat of perjury was also raised when discovery was introduced into civil trials. Yet despite these fears, civil litigation does not seem to have suffered from this innovation. *See generally* Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951).

9 State v. Rhoads, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910); 8 J. WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961). With the exception of two states that provide for it by statute, there is a constitutional privilege against self-incrimination in all states.

10 *See* R. 3:13-3. In pertinent part it now provides that upon defendant's motion, and absent a showing of good cause to the contrary, the trial court shall order the prosecuting attorney to permit the defendant to inspect "any relevant records of statements, signed or unsigned," by persons known by the prosecuting attorney to have relevant evidence or information. R. 3:13-3(c)(2). It further provides in R. 3:13-3(d) that, if the court grants such discovery to the defendant, it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names of persons the defendant intends to use as witnesses at trial "and their written statements, if any." R. 3:13-3(e) does not authorize discovery by a party of "reports, memoranda or internal documents" made by any other party, his attorney or agents in connection with the investigation, prosecution or defense, or "records of statements, signed or unsigned," by the defendant himself to his attorney or agents.

11 *See, e.g.*, Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338, 78 A.2d 705, 707

In criminal proceedings, mutual broad discovery was held to be generally unobtainable in light of the defendant's privilege against self-incrimination embodied in the fifth amendment.[12] Influenced largely by this circumstance, the course of New Jersey's criminal practice rules differed from those in civil practice and did not originally include any pretrial discovery provisions. However, omission of a specific discovery vehicle has not impaired the power of a trial court to order discovery when justice requires,[13] and indeed, the inherent power of a trial court to compel discovery to further the just administration of criminal law has long been established in New Jersey.[14]

(1951); Myers v. St. Francis Hosp., 91 N.J. Super. 377, 220 A.2d 693 (App. Div. 1966); Rogotzki v. Schept, 91 N.J. Super. 135, 219 A.2d 426 (App. Div. 1966); Interchemical Corp. v. Uncas Printing & Fin. Co., 39 N.J. Super. 318, 325, 120 A.2d 880, 883 (App. Div. 1956).

12 *See* State v. Tune, 13 N.J. 203, 211, 98 A.2d 881, 884-85 (1953). *Contra*, State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965); State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879, 96 A.L.R.2d 1213 (1962). *See also* Louisell, *supra* note 4, at 87-90; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1197-98 (1960).

13 *See, e.g.*, State *ex rel.* Helm v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); State v. Winne, 27 N.J. Super. 304, 310, 99 A.2d 368, 371 (App. Div.), *cert. denied*, 13 N.J. 527, 100 A.2d 567 (1953); 6 J. WIGMORE, EVIDENCE § 1850, at 395 (3d ed. 1940).

14 State v. Funicello, 49 N.J. 553, 231 A.2d 579, *cert. denied*, 390 U.S. 911 (1967) (defendant denied delivery of witnesses' statements in advance of trial); State v. Farmer, 48 N.J. 145, 224 A.2d 481, *cert. denied*, 386 U.S. 991 (1966) (interests of defendant and public required trial delayed to permit defendant to study reports which the prosecution was required to deliver under discovery order); State v. Tate, 47 N.J. 352, 221 A.2d 12 (1966) (defendant not entitled to an order to compel certain state's witnesses who were to be produced at trial to testify on depositions in advance of trial); State v. Trantino, 44 N.J. 358, 209 A.2d 117, *cert. denied*, 382 U.S. 993 (1965) (defendant entitled to pretrial inspection of witnesses' statements); State v. Cook, 43 N.J. 506, 206 A.2d 359 (1965) (defendant entitled to pretrial inspection of state's objective documents such as hospital and autopsy reports absent showing by state that prosecution would be improperly hampered); State v. Reynolds, 41 N.J. 163, 195 A.2d 449, *cert. denied*, 377 U.S. 1000 (1963) (refusal to permit defendants to inspect those parts of doctor's reports containing their confessions of crimes was not prejudicial to the defendants); State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961) (trial court granted defendant's motion for pretrial inspection of the balance of witness' testimony before grand jury); State v. Murphy, 36 N.J. 172, 175 A.2d 622 (1961), *rev'd on other grounds*, 378 U.S. 52 (1964) (defendants entitled to copies of transcripts of testimony before the Waterfront Commission's secret hearings); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958), *cert. denied*, 368 U.S. 933 (1961) (application of defendant for inspection of statement given to police two years earlier granted in absence of state showing that inspection would improperly hamper the prosecution); State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958) (trial court has inherent power to issue a subpoena implementing a pretrial order for psychiatric examination of witness in criminal prosecution); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958) (reversible error in refusing to allow defense counsel to examine notes on which detective based his testimony deprived defendant of fair trial); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957) (reversible error in the refusal to allow defendant to inspect testimony given to grand jury and to use it in cross-examination of the witness); State v. Cicenia, 6 N.J. 296,

In the instant case, defendant did not contend that the trial court's order for production of the prior statement of the witness was violative of any privilege. Instead, he sought to rest on court rules which, he alleged, prohibited the state from discovering a defense counsel's notes of an interview with a prospective witness.[15] In response, the court noted that its rules contained no such prohibition and indeed contained nothing specific with respect to the right of the state to call for the production of a prior statement of a defense witness after he has testified on direct examination.[16] The court went on to affirmatively recognize the right of the prosecutor to inspect the prior statement of a witness,[17] and dismissed defendant's argument that the statement was not discoverable as work product within *Hickman v. Taylor*,[18] when it noted that *Hickman* did not enunciate any constitutional principle and hence had no controlling force on the issue before the court.[19]

Judicial precedent for discovery by the prosecution may be found outside New Jersey. In *Jones v. Superior Court*,[20] the Supreme Court of California held that the prosecution was entitled to pretrial discovery of the names of witnesses the accused intended to call in a rape case, and any reports or X rays he intended to introduce into evidence to support his affirmative defense of impotency.

> Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the

78 A.2d 568 (1951) (defendant did not have absolute right to pretrial inspection of his alleged confession).

15 55 N.J. at 400, 262 A.2d at 404.

16 *Id.*

17 *Id.* at 400-01, 262 A.2d at 405.

18 329 U.S. 495 (1947).

19 55 N.J. at 401, 262 A.2d at 405. *See* Note, *Work Product in Criminal Discovery*, 1966 WASH. U.L.Q. 321 (1968). *Hickman's* main effect was to afford a measure of protection to the attorney against pretrial disclosure of his litigation strategies, his mental processes and the like; it has led to varying interpretations and much controversy. *See* 4 J. MOORE, FEDERAL PRACTICE § 26.63 (1970); Note, *Developments in the Law-Discovery*, 74 HARV. L. REV. 940, 1027 (1961). Since it represents an exception to the modern embracement of broad discovery as an aid to truth and justice, it is to be construed very narrowly. Dougherty v. Gellenthin, 99 N.J. Super. 283, 287, 239 A.2d 280, 283 (L. Div. 1968). N.J.R. 4:10-2 affords a comparable privilege with respect to writings obtained or prepared by the attorney "in anticipation of litigation and in preparation for trial."

20 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

> evidence permits. . . . Similarly, absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case.[21]

In *People v. Lopez*,[22] the same court approved the trial court's pre-trial order requiring the defendant to provide the state with the written statements of proposed alibi witnesses. In *State v. Grove*,[23] the Supreme Court of Washington upheld a trial court's order requiring defense counsel to produce a letter written by the defendant to his wife while in prison. Even though the evidence in question was a statement of the defendant himself, in contrast with the other decisions cited herein which involved statements of witnesses, the court treated the question of self-incrimination in a perfunctory manner.

In accord with *Jones* is the New York Court of Appeals decision in *People v. Damon*,[24] where the court upheld the trial court's decision to furnish the prosecution with prior statements of witnesses for the defense.

> These statements were not those of the defendant but of witnesses offered by the defendant. In no sense can it be said that he is being compelled to produce incriminating statements of his own. The privilege against self-incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself (Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908; see, also, Jones v. Superior Ct. of Nevada County, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919, 96 A.L.R.2d 1213; Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228, 246 n.; Note, 76 Harv. L. Rev. 838). We have recognized the defendant's right to obtain and inspect statements of prosecution witnesses for possible use in cross-examining them (see People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881, 7 A.L.R.3d 174). There is neither reason nor justification for not allowing the People to procure from the defendant statements taken from his witnesses for the same purpose of cross-examining them.[25]

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21 *Id.* at 57, 372 P.2d at 920, 22 Cal. Rptr. at 880. *Jones* has come under attack as an infringement of the defendant's right "to remain silent both prior to and during the trial." Smith & McCollom, *Counterdiscovery in Criminal Cases: Fifth Amendment Privilege Abridged*, 54 A.B.A.J. 256, 259 (1968).

22 69 Cal. 2d 837, 384 P.2d 16, 32 Cal. Rptr. 424 (1963).

23 65 Wash. 2d 525, 398 P.2d 170 (1965).

24 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830 (1969).

25 *Id.* at 261-62, 247 N.E.2d at 654, 299 N.Y.S.2d at 834-35; *accord*, People v. Sanders, 110 Ill. App. 2d 85, 249 N.E.2d 124 (1969) (ordering defense counsel during state's cross-examination to turn over to the state a prior statement of a defense witness did not violate any attorney-client relationship or privilege).

All of the above cited cases involved pretrial discovery, but access to sources of information at the trial can be of even greater importance. As Professor Louisell has observed, "sound analysis probably would be promoted by regarding discovery, both pretrial and at trial, as presenting phases of a single problem."[26] In *Montague*, there was no issue of pretrial discovery, nor was there any encroachment on the defendant's right to remain silent. He had voluntarily offered the witness to testify on his own behalf and the witness had done so. The prosecution desired the prior statement during cross-examination to ascertain whether it differed from the direct testimony. If so, its use would be of assistance in the search for truth. Previously, defense counsel had summoned and received copies of statements of the state's witnesses.[27]

The New Jersey Supreme Court has noted that cross-examination was the most valuable safeguard discovered in the judicial search for truth and, that if it is to be effective, there must be wide latitude in testing the recollection of a witness.[28] As long as no constitutional privilege is infringed, there can be no sensible reason for imposing any restrictions on the cross-examination of defense witnesses other than those applied to prosecution witnesses.[29] The court found no infringement in the present case for, as was said in *State v. Angeleri*,[30] nothing in the Constitution assures a defendant "a right so to defend as to deny the State a chance to check the truth of his position."[31]

However, this proposition is not adhered to on the federal level, where discovery and inspection rights are embodied in Rule 16 of the Federal Rules of Criminal Procedure. In essence, except as to scientific or medical reports, the rule does not authorize discovery or inspection of statements of defense witnesses by the prosecutor. Similarly, the Jencks Act,[32] which provides that statements made by a government witness to a government agent shall be the subject of discovery after the witness has testified on direct examination, fails to make this a

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26 Louisell, *supra* note 4, at 64.

27 Filing was done in compliance with State v. Hunt, 25 N.J. 514, 524, 138 A.2d 1, 6 (1958). The New Jersey Supreme Court there held that defense counsel was entitled at trial to examine the prior notes of a prosecution witness and to use them in connection with his cross-examination. The court's holding was grounded not on any specific statute or rule but on the court's inherent powers to order discovery when justice requires. *See* N.J.R. 3:17-1.

28 State v. Hunt, 25 N.J. at 524, 138 A.2d at 6 (1958).

29 55 N.J. at 399, 262 A.2d at 403-04.

30 51 N.J. 382, 241 A.2d 3, *cert. denied*, 393 U.S. 951 (1968).

31 *Id.* at 385, 241 A.2d at 5.

32 18 U.S.C. § 3500 (1969).

reciprocal discovery vehicle for the government in a criminal prosecution.

The New Jersey Supreme Court perceived, and the justification for the use of its inherent judicial power rests on this premise, that the result in *Montague* was necessary to the proper administration of criminal justice. No doubt the court was influenced by the broad discovery powers already allowed to New Jersey defendants. It is submitted, however, that a contrary decision by the court would defeat the growth of mutual discovery which is essential to maintain a proper balance of the burden sustained by the defense and the prosecution.[33]

It has been argued that, as a matter of policy, mutual discovery in criminal cases should be initiated by the legislature rather than through a case-by-case development involving the inherent uncertainty of a judicially created procedural system.[34] It is foreseeable that private defense attorneys can circumvent the requirement of producing written statements by "allegedly" taking only oral statements from their prospective witnesses. This raises the question of credibility, for what competent defense lawyer would elicit testimony from a witness without first having taken a written statement? However, such a shortcoming would not materialize where the defense is handled by the Public Defender's Office, which maintains a permanent investigatory team similar to that of the Prosecutor's Office, whose statements, in light of this decision, would immediately become discoverable at trial.

Not discussed in the opinion is the questionable existence of a true adversary system in New Jersey. Does such a system exist in our state and, if so, does this decision effect an encroachment thereon? The continued presence of an adversary system appears to be questioned when a holding, such as *Montague*, demands broad mutual discovery in the criminal environment. Supporting this premise is the proposition, embodied in our Canons of Ethics, dictating that the primary role of a prosecutor is not to convict but to see that justice is done.[35]

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33 *See*, Goldstein, *supra* note 12, at 1163-92. As to the practice in Great Britain allowing an accused virtually complete access to the Crown, *see* J. ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE § 40, at 1374-75 (35th ed. 1962); P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 112-16 (1958); Louisell, *supra* note 4.

34 Jones v. Superior Court, 58 Cal. 2d at 63, 372 P.2d at 926, 22 Cal Rptr. at 886. *See also* Carr & Lederman, *Criminal Discovery*, 34 J. STATE BAR OF CAL. 23, 30-31 (1959).

35 N.J. CANONS OF PROFESSIONAL ETHICS No. 5, THE DEFENSE OR PROSECUTION OF THOSE ACCUSED OF CRIME:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and

Does there not exist a reciprocal responsibility on a defense counsel in light of his primary role as an officer of the court? Logic impels doubt as to whether the ends of justice and the search for truth are perpetuated by proceedings not implementing the full ramifications of this holding. *State v. Montague* adequately remedies one of the more glaring deficiencies of the adversary system through a liberalization of criminal discovery procedure similar to that presently existing in civil practice.

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honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.