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Discovery in Criminal Procedure

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DISCOVERY IN CRIMINAL PROCEDURE

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It is not unusual for a lawyer active at the criminal bar to receive a telephone call from another lawyer who is unfamiliar with the criminal practice, the latter asking the former to undertake the defense of a criminal charge against his regular civil client, a close personal friend, or in some instances, the defense of the civil lawyer himself. The civil lawyer has made some inquiry into the facts and usually suggests that the deposition of the complaining witness be taken immediately. He is invariably shocked to learn that there is no authorized procedure in Florida for the taking of such deposition, indeed, that there is no authorized procedure for any substantial discovery in criminal cases. The civil lawyer is shocked because he is accustomed to the broad discovery procedures in civil trials, he knows the necessity for such discovery in determining the truth at such civil trials, and he cannot believe that the rights of a defendant in a criminal case are so much more severely restricted than those of a defendant in a civil case.

Most lawyers think of discovery in the form provided by the Federal Rules of Civil Procedure[1] and by the analogous Florida Rules.[2] These provide for the pretrial taking of depositions of parties and witnesses, compulsory process for such purposes, the propounding and answering of written interrogatories, and the examination and copying of documents and other tangible items in the possession of the adverse side. It is this concept of discovery which has worked so well in civil cases in the federal courts for almost a quarter of a century, and in Florida for nearly fifteen years. Many legal philosophers say that such a concept should be extended to criminal cases.[3]

It is argued that a person accused of a crime is over-protected now by such common law, statutory, constitutional, and judicial safeguards as rights against self-incrimination, unreasonable searches and

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1. FED. R. CIV. P. 26-37.

2. FLA. R. CIV. P. 1.21-1.32.

3. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-98 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Louisell,

seizures, testimony of accomplices, circumstantial evidence, double jeopardy, and entrapment, and rules concerning burden of proof and presumption of innocence. In spite of all these protections, a vast change is taking place throughout the United States in the determination of an accused's rights to pretrial discovery. One of the strange aspects of this change is that it is not occuring by legislative means, but by judicial fiat in the various appellate courts throughout the land.[4]

A defendant in a case where the stakes are deprivation of liberty, or even life itself, does not enjoy equal privileges with a defendant in a case where the stakes are property or money, regardless of how infinitesimal the value or the amount. This is difficult for the layman, and indeed many lawyers, to understand, especially when the very foundation of our society is the right of every man to "life, liberty, and the pursuit of happiness."

For illustration, let us examine a hypothetical set of facts: Mr. Defendant has had a cocktail or two with business associates. While driving his car home, a passing car cuts back into his lane of traffic too closely, causing Mr. Defendant to cut slightly to the right, hit soft sand, and veer sharply to the left across a median directly into the path of an approaching car. As a result of the collision, a passenger in Mr. Defendant's car is killed. Mr. Defendant is also injured. When he is released from the hospital several days later, he is arrested and charged with the crime of manslaughter. The information filed against him contains two counts: (1) manslaughter through culpable negligence and (2) manslaughter through intoxication.

If Mr. Defendant had been sued by the survivors of the deceased passenger for damages, the civil complaint against him for gross negligence would necessarily allege the ultimate facts sounding in gross negligence.[5] He would, prior to trial, be entitled to take the depositions of all witnesses, including the expert toxicologist who gave an opinion that his blood contained so much alcohol that Mr. Defendant could not have controlled his car.[6]

The information which charges him with the crime for which he can receive up to twenty years imprisonment, however, merely tracks each of the two statutes involved and alleges that (1) Mr. Defendant was guilty of culpable negligence,[7] without describing of what the

The Theory of Criminal Discovery and the Practice of Criminal Law, 14 VAND. L. REV. 921 (1961).

4. See section entitled *Other State Jurisdictions, infra.*

5. Jackson v. Edwards, 144 Fla. 187, 197 So. 833 (1940).

6. FLA. R. CIV. P. 1.21-1.32.

7. FLA. STAT. §782.07 (1961).

culpable negligence consisted,[8] and (2) that Mr. Defendant was so intoxicated that he did not have full possession of his normal faculties.[9] After identifying the county, the information need not even aver where in the county the automobile accident occurred. The date alleged need not be proved, except that the date must have occurred within two years prior to the filing of the charges.[10] From the averments of the information, the defendant's lawyer does not have sufficient facts disclosed to him to be able to obtain a police report of the accident, a fact especially harmful in most large cities where the date and the intersection of the accident are required by the police department indexing system. Mr. Defendant's attorney seeks to determine what the report of the toxicologist, who took the defendant's blood sample on the night of the accident, shows, but he is not privileged to do so.[11] The attorney may attempt to require the prosecution to furnish a list of witnesses, or persons, who have knowledge concerning the alleged accident, but the trial judge would be correct in only requiring the prosecutor to furnish "the names of the witnesses on whose evidence the . . . [information] is based . . . ."[12] Such list does not require the disclosure of all witnesses and usually includes as few as the prosecutor feels will establish a prima facie case. Upon learning the names and addresses of the passengers in the other car involved in the collision, the attorney goes to their homes to suit their convenience, taking a court reporter with him in an effort to take their statements. After the witnesses learn the nature of the inquiry, they telephone the prosecutor to ask if they must give a statement. Upon learning that the law does not make it mandatory, they typically refuse to talk.

It becomes readily apparent that the accused in the criminal case does not have rights equal to those of a defendant in a civil case, and by no means can he be considered in Florida to have equal rights with the prosecution. The cry of the prosecutor is immediately heard that he cannot compel the defendant to give him a list of his witnesses, nor can he compel the defendant to give a deposition. He further contends that the allowance of discovery to defendants in criminal cases will require the prosecution to identify confidential informers upon whom police officers rely heavily for the enforcement of criminal statutes. Finally, he states that discovery will promote

8. Cochran v. State, 141 Fla. 467, 193 So. 535 (1940).

9. FLA. STAT. §860.01 (1961), Tootle v. State, 100 Fla. 1248, 130 So. 912 (1930).

10. State v. Clein, 93 So. 2d 876 (Fla. 1957).

11. Ezzell v. State, 88 So. 2d 280 (Fla. 1956).

12. FLA. STAT. §906.29 (1961), Shields v. State, 64 So. 2d 271 (Fla. 1953); Nelson v. State, 148 Fla. 338, 4 So. 2d 375 (1941).

perjury and the manufacturing of evidence. These are legitimate complaints and deserve consideration by any legislative or judicial body before extending rights of discovery. A discussion of these objections will follow a delineation of present rights of discovery.

PRESENT RIGHTS OF DISCOVERY IN FLORIDA

From the very inception of the criminal charges, the defendant gains little information from the formal document which constitutes the accusation.[13] Most prosecutions in Florida, in the circuit courts and criminal courts of record, are by information. Under modern concepts of litigation this document is incorrectly named, for it gives little "information." It only avers that a particular accused is charged with a particular crime in a particular county within two years of a given date.[14] The allegations are general and merely track the statute.[15]

By statute[16] a defendant may make a motion for a bill of particulars "when the indictment or information fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense." The granting or refusal of such a motion is not founded on any legal right, but is a matter resting entirely within the sound discretion of the trial court.[17] Despite a defendant's basic presumption of innocence, it is indeed shocking to note that the Supreme Court of Florida has ruled that a defendant is not entitled to know more about the charges against him than what is contained in the indictment or information. Such a ruling has been rationalized on the ground that the defendant is in a better position to know the facts surrounding the charge than anyone else.[18] In the course of a year judges preside over literally hundreds of criminal cases in which the defendants, in the vast majority of instances, are plainly guilty, and indeed, most plead guilty. Because of this constant and persistent awareness of crime and criminals it is only natural that many judges consciously, or unconsciously, want to help the prosecutor rid the community of such elements. They are aware that by the law of averages there are some who come before them who are not guilty, but in considering individual cases such defendants are few. Judges

13. For a full discussion of accusatory documents in Florida, see McEwen, *Criminal Pleadings in Florida*, in this Symposium.

14. State v. Clein, *supra* note 10.

15. State v. Clein, 93 So. 2d 876 (Fla. 1957); State v. Pound, 49 So. 2d 521 (Fla. 1950); Urga v. State, 155 Fla. 87, 20 So. 2d 685 (1944).

16. FLA. STAT. §906.07 (1961).

17. Rogers v. State, 158 Fla. 582, 30 So. 2d 625 (1947); Jarrell v. State, 135 Fla. 736, 185 So. 873 (1939).

18. Mendenhall v. State, 71 Fla. 552, 72 So. 202 (1916).

are less inclined to want to "help" a defendant charged with a crime by ordering the prosecution to furnish more information to the defendant than the law says he is entitled to as a matter of right. Certainly, this is not true of all judges and it is particularly untrue of those trial judges whose dockets include more civil than criminal cases. However, it is a factor to be considered when so broad a discretion is given to a trial judge in the granting or denial of a motion for a bill of particulars and the consequent loss of discovery to a defendant.

Florida is one of seven states (the others are Arkansas, Maryland, Idaho, Missouri, New Jersey, and Vermont) that allows pretrial discovery by the inspection, copying, or photographing of certain tangible things:[19]

> When a crime has been committed and the evidence of the state shall relate to ballistics, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photographs, objects, or other tangible things, upon motion showing good cause therefor, and upon notice to the prosecuting attorney, the court in which the action is pending, whether the committing magistrate's court or the court having jurisdiction to try the cause, may order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things. In examinations to be conducted by representatives of the state, as to ballistics, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, as aforesaid, shall be permitted under order of court, to be present, or have present, an expert of his own selection, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just.

At first blush the above statute seems to be very comprehensive, appearing to lay open the prosecutor's files. Judicial interpretation has been to the contrary, however. The Supreme Court of Florida has held that a statement or confession by the defendant is not included within the scope of the statute.[20] It has also held that this statute does not comprehend the right of a defendant to examine

19. FLA. STAT. §909.18 (1961). See brief discussion of this statute in McEwen, *Criminal Pleadings in Florida,* text at notes 64-65, in this Symposium. See also the author's conclusion in text at note 70 of the same article.

20. Williams v. State, 143 Fla. 826, 197 So. 562 (1940).

transcripts of testimony of the State's witnesses taken prior to trial.[21] The statute prescribes a right of the defendant or his expert to be present when the enumerated objects are examined by the State's expert. However, the State's examination is usually made before the criminal charges are brought and almost invariably made before the defendant's attorney gets into the case, or before he is even aware that there is or may be an issue concerning an item covered by the statute. The statute does not provide for examination of the expert's report.[22] In many instances the mere lapse of time thwarts the defendant's rights. For instance, in the example hypothesized earlier where blood was taken from the defendant at the hospital, the toxicologist usually discards the blood sample after he makes his report because the quantity of alcohol in the sample changes as a result of the volatility of alcohol. It has also been held that the statute does not confer upon the defendant the right to examine a transcript of testimony taken in secret before the grand jury.[23]

Criminal prosecutions in Florida may be instituted in several different ways. One is the classic indictment by a grand jury. Another is the filing of a "direct" information by the prosecuting officer who has the power to administer oaths and take testimony to determine probable cause for the filing of an information. In this capacity the prosecutor acts as a one-man grand jury. A third manner by which a prosecution may be instituted is before a committing magistrate, usually a justice of the peace, who has jurisdiction to determine probable cause. An affidavit is made by the complaining witness before the magistrate who, in turn, issues a warrant for the arrest of the defendant based thereon. After the defendant is arrested, he is afforded a preliminary hearing at which time the committing magistrate determines from the examination of witnesses whether probable cause exists to hold the defendant to answer formal charges and stand trial in a higher court. The defendant has a right to have counsel at the preliminary hearing and his counsel has a right to examine and cross-examine witnesses. The preliminary hearing offers a degree of discovery to a defendant. However, its scope in that regard is limited because the prosecution calls only those witnesses necessary to establish a prima facie case. In most instances, the preliminary hearing is held before the defendant obtains counsel and no transcript is taken to preserve the testimony. No preliminary hearing is afforded a defendant arrested pursuant to a grand jury

21. McAden v. State, 155 Fla. 523, 21 So. 2d 33 (1945).

22. Ezzell v. State, *supra* note 11.

23. Richards v. State, 144 Fla. 177, 197 So. 772 (1940). An excellent discussion concerning the right to obtain grand jury notes is found in Note, 13 U. FLA. L. REV. 242 (1960).

indictment or a direct information. Consequently, in the more important cases the prosecutor files a direct information in order to circumvent those rights afforded a defendant in a preliminary hearing. Once an indictment or information is filed, the accused is unable to inquire into the sufficiency of the evidence prior to trial.[24] In any instance where an information or indictment is filed prior to the preliminary hearing, even if the prosecution is commenced before a committing magistrate, the defendant is not entitled to a preliminary hearing.[25] This result is still not changed if the defendant attempts to obtain a disclosure of the evidence and seeks his release upon habeas corpus proceedings after the indictment or information is filed.[26] Section 909.04 of the Florida Statutes does provide that when a defendant has been arrested upon a capias and remains confined in custody for thirty days after his arrest without trial, "he may apply to the trial court having jurisdiction for and be allowed a preliminary hearing" (a defendant is usually arrested on a capias when the criminal proceedings are instituted by direct information or indictment).

On the other hand, with the exception of obtaining a statement from the accused, the prosecution is unlimited in its discovery of evidence. Police officers usually are immediately upon the scene after the commission of a crime and in many instances before the crime is committed. The vast manpower and funds of a police department are at the disposal of the investigators, and the very authority with which they are clothed often evokes statements from witnesses that private investigators could not obtain. It is a rare case when all of the eyewitnesses have not been interviewed before the facts are even presented to the prosecuting attorney. When these factors are coupled with modern scientific investigation and detection devices (microphone and recording devices are now available which will record conversations a half-mile away), the argument that it is not "fair" to allow discovery to defendant seems unrealistic.

Florida has one right of discovery for the *prosecutor* which is not extant in most states. In this state he has the right to call a person to his office by process of the court and conduct a unilateral deposition under oath, the violation of which constitutes perjury.[27] It also must be recognized that when a defendant is arrested he is undergoing, in most instances, a highly emotional experience. He is unnerved. He is overwhelmed by the mere authority of the officers who are interrogating him. As a result, statements are obtained from an accused,

24. Di Bona v. State, 121 So. 2d 192 (Fla. 1960); State v. Schroeder, 112 So. 2d 257 (Fla. 1959).

25. Di Bona v. State, *supra* note 24.

26. Sullivan v. State, 49 So. 2d 794 (Fla. 1951).

27. FLA. STAT. §§27.04, 32.20 (1961).

regardless of his right not to give such a statement, in a great majority of cases. It is true that many such statements are exculpatory in nature, but they pin the defendant down to a particular defense and serve the same purpose as a deposition to impeach the defendant's testimony if he should testify differently at the trial. The experienced prosecutor and defense lawyer will verify the fact that regardless of how many brushes with the law an accused may have had prior to his arrest in question, he will invariably make some statement, notwithstanding advice by counsel to remain silent.

The most urgent discovery need for defense attorneys is a method to enable them to determine in advance of trial the nature of the testimony of witnesses who are reluctant or who refuse to give statements. The absence of such a right creates an inconsistency between the practice directed by the courts and the practice permitted by the courts. The Supreme Court of Florida has held that it is not merely the right, but the duty of defense counsel to interview and examine, prior to trial, as many as possible of the persons who are supposed to know facts concerning the alleged crime, thus enabling him to ascertain the truth concerning the controversy.[28] In an important early case[29] defense counsel sought to interview a witness who was in jail, but the witness's attorney and the prosecutor refused permission. Defense counsel sought a writ of habeas corpus *ad testificandum* and the Supreme Court of Florida held that it should have been granted in order to allow defense counsel to interview the witness prior to trial. Thus, it appears that defense counsel has a duty to interview all witnesses prior to trial, yet there are no procedural mechanics to permit him to do so when the witnesses refuse to cooperate. In criminal cases such refusal is not unusual because of the emotional issues involved as well as the witness's natural tendency to feel that he is doing something wrong when he talks to defense counsel.

Discovery in Other Jurisdictions

England[30]

Defense lawyers in England are not confronted with the same problems of discovery as those in the United States. Although the procedure in England does not encompass the broad scope of the Federal Rules of Civil Procedure, it nevertheless affords defense counsel a far more effective method of discovery.

28. Mathews v. State, 44 So. 2d 664 (Fla. 1950).
29. Hodgins v. State, 139 Fla. 226, 190 So. 875 (1939).
30. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 64 (1961).

In almost every instance the defendant is given a right to a preliminary hearing. At this hearing each witness which the prosecution intends to produce at the trial testifies and is subject to cross-examination by defense counsel.[31] The substance of the witness's testimony is reduced to writing and a copy given to defense counsel. This is done even though the defendant was not represented by counsel at the preliminary hearing. The prosecution is required to produce all the evidence which it then has at the preliminary hearing and if any evidence is subsequently obtained, it is made available to the defendant by means of a notice of additional evidence. The effect is to give defense counsel a pretrial insight into the prosecution's case.

The English procedure does have restrictions, however. Only admissible evidence is produced by the prosecution at this hearing, whereas the witness may have some knowledge, otherwise inadmissible, which might in turn lead the examining attorney to admissible evidence. In addition, in the case of subsequently found evidence, the prosecutor only gives the defense counsel a summary of such evidence as he intends to produce at the trial, and defense counsel does not have the advantage of a pretrial cross-examination. However, half a loaf is better than none, and most defense counsel in the United States would be delighted to have the benefits of the discovery rights which their counterparts in England now enjoy.

Federal Courts

The procedures available in the federal courts are no more liberal than in Florida.

Rule 6(e), Federal Rules of Criminal Procedure, provides that certain matters which occur before a grand jury may be disclosed to the defendant's attorney "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occuring before the grand jury." In view of the holding in *Costello v. United States*[32] that a grand jury indictment may be based entirely upon hearsay evidence, it appears that there is little hope of discovering testimony made before the grand jury which will be admissible at trial.

Rule 7(f) provides that a defendant may move for a bill of particulars. However, the federal courts, similarly to the Florida courts,

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31. Indictable Offences Act, 1848, 11 & 12 Vict., c. 42; DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 112 (1958); 9 HALSBURY, LAWS OF ENGLAND 103-11 (2d ed. 1953); HOWARD, CRIMINAL JUSTICE IN ENGLAND 330 (1931).

32. 350 U.S. 359 (1956).

have ruled that the disposition of such a motion for a bill of particulars rests within the discretion of the trial judge, and the denial, in the absence of abuse, will not be error.[33]

Rule 15 provides for the taking of depositions, but a close inspection reveals that this is not a discovery procedure at all. Depositions so taken can only be used if it appears that[34]

> the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

Unless a showing is made that one of these purposes will likely be served, the deposition cannot be taken.

Until the courts strictly limited the scope of rules 16 and 17(c), these provisions were most frequently relied upon in efforts by defense counsel to obtain discovery. Rule 16 is entitled "Discovery and Inspection" and provides:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

The decisions, however, have rendered Rule 16 substantially inoperative as a means of discovery.[35]

Rule 17(c) provides that a subpoena duces tecum may be issued to require the production of books, papers, documents, or objects designated in the subpoena prior to trial. This rule appears to provide that the court may direct subpoenaed items to be produced prior to trial; however, judicial interpretation has rendered this rule ineffective for discovery purposes, it being available only to facilitate the trial of complicated cases where many documents might be presented and

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33. Braden v. United States, 272 F.2d 653 (5th Cir. 1959), *aff'd*, 365 U.S. 431 (1961).

34. FED. R. CRIM. P. 15.

35. Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statement in the Federal Courts*, 57 COLUM. L. REV. 1, 113 (1957); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 242 (1957).

defense counsel would be confronted by them for the first time at the trial.[36]

In recent years the discoverability during trial of statements made by a Government witness has undergone severe changes in both directions. In *Goldman v. United States*[37] the Supreme Court held that a defendant was not entitled to pretrial inspection of notes and memoranda of government agents, nor was the defendant entitled to such inspection as a matter of right during the course of the trial. The court left inspection during trial to the discretion of the trial judge. In the 1953 case of *Gordon v. United States*,[38] the Supreme Court required the Government to produce contradictory written statements made prior to the trial by a Government witness. This was during the trial, however, after the defendant by cross-examination had laid a proper foundation showing that the documents were in existence, were in possession of the government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction related to a material matter.[39]

In 1957 the Supreme Court decided the now famous *Jencks* case,[40] holding that a defendant is entitled during the course of a trial to the inspection of notes and memoranda of Government witnesses, even though the witness does not use them in the courtroom. The Supreme Court condemned the previous practice of allowing the trial judge to inspect certain classes of notes and memoranda *in camera* to determine their materiality before allowing defense counsel to inspect. Previously, if the trial judge determined that they were not material, he had discretion to deny the inspection. The Court stated:[41]

> We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

The *Jencks* opinion was rendered on June 3, 1957. The decision caused such a controversy that Congress considered and enacted on

36. United States v. Malinsky, 19 F.R.D. 426 (S.D.N.Y. 1956); United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955); United States v. Carter, 15 F.R.D. 367, 369 (D.D.C. 1954).

37. 316 U.S. 129 (1942).

38. 344 U.S. 414 (1953).

39. Shelton v. United States, 205 F.2d 806 (5th Cir. 1953).

40. Jencks v. United States, 353 U.S. 657 (1957).

41. *Id.* at 668.

September 12, 1957, what it deemed to be curative legislation.[42] The effect of the "Jencks Act" is to require the Government to furnish the trial judge the statements, notes, or memoranda made by witnesses. The trial judge, *in camera*, determines the portions of the statement which relate to the subject matter of the testimony of the witness and permits defense counsel to inspect that part of the statement only.

Other State Jurisdictions

To display the marked increase in rights to discovery granted by the appellate courts in the United States, it is noted that until 1955 no discovery as we know it today was allowed in any of the various states. However, in the brief span since 1955, and more particularly, since 1958, the following jurisdictions have rendered revolutionary decisions:

Arizona: The appellate court approved the trial court's order requiring the State to furnish for pretrial inspection tangible objects such as pistols, alleged slugs, shirt, and car keys. *State v. Superior Court,* 78 Ariz. 74, 275 P.2d 887 (1954).

California: In *Cash v. Superior Court,* 53 C.2d 72, 346 P.2d 407 (1959), the court allowed the defendant to inspect his own statements and the statements and notes of the arresting officers. In *People v. Garner,* 57 C.2d 135, 367 P.2d 680 (1962), a defendant was entitled to inspect statements of a co-defendant prior to trial. *People v. Chapman,* 52 C.2d 95, 338 P.2d 428 (1959), held that a defendant was entitled to statements made by other witnesses. In *People v. Renchie,* 201 Cal. App. 2d 1 (1962), the defense was entitled to officers' notes made at the time of the victim's interview. Finally, *Schindler v. Superior Court,* 161 Cal. App. 2d 513, 327 P.2d 68 (1958), allowed the defendant to inspect autopsy and other scientific reports.

Louisiana: In *State v. Dorsey,* 22 So. 2d 273 (1945), it was held that a defendant is entitled to a pretrial inspection of his confession.

Michigan: In 1959 in *People v. Johnson,* 356 Mich. 619, 97 N.W.2d 739, the court held that a defendant was entitled to a pretrial discovery of confessions when he claimed that they were needed for evaluation by a psychiatrist in a case where insanity was a defense. The language of the opinion indicates approval of much broader discovery.

New Jersey: State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958), held that a defendant is entitled to pretrial discovery of his own confession or statement, but not that of witnesses. This court suggested, however, that a change in the rules with regard to the latter is in order.

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42. Jencks Act, 18 U.S.C. §3500 (1957).

With respect to pretrial inspection of confessions or statements the court said (at 137, 145 A.2d at 316):

> We must be mindful of the role of a confession. It frequently becomes the core of the State's case. It is not uncommon for the judicial proceeding to become more of a review of what transpired at headquarters than a trial of the basic criminal event itself. No one would deny a defendant's right thoroughly to investigate the facts of the crime to prepare for trial of that event. When a confession is given and issues surrounding it tend to displace the criminal event as the focus of the trial, there should be like opportunity to get at the facts of the substituted issue. Simple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him.

Oklahoma: An appellate court approved the trial court's order allowing a defendant to have a copy of an F.B.I. report on a specimen scraped from the defendant's car. *State v. Lackey,* 319 P.2d 610 (1957).

Pennsylvania: The appellate court approved the trial court's order allowing the defendant to inspect photographs of the scene, alleged murder weapon, articles of furniture and clothing, and broken glass, but refused inspection of a photograph of fingerprints. *In re Di Joseph's Petition,* 394 Pa. 19, 145 A.2d 187 (1958).

Vermont: This state took large original steps in granting pretrial discovery through judicial action. *State v. Skagen,* 122 Vt. 215, 167 A.2d 530 (1960); *Hackel v. Williams,* 122 Vt. 168, 167 A.2d 364 (1960). Far-reaching legislation in the area was enacted in 1961. VT. STAT. ANN. ch. 203, §§6721-27 (1961). The legislation provides for defendant's taking of depositions of any witness, for a subpoena power for the defendant pursuant to taking a deposition, and for discovery and inspection of tangible objects.

Washington: State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959), approved, though not as a matter of right, a pretrial order allowing the defendant discovery of confessions, an autopsy report, and an F.B.I. report on examination of clothing, personal effects, and blood samples.

ARGUMENTS FOR AND AGAINST

There can be little doubt that the success of the comparatively new rules of civil procedure in the federal and state courts is beginning to instill a new concept in the trial of criminal cases. The civil rules have shown us that pretrial discovery produces more enlightened litigants who present narrower issues to juries. The chance of injustice

occurring because of surprise witnesses or unforeseen theories has correspondingly been diminished. More pretrial settlements have occurred.

Some dangers are anticipated in allowing discovery in criminal cases. One is the possibility of encouraging perjury and manufactured evidence. This theory, however, implies that the presumption of innocence is inapplicable before trial; it assumes that all persons are guilty and that they will take whatever steps they feel necessary to prevent a conviction. This is certainly contrary to our basic concept of justice. The perjury argument was most prevalent prior to the adoption of the civil rules. The pre-civil-rules opponents shouted loud and long that pretrial discovery would be a veritable incubator for perjury.[43] Experience, however, has ruled these arguments a nullity. We must also remain aware that there are existing laws against perjury, bribery and related crimes, which are not entirely ineffectual. Finally, it should be remembered that the very purpose of taking depositions in most instances is to commit the witness so that he will not be able to change his testimony at a later date without impeachment. This cannot be said to be an encouragement of perjury; rather, it is a deterrent.

The most cogent argument against allowing pretrial discovery is that there is no mutuality and that it would not be "fair" to the prosecution. Certainly this is true, but is this single imbalance in favor of an accused so heavy a weight on his side of the scales of justice that it should serve the purpose of leaving the scales overburdened on the side of the prosecution? In answering this question it should be remembered that the prosecution is always the moving force and gathers its evidence before the defense, that law enforcement agencies are far more effective in gathering their evidence than an accused, and that in the great majority of cases the prosecution obtains a confession or statement by the accused who almost always submits before he has retained counsel. From a practical standpoint such a statement will operate at least as well as a defendant's deposition, if such were allowed. Far more important than the above, however, is the query whether mutuality or "fairness" is the correct test. Professor Robert L. Fletcher answered this by saying:[44]

> [R]elated to this objection is the further complaint that such a one-sided grant of discovery is "unfair" to the state, that it overburdens a prosecutor confronted as he is with the privilege

43. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

44. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 312 (1960).

against self-incrimination and the requirement of proof beyond a reasonable doubt.

Consider the related question first, that of the "unfairness" to the state which would result from allowing discovery. Frequently if not usually in the criminal case it is now the state which is highly favored in the discovery of evidence, as where the police seize the defendant and possibly others for questioning. We may for our present purposes assume that questioning is conducted without coercion, but we certainly would not countenance the circumstances surrounding the usual type of police questioning if done as part of any pending civil litigation. Particularly when these techniques are employed by the state against an indigent defendant, the advantage seems to be one-sided.

In any event, whether the chances to win the lawsuit are one-sided or evenly balanced is immaterial. Criminal prosecution is not designed to determine the better of two contestants; to argue that we should not afford the defendant a certain degree of discovery because it gives him a better chance to win is to assume that he is guilty. (Emphasis added.)

In another enunciation of the "fairness" concept, it has been said:[45]

> In any event, it would seem that the question of the desirability of criminal discovery ought not to turn solely upon a close balancing of procedural advantages. The belief that the criminal trial should be a balanced contest between adversaries has long been criticized as a "sporting theory of justice" which is particularly inappropriate in light of the high stakes involved in criminal litigation.

Another argument frequently raised as an objection to allowing pretrial discovery in criminal cases is that the prosecution would be forced to identify confidential informers and that "organized crime" would intimidate witnesses. If the prosecution expects to use its confidential informer at the trial, then there is no valid argument why his identity should not be disclosed, nor his deposition taken, prior to the trial. It is only the confidential informer who remains "confidential" who should be accorded protection. The answer to the objection is that a protective order should be available to the prosecution just as it is in the civil rules.[46] Upon proper showing the trial judge would be empowered to protect the confidentiality of an informer with a defi-

45. Note, *Developments in the Law–Discovery*, 74 HARV. L. REV. 940, 1063 (1961).

46. FED. R. CIV. P. 30(b); FLA. R. CIV. P. 1.24(b).

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nite decree that the informer will not be used as a witness at the trial. The argument for not permitting discovery because of possible intimidation by organized crime is too often used merely to charge the emotional atmosphere. Organized crime is in fact interested in very few of the criminal prosecutions in the United States. It is an argument which certainly must be considered, but is not one which cannot be overcome by the same protective order, preventing the disclosure of confidential informers.

CONCLUSION

Of all the suggested reforms "[M]ost immediately relevant . . . is the creation of a free deposition and discovery procedure. For this would afford the accused the ability to draw upon all that the prosecution has gathered, compensating in part for all that the prosecution has learned from the accused and his witnesses."[47] To this end reforms certainly should be instituted.

Some prosecutors see the handwriting on the wall that pretrial discovery in criminal cases is inevitable. They are beginning to suggest that the defendant be entitled to some pretrial discovery, but only after he makes an irrevocable waiver of his right against self-incrimination and submits himself to the same type of inquisitorial process. While there is some merit to such a suggestion, this writer feels that there is an inherent danger of reverting to the ancient Star Chamber proceedings. Most trials then would ultimately become a rote procedure of establishing the corpus delicti and introducing the deposition of the defendant, followed by a systematized dissection of the deposition to establish discrepancies and inconsistencies. The real issues would be overshadowed by a trial of the deposition.

What is the solution? The answer is articulately set forth by Professor Goldstein, suggesting that the most desirable solution[48]

> would allow the defendant his immunity—as a mark of the maturity of our state and the consummate respect it pays to the dignity of the individual, both for his own sake and for the benefit of a society seeking to impress upon its police and prosecutors the high obligation to proceed against a citizen only when they have independent evidence of his crime. History teaches that too ready availability of the accused as the source of the evidence against him inevitably tempts the state to intrude too much. And the inherent inequality in investigative

47. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192 (1960).

48. *Id.* at 1197.

resources, as between state and accused, suggests also that the defendant does not get so much on the total scale when his limited immunity is left him.

I firmly believe that it is necessary for the defendant in a criminal trial to have all of the means of discovery now afforded the parties in civil proceedings in order to afford a defendant adequate protection under the law. The prosecution has most of the advantages in investigative power and basically has its case prepared before the defendant is even arrested. The defendant needs the rights of discovery in order to compensate for the many advantages the prosecution already has. If fairness should be the criteria, then the prosecution has been guilty of unfairness for hundreds of years and those accused have been its victims. However, fairness or unfairness should not be the criteria. We should remain aware that every accused is presumed to be innocent. With that presumption must go the assumption that the defendant knows nothing about the charges brought against him and most certainly does not know what the state must assume to be true by the mere fact that it brought such charges. This being the case, the person accused of a crime should be given every opportunity to find out, to discover everything he must refute at his trial, and to search out all possible avenues which will help him establish his innocence. Through such discovery will the ends of criminal justice be better served.