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PRE-TRIAL DISCOVERY IN CRIMINAL CASES

Pre-trial discovery in criminal cases, unknown to the common law and in the past contemplated with adhorrence by eminent jurists, is now firmly rooted in American law and growing steadily if not rapidly.

During the early years, all trial (both civil and criminal) were conducted in the atmosphere of a sports contest. Disclosure to an adversary would have violated principles of true sportsmanship. Commenting on this situation, Sir J. Arnold in 1874 said:[1]

> The only answer . . . is that English criminal procedure does not so much seek the discovery of truth pure and simple, as the discovery of truth according to certain artificial rules. . . . The prisoner must be convicted according to the strict rules of the legal game or not convicted at all and that, too, however clear his guilt may be.

In 1895 Sir F. Pollack and Professor F. W. Maitland put it this way in their History of English Law, II 667:[2]

> At one of these (poles or extremes) the model is the conduct of the man of science who is making researches and will use all appropriate methods for the solution of problems and the discovery of truth. At the other, stands the umpire of our English games, who is there not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket match. The judges sit in the court, not in order that they may answer the question "how's that?" This passive habit seems to grow upon them as time goes on. . . . Even in a criminal cause, even when the King is prosecuting, the English judge will, if he can, play the umpire rather than inquisitor.

Such statements by eminent authorities (plus the fears that discovery would foster perjury or that unscrupulous opponents would abuse the privilege), suppressed the growth of discovery techniques in criminal procedure.

In the civil procedure area, however, the discovery technique received somewhat early recognition. It is believed to have originated in the ecclesiatical courts, through the use of the device of having the complaining party state his position, and requiring the other party to answer by swearing to the facts pleaded.[3] The whole procedure was under the control of the court. From this notion the courts of equity adopted the concept of the bill of discovery. By this procedure one could obtain such facts as might tend to prove his own case, but one could not prove into evidence which would tend to prove or disprove the case of his opponent. Finally the common law courts of England allowed a form of discovery in civil cases,

1. 6 Wigmore, Evidence, § 1845) 3d ed. 1940).
2. Ibid.
3. 4 So. Cal. L. Rev. 169 (1931).

after the passage of the Judicature Acts of 1873-1875. The courts of the United States generally allowed the bill of discovery, but with the enactment of statutory methods the bill of discovery became obsolete. For at lease 30 years, comprehensive statutes for discovery in civil cases have existed in the United States.[4]

But this evolution in the civil discovery area did not carry over into the criminal law; courts and legislatures continued reluctant to allow criminal discovery of any type. The requirement of excluding witnesses whose names had not been furnished to the defendant never existed at common law, but statutes gradually set it up.[5] Much less was the accused allowed to inspect notes of testimony taken before the grand jury; nor could the disclosure of any other evidence be obtained.[6]

Even as recently as 1927, New York, in *People ex rel. Lemon v. Supreme Court,*[7] failed to recognize discovery in criminal matters. Speaking through Cardozo, the court denied defendant access to autospy reports or files of an accomplice's statements made to the prosecution, on the grounds the documents were inadmissible as evidence. Cardozo perceived the faint beginnings of criminal discovery, but failed to deviate from the common law notion of denying discovery in criminal matters. He did indicate, however, that discovery existed in a limited sense in other states, and hinted that perhaps the trial court may have inherent power to allow discovery.

After the *Lemon* case, the general attitude regarding discovery in criminal cases began to change. The courts went off in three directions:[8] (1) Some courts granted discovery to a limited extent as a matter of right to the defendant. (2) A few continued to insist that the trial court lacked inherent power to grant discovery. (3) Others allowed discovery as a matter within the trial court's discretion. Many courts including Wyoming have not chosen one of these three possible roads.

The purpose of this paper is to explore these judicial attitudes. The discussion of cases will be limited to pre-trial discovery of the defendant's statements or confessions, and pre-trial statements by a witness. But the statutes discussed cover a broader area than merely statements or confessions.

Louisiana adopted the first view (discovery as a matter of right) in 1945 by *State v. Dorsey.*[9] In deciding that the defendant's written confession in the hands of the prosecution was subject to discovery, the court went further by holding that such denial of access was a deprivation of

4. 38 Yale L.J. 746 (1929).
5. Wyo. Stat. §§ 7-119, 7-120 (1957) is an example.
6. Wigmore, supra note 2.
7. 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (1927).
8. 32 Temp. L.Q. 217 (1958).
9. State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945).

due process. In 1960, however, the Louisana court decided in a summary fashion that such constitutional right does not extend to copies of the defendant's oral statements.[10]

The Supreme Court of the United States has ruled on the constitutional issue. Lack of due process by denying the defendant access to his confession was one of many grounds urged for reversal in *Leland v. Oregon*.[11] While saying that the better practice may be to allow discovery, nevertheless in a summary fashion, the court held such denial not to be unconstitutional.

In contrast to the Louisana view (discovery as a matter of right) some courts have held that discovery is not available to the defendant even at the trial court's discretion. Some have said that a witness' statements in the hands of the prosecutor are not public records hence not subject to discovery.[12]

The most interesting line of cases lies in the third category—existence of discovery not as a right, but within the court's discretion. Many forceful and compelling arguments have been voiced in this area. Maryland was among the first to recognize the inherent power of the court by allowing discovery of a confession.[13] The court was not impressed by the fear of the prosecuting attorney that the exercise of such discretion will change the whole practice of criminal law by making a conviction more difficult to obtain. Rather the court realized a "measure of elemental justice" in permitting the accused access to his confession.

New Jersey's contribution consists of three decisions. In *State v. Cicenia* (1951)[14] the court held that while the trial court, within its discretion, had the power to allow discovery, the defendant had no aboslute right to a pre-trial inspection of his confession and thus affirmed the lower court's denial of discovery. Then two years later in *State v. Tune*,[15] the trial court did exercise its discretion in allowing inspection of a confession before trial. By a four to three decision, the trial court was reversed. The majority claimed that discovery would not lead to honest fact-finding but rather to perjury and suppression of the evidence in the accused's attempt to set up a false defense. The minority claimed *State v. Cicenia* was precedent and to hold otherwise would render the earlier decision sterile.

In 1958, however, in *State v. Johnson*,[16] the court reversed the stand taken in *State v. Tune*. Despite the fears of the majority in *State v. Tune*, the court pointed out compelling reasons in favoring discovery. Starting

10. State v. Bickham, 238 La. 1094, 121 So. 2d 207 (1960).
11. 343 U.S. 790 (1952).
12. Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952); Dowling v. State, 166 Tex. Cr. App. 43, 317 S.W.2d 533 (1958).
13. State v. Haas, 188 Md. 203, 51 A.2d 647 (1947).
14. 6 N.J. 296, 78 A.2d 568 (1951).
15. 13 N.J. 203, 98 A.2d 881 (1953).
16. 28 N.J. 133, 145 A.2d 313 (1958).

with the premise that truth is best revealed by a decent opportunity to prepare for the trial and recognizing that counsel isn't sure or doesn't even know whether he needs the inspection until he has it, the court discounted the fears of perjury. Weight was also given to the state's ability to conduct a superior investigation. "The state is immediately at the scene of the crime with a staff. Even pecunious defendants are rarely represented at this stage."[17]

More recently, Washington,[18] Utah,[19] California[20] and Oklahoma[21] have joined the liberal camp allowing discovery as a matter within the court's discretion. Typical of the thinking involved in this area is the Utah case. In allowing pre-trial discovery of the transcript of a grand jury witness the court argued the defense cannot know whether prior testimony of the witness was inconsistent with the testimony given at the trial unless he knows what the testimony before the grand jury was. While acknowledging the value of the secrecy of the grand jury proceedings the court added that since the trial judge discretely and properly circumscribed the procedure so that only material portions of the transcript of the testimony of the witness would be exposed, he had not abused his discretion. In an acrimonious dissent, Justice Henriod voiced his fear of the "boomerang" effect of "do good statutes and decisions."

One of the recent cases of great interest is from New York.[22] This state had previously recognized the existence of discovery in the court's discretion.[23] In *People v. Rocario,* the trial court refused to turn over the statements of the prosecution's witness before trial. In reversing, the Court of Appeals declared that a right sense of justice entiles the defense to examine a witness' prior statement whether or not it varies from his testimony on the stand, because something will be withheld from the defense counsel which may assist him in impeaching the witness; hence the court allowed the defendant to inspect as a matter of right before the trial. The court attached three limitations to its decision: (1) the statement should relate to the subject matter of the witness' testimony, (2) the statement may only be used for impeachment purposes, (3) statements of secret or confidential dealings would be excluded, as required by the necessities of law enforcement.

Another area of concern is the availablity of the discovery process to the state against a defendant. A recent case comes from California.[24] The defendant, accused of rape, filed a motion for continuance and an affidavit in which he alleged impotency as a result of an earlier accident. The majority allowed the state discovery of the doctor's reports and X-rays

17. Ibid. at 318.
18. State v. Thompson, 154 Wash. Dec. 91, 338 P.2d 319 (1959).
19. State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959).
20. Powell v. Supreior Court, 48 Cal. 2d 737, 312 P.2d 698 (1957).
21. State ex rel. Sadler v. Lakey, 319 P.2d 310 (1957).
22. People v. Rosario, 9 N.Y. 2d 286, 173 N.E.2d 881 (1961).
23. People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933).
24. Jones v. Superior Court of Nevada County, 22 Cal. Rptr. 879 (1962).

taken immediately following the accident. The defendant raised two constitutional issues. First he argued that the past cases which the discovery are not based on the court's power to develop rules of procedure but on notions of due process. And since there was no constitutional mandate to extend discovery to the prosecution it could not do without enabling statutory authority. The court answered that when it permitted the defendant pre-trial discovery in the past, it was not acting under constitutional compulsion, rather it was seeking the orderly ascertainment of truth. "That procedure should not be a one-way street."[25] Secondly, the defendant invoked the privilege against self-incrimination. The court noted that statutes requiring the defendant to disclose the names of alibi witnesses did not violate the privilege. By analogy a requirement of disclosing evidence pertaining to the affirmative defense of impotency would not violate the privilege either. The dissent was fearful not so much of the step taken but of its possible implication.

DISCOVERY UNDER STATUTES

The Federal Rules of Criminal Procedure have set the stage for statutory development of discovery in criminal cases. Under the federal system, Rules 15a, 16 and 17c pertain to discovery. Rule 15a enables the defendant to deposition a witness who "may be unable to attend or prevented from attending a trial," and the court may require a witness to produce designated papers and documents at the time and place of deposition.[26] Decisions under the rule have indicated that the prosecution must answer interrogatories propounded by the defense, unless the inquiry goes clearly beyond the scope of the case.[27]

Rule 16 allows discovery of documents and papers belonging to the defendant or seized from third persons and now in possession of the prosecution.[28] The underlying philosophy here is to allow the defendant access to material which would otherwise not be available to him.[29] Accordingly, materials which are readily available to the defendant or voluntary statements (such as confessions) made to authorties are not within the scope of the rule, since they were not obtained by seizure or process.[30] Further limitations are: (1) the right to inspect extends only to the defendant,[31] (2) a sufficient showing of materiality to the case is

25. Ibid. at 881.
26. "If it appears that a prospective witness may be unable to attend . . . a trial . . . the court . . . may . . . order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. . . ." Fed. R. Crim. p. 15(a).
27. United States v. Jerrold Electronics Corp., 168 F. Supp. 146 (E.D. Pa. 1958).
28. "Upon motion of a defendant at any time after the filing of the indictment of 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 and 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 his request is reasonable. . . ." Fed. R. Crim. P. 16.
29. United States v. Woodner, 24 F.R.D. 33 (D.C. N.Y. 1959).
30. Cooper v. United States, 282 F.2d 527 (9th Cir. 1960).
31. United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954).

needed,[32] (3) defendant's own statements or confession in the hands of the prosecution are ordinarily not available for inspection.[33]

Rule 17c authorizes the court to issue a *subpeona duces tecum* ordering the production of "books, documents or objects" before the commencement of the trial.[34] This rule does not purport to provide for additional means of discovery but is only a means to expedite the trial.[35] But in another sense this rule expands Rule 16 by allowing inspection of documents which would be admissible in evidence and have been obtained by the prosecution, voluntarily or otherwise.[36] Further, under this rule the defendant's own statements in the hands of the prosecution may be inspected under certain circumstances.[37] Thus written confessions are within Rule 17c although not within Rule 16.

Closely related in substance to the federal rules are the new Colorado Rules of Criminal Procedure adopted in 1961. As noted previously, Colorado courts were reluctant to recognize discovery.[38] Colorado Rules 15, 16 and 17 (corresponding to their federal counterparts) provide for discovery. Rule 15a, derived from the corresponding federal rule, allows the prosecution or the defendant to deposition a witness who "may be unable to attend a trial or hearing . . . to prevent injustice." Additionally the court order "may require that any designated books, papers, documents, photogrophs or tangible objects not privileged" to be produced.[39] Rule 15g, having no federal counterpart, insures the defendant acquisition of a transcribed copy of the deposition taken by the state, without cost.[40]

Rule 16(a) being substantially identical to the federal rule 16, allows the defendant access to books, papers, documents, photographs or tangible objects which were obtained by seizure.[41] Rule 16b enables the court to order the production of "any statements of the witness in the possession of the prosecuting attorney . . . which relate to the subject matter to which the witness has testified."[42] Rule 16c provides for the trial judge's inspection of a witness' testimony. However, this inspection is not allowed until

32. United States v. Rothman, 179 F. Supp. 935 (W.D. Pa. 1959); United States v. Klock, 100 F. Supp. 230 (N.D. N.Y. 1951).
33. Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Patrisso, 20 F.R.D. 576 (S.D. N.Y. 1957).
34. "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof be inspected by the parties and their attorneys." Fed. R. Crom. P. 17(c).
35. Bowman Dairy v. United States, 341 U.S. 214 (1951).
36. Ibid.
37. 57 Colum. L. Rev. 1113 (1957).
38. Walker v. People, supra note 12.
39. Colo. R. Crim. P. 15(a).
40. "If the deposition is taken at the instance of the State, a transcribed copy of it shall be furnished without cost to the defendant promptly upon his request." Colo. R. Crim. P. 15(g).
41. Colo. R. Crim. P. 16(a).
42. Colo. R. Crim. P. 16(b).

after the witness has testified. But 16c in recognizing the handicap of the defendant allows him recess if the court so desires.[43]

Rule 17c allowing inspection of "papers, documents, photographs or objects" is substantially similar to the corresponding federal rule.[44]

DISCOVERY IN WYOMING

Wyoming authority concerning the issue of pre-trial discovery is scant. Wyoming Statutes Sections 7-253 and 7-258 allow the prosecution or the defendant to deposition a material witness who is about to leave the state or who is sick or infirm. Section 7-255 allows the defendant to cross-examine the states' witness on deposition. Mention of the defendant's right to a duplicate copy of the deposition is wanting.[45]

Beyond the deposition statutes one could argue that Rule 1 of the Wyoming Rules of Civil Procedure provides for the application of the civil rules to the trial of criminal cases, thus unlocking civil discovery techniques to the accused.[46] But such a construction has been disapproved by other jurisdictions with similar code provisions.[47]

Aside from the statutes, *State v. Vines*,[48] though not directly in point, mentioned the existence of discovery. Not knowing whether he was charged as the principal or an accessory, the defendant filed a plea in abatement, praying that the information be abated, and he be granted a preliminary examination. Stating that the effect would have been practically the same had the defendant been charged in two separate counts as principal and an accessory, the court sustained the state's demurrer. The opinion reasoned that the defendant's main purpose in requesting a preliminary examination was to obtain a disclosure of the states' evidence. By way of dicta the court observed that there was no common law rule allowing discovery as a matter of right but, citing the *Lemon* case, the court recognized a body of authority for the view that a trial court had such discretionary power. Thus the dicta in the *Vines* case seems to incline to the third view—that discovery is allowable in the trial court's discretion—although the holding amounts to denial of the limited discovery sought by the accused.

CONCLUSIONS

In view of the desirability of providing discovery procedures, provisions should be added to the Wyoming criminal code to guard against injustice. In the main, the Federal and Colorado discovery procedures strike an equal balance between the rights of the defense and the prosecution. While providing the defendant with certain liberal discovery techniques,

43. Colo. R. Crim. P. 16(c).
44. Colo. R. Crim. P. 17(c).
45. Wyo. Stat. §§ 7-253 to 7-258 (1957).
46. Wyo. R. Civil P. 1.
47. United States v. Malnisky, 19 F.R.D. 426 (S.D. N.Y. 1956); State v. Rhoads, 6 Ohio 393, 91 N.E. 86 (1910).
48. 49 Wyo. 212, 54 P.2d 826 (1936).

opportunity for abuse by an unscrupulous opponent seems absent, inasmuch as the whole procedure is under the judge's control. Colorado Rule 15g which gives the defendant the right to a copy of a deposition taken by the State is especially desirable.

Shortcoming, however, exist. The point in time for allowing the inspection of the witness' prior statements should be changed to pre-trial rather than after the witness has testified. As the point in time for discovery now stands, the defendant enjoys no more right to inspect the witness' statements for inconsistency before trial than he enjoyed at common law. To allow the defendant access to the witness' prior statements for impeachment purposes after the witness has testified has always been the common law.[49] A defendant can successfully discover inconsistencies only when he has access to the witness' statements before the trial. No abuse will befall the procedure if the trial court has control of the process.

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49. 34 Rocky Mt. L. Rev. 33 (1961).