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Doctrine of Discovery in Criminal Law Procedure

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DOCTRINE OF DISCOVERY IN CRIMINAL LAW PROCEDURE

With the adoption of the federal rules of civil procedure by the United States government and most states, pre-trial discovery through depositions, interrogatories and conferences to prevent surprise has become the rule rather than the exception in American jurisprudence. On the other hand in ciminal prosecutions, where some persons feel that the need for an adequate discovery procedure is greater than in civil matters, the discovery process is very limited.

Discovery is the disclosure by the defendant of the facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the disclosure as a part of a cause of action pending or to be brought in another court, or as evidence of his rights or title in such proceedings.[1] Thus the defense or prosecution in a criminal case may get information which must be confined to facts which are material to the cause of action. The right of discovery is limited to matter which is material and pertinent to the issue in the case, and cannot be had for matter merely useful in supplying a clue whereby evidence may be found for use in an anticipated case.[2] Discovery will not be granted to a plaintiff to enable him to pry into the defendant's case or to find out the evidence by which the case will be supported, but it may be granted even though the materiality of evidence sought is not definitely established.[3] This note will present a discussion of the opposing views concerning development of discovery — a liberal discovery procedure favored by defense attorneys whereby many things such as confessions, lists of witnesses, grand jury proceedings and tangible evidence will be available to the defense, or a restricted discovery procedure, which is favored by the prosecution. This note will also present the case for and against disclosure, discovery

1. BLACK, LAW DICTIONARY (4th ed. 1957).
2. Eastern States Corp. v. Eisler, 181 Md. 526, 30 A.2d. 867, 868 (1943), Bank v. Bank, 180 Md. 254, 23 A.2d 700, 703 (1942).
3. Reynolds v. Boston & Maine Transp. Co., 98 N.H. 251, 98 A.2d 157 (1953).

by both the prosecution and defendant and some implications for reform.

Some courts view the main purposes of the rule authorizing pretrial discovery procedure as permitting, prior to trial, the narrowing of issues by elimination of matters not in controversy, the securing of information such as the existence of evidence, and the obtaining of evidence for use at the trial.[4] To obtain discovery, the defendant must show some better cause than a mere desire for the benefit of all information which has been obtained by the prosecution in their investigation of the crime.[5] For production purposes, it need only appear that the evidence is relevant and outside of any exclusionary rule.[6]

Under common law, no right for discovery existed.[7] But subsequent English cases established the contrary a century ago.[8] There may be inspection of a document where it is the subject or the substance of the indictment,[9] and also if the object is such a document or chattel as would require an investigation by experts in order to bring the facts before the jury [10] On the other hand, the defendant's privilege against self incrimination would prevent inspection by the prosecution.[11]

The prevailing law in the United States appears to be that four kinds of disclosure are available in criminal trials. Defendants have some rights to discovery of tangible evidence,[12] inspection of grand jury minutes[13] and lists of government witnesses.[14] The prosecution in certain states can obtain notice of defenses of alibi[15] or insanity [16]

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4. Maddox v. Grauman, 265 S.W.2d 939 (Ky 1954), Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955).

5. People v. Cooper, 53 Cal.2d 775, 3 Cal. Rptr. 148, 157, 349 P.2d. 964, 973 (1960).

6. Gordon v. United States, 344 U.S. 414 (1953).

7. Shores v. United States, 174 F.2d. 838, 843 (8th cir. 1949) Rex v. Holland, 4 T.R. 692, 100 Eng. Rep. 1248 (1792).

8. Regina v. Colucci, 3 Fost & F 103, 176 Eng. Rep. 46 (1861) Rex v. Spry & Dore, 3 Cox C.C. 221 (1848) Rex v. Harrie, 6 Car. P 105, 172 Eng. Rep. 1165 (1833).

9. Regina v. Colucci, 3 Fost & F 103, 176 Eng. Rep. 46 (1861), Rex v. Harrie, 6 Car. P 105, 172 Eng. Rep. 1165 (1833).

10. Rex v. Spry & Dore, 3 Cox C.C. 221 (1848).

11. Rex v. Purnell, 1 Wm. Bl. 36, 96 Eng. Rep. 20 (1748).

12. State v. Haas, 188 Md. 63, 69, 51 A.2d 647, (Ct. of Appeals 1947) (written confessions of the defendant), Application of Hughes, 181 Misc. 668, 673, 41 N.Y.S.2d. 843, 847 (Sup. Ct. 1943) (Guns and bullets), People v. Terzani, 149 Misc. 818, 269 N.Y.S. 620 (City. Ct. 1933) (finger prints on gun) State *ex rel* Wagner v. Circuit Court, 60 S.D. 115, 244 N.W 100 (1932) (Defendant indicted for defrauding county by overcharging for construction of bridge, allowed to inspect field notes of county engineer).

13. IOWA CODE ANN. § 772.4 (1949), KY. CRIM. CODE TIT. 6 § 110 (Carroll 1948).

14. State *ex. rel.* Porter v. District court, 220 P.2d. 1035 (Mont. 1950) Leahy v. State, 111 Tex. Crim. 570, 585-589, 13 S.W.2d. 874, 881-882 (1928).

15. ARIZ. REV. STAT. Rule of Crim. Proc. 192 (1956) IND. STAT. ANN. § 9-1633 (1933) IOWA CODE § 777.18 (1962) KAN. STAT. ANN. § 62-1341 (1964) MICH. CODE OF CRIM PROC. Ch. 8, 768.20 (1948) MINN. STAT. ANN. § 630.14 (1946) N.Y. CODE CRIM. PROC. § 295L (1935) OHIO REV. CODE ANN. § 2945.58 (Baldwin 1958) OKLA. STAT. ANN. 22 § 585 (1935) PA. STAT. ANN. R. of Crim. Proc. 312 (Supp. 1965) S.D. CODE § 34.2801 (Supp. 1960), UTAH CODE ANN. 77-22-17 (1953) VT. STAT. ANN. TIT. 13 § 6564 (1958), WIS. STAT. ANN. § 955.07 (1959).

Several states have attempted to codify discovery procedure by enacting statutes.[17]

The power to require production of tangible evidence is generally assumed to exist in the discretion of the trial court,[18] but in exercising their discretion, more courts have denied discovery on the broad ground that the defendants should not be allowed to pry into the prosecution's case.[19]

Advance notice of opposing witnesses' testimony is probably worth more to litigants than discovery of tangible evidence. In criminal trials, however, it is generally available, if at all, only through inspection of grand jury minutes;[20] and such inspection affords at best only partial discovery since the prosecution need not present its entire case to the grand jury.[21]

At least two state statutes give the accused the right to inspect grand jury minutes.[22] One jurisdiction rules that the defendant is not entitled, as of right, to obtain a copy or examine the minutes of the grand jury.[23] In the federal courts, however, defendants have generally been denied inspection under any circumstances.[24]

An important object of disclosure is to enable each side to know the names of opposition witnesses.[25] Common law did not

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16. ARIZ. REV. STAT. Rule of Crim. Proc. 192 (1956), ARK. STAT. ANN. § 43-1304 (Supp. 1961) CALIF. PEN. CODE § 1016 COLO. REV. STAT. ANN. § 39-8-1 (1953), FLA. STAT. § 909.17 (1963) GA. CODE § 27-1502 (1933), IND. ANN. STAT. § 9-1701 (1933) IOWA CODE § 777.18 (1962), LA. REV. STAT. § 15 268 (1950), MD. CRIM. PROC. RULE 725 (1957) MICH. CODE OF CRIM. PROC. Ch. 8, 768.21 (1948), OHIO. REV. CODE ANN. § 2943.03 (Baldwin, 1958), S.D. CODE § 34.20A01 (Supp. 1960), VT. STAT. ANN. TIT. 13, § 6561 (1958) WIS. STAT. § 957.11 (1959).

17. ALASKA STAT. Crim R. 16, 17 (c) (1963), FLA. STAT. § 925.04 (1963), MD. CRIM. PROC. R. 728 (1957) MO. ANN. STAT. R. of Sup. Ct. Crim. Proc. R. 25.19 (1953) Pa. STAT. ANN. R. of Crim. Proc. 310 (Supp. 1965) TEXAS R. CRIM. P Art. 39.14 (1966) W VA. CODE ANN. § 6164 (S) (Supp. 1965).

18. Commonwealth v. Jordon, 207 Mass. 259, 265, 93 N.E. 809, 811 (1911), State v. DiNoi, 59 R.I. 348, 357, 195 Atl. 497, 501 (1937).

19. State v. Superior Ct. of Santa Cruz County, 81 Ariz. 127, 302 P.2d. 263 (1956) People v. Skoyec, 183 Misc. 764, 50 N.Y.S.2d. 438 (Sup. Ct. 1944).

20. McAden v. State, 155 Fla. 523, 31 So.2d. 33 (1945), Poyner v. Commonwealth, 274 Ky. 813, 120 S.W.2d. 649 (Ct. App. 1938).

21. The prosecutor need present only enough evidence to satisfy statutory requirements for bringing of indictments. MINN. STAT. ANN. § 628.03 (1947) provides the grand jury shall find an indictment when all the evidence taken together is such as in its judgment, would, if unexplained or uncontradicted warrant a conviction by a trial jury. N.D. CENT. CODE 29-10-39 (1960) provides the grand jurors shall find an indictment charging the defendant with the commission of an offense when all the evidence before them, taken together, is such as in their judgment would warrant a conviction by the trial jury.

22. *Supra* note 13 Most states have statutes requiring secrecy of grand jury proceedings *e. g.* N.D. CENT. CODE 29-10-29 (1960) "Every member of a grand jury must keep secret whatever he himself or any other grand juror may have said, or in what matter he or any other grand juror may have voted on a matter before the jurors"

23. Commonwealth v. Baliro, 209 N.E.2d. 308, 316 (Mass. 1965) Commonwealth v. Galvin, 323 Mass. 211, 215, 80 N.E.2d 825, 830 (1948) It was within the discretion of the court of grant or refuse the motion for grand jury minutes.

24. United States v. Gonzalez, 38 F.R.D. 326, 328 (S.D.N.Y. 1965) *e. g.* United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923) (per L. Hand, J. "Inspection is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will.").

25. State *ex rel.* Porter v. District Court 220 P.2d 1035 (Mont. 1950) Leahy v. State, 111 Tex. Crim. 570, 585-589, 130 S.W.2d 874, 881-882 (1928).

require the state to furnish defendant in the indictment, in the information, or elsewhere with the names of its witnesses.[26] In most states, by case law or statute, the names of all the witnesses on whose evidence the indictment or information was based shall be endorsed thereon before it is presented.[27] Even a list requirement covering all witnesses which the prosecution intends to produce at trial does not necessarily prevent the production of new witnesses. Generally, the prosecutor can produce unlisted witnesses if he did not know of them when he submitted his list to the defendant.[28] In addition, witnesses can usually be called in rebuttal without prior notice.[29]

A form of disclosure especially important to prosecutors is advance notice of the theory of the defendant's case. While the state must reveal in the indictment or information the nature of its charge against an accused, under common law the defendant need give no notice of his defense in his plea of "not guilty" Ordinarily, such defenses as entrapment, alibi, self-defense and insanity may be offered at the trial without prior warning.[30]

A number of states, North Dakota not being among them, have changed the common law rule by enacting statutes requiring defendants to plead specially, defenses of alibi[31] or insanity [32] This gives notice of the defenses to be relied on and saves the state expense in preparing its case since it knows for what it has to prepare. The purpose of the alibi statutes was to prevent a defendant from obtaining acquittal of a crime of which he was guilty by calling a number of witnesses to testify to a false alibi with no prior opportunity afforded to the District Attorney to make any investigation of them or their story [33] If the defense is not pleaded the court may exclude evidence tending to prove it.[34] The statutes have been construed, however, to permit the defendant to establish a defense anytime by his own testimony [35] The Federal Rules of Criminal Procedure contain no provision for disclosure of defenses.

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26. State v. Daspit, 129 La. 752, 56 So. 661 (1911).
27. *E. g.*, N. D. CENT. CODE 29-11-57 (1960).
28. N.D. CENT. CODE 29-11-57, (1960), State v. Grams, 65 N.D. 400, 259 N.W 86 (1935) See People v. Weisberg, 396 Ill. 412, 71 N.E.2d. 671 (1947).
29. Watkins v. People, 408 P.2d 425 (Colo. 1965), Schreiner v. People, 95 Colo. 392, 36 P.2d. 764 (1934).
30. Romero v. Squier, 133 F.2d. 528, 532 (9th Cir. 1933) (Entrapment), Shields v. State, 221 Ala. 321, 128 So. 786 (1930) (Self-defense) Leonard v. State, 17 Ariz. 293, 299, 151 Pac. 947, 949 (1915) (Alibi).
31. *Supra* note 15.
32. *Supra* note 16.
33. People v. Rakiec, 289 N.Y. 306, 45 N.E.2d. 812 (Ct. App. 1942).

DISCOVERY IN FEDERAL CRIMINAL PROCEDURE

While it often is assumed that there was no discovery in the federal courts before the adoption of the Federal Rules of Criminal Procedure, the cases reveal that discovery was sometimes granted. In perhaps the first case on the subject, Chief Justice Marshall, sitting as a circuit Justice, upheld a subpoena *duces tecum* issued to the President of the United States directing him to bring any paper of which the party praying has a right to avail himself as testimony [36] He stated that "Such motion for subpoena *duces tecum* is to the discretion of the court."[37]

Apparently no decisions involving discovery were rendered in reported decisions for more than a century following Marshall's precedent-setting decision. In 1918 the discovery procedure was extended to bankruptcy proceedings. It was held that in the course of an investigation into a bankrupt's affairs, under the Bankruptcy Act of 1898, the testimony of witnesses was taken stenographically before a referee and the bankrupt was entitled to a copy of the testimony [38] The court pointed out that the proceedings might result in contempt and criminal proceedings against the bankrupt.[39]

A case frequently cited by opponents of discovery is *United States v Garsson.*[40] In respect to discovery the case held that a motion by a defendant to inspect the minutes of the grand jury should be denied, and District Judge Learned Hand condemned such motions in strong language.[41]

A defendant charged with perjury on the basis of testimony given before a representative of the Securities and Exchange Commission applied for an order directing that the defendant be furnished with a copy of testimony taken at an investigation made by the commission through its representatives. The federal district court denied the application.[42] The court concluded that the copy of the testimony would be of no help to the defendant in his trial and that the defendant could have a fair trial without it. The

34. *E. g.*, MINN. STAT. ANN. § 630.14 (1946).
35. *Supra* note 33.
36. United States v. Burr., 25 Fed. Cas. 30, 35 (C.C.D.Va. 1807) "The court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense An accused person has the right, before indictment found, to compel, by ways of precaution, the production of letters containing statements of his conduct written by the person who is declared to be the essential witness against him. And in such case he is entitled to the production of the original letter, a copy not being sufficient."
37. *Ibid.*
38. *In re* Greenbaum, 249 Fed. 468 (6th Cir. 1918).
39. *In re* Greenbaum, *supra*, note 38.
40. 291 Fed. 646, 649 (S.D.N.Y. 1923).
41. *Infra*, note 70.
42. United States v. Mascuch, 30 F Supp. 976, 978 (S.D.N.Y. 1939).

defendant argued that the court had discretionary power to grant discovery The court did not deny that it had discretionary power, but added that there was no absolute right to discovery The burden of showing good reason for inspection is on the defendant, and the government need not show disadvantage.[43]

In the first Supreme Court decision to touch on discovery, the court did not reject the right to discovery in criminal cases.[44] Defendant's plea at bar claimed immunity from prosecution because of prior incriminating testimony given under compulsion by the petitioner at an investigation conducted by the Securities and Exchange Commission. The plea was accompanied by an application for production of a transcript of the testimony The Court held that the district court had erred in not ordering production, but whether the complete transcript should have been produced or only enough to show whether the testimony of the defendant was a proper foundation for amnesty claimed, was in the discretion of the district court.[45]

In the last federal decision prior to the adoption of the Federal Rules of Criminal Procedure, it was held the defendant was entitled to inspection of the contents of a package containing a threatening letter alleged to have been sent through the mails.[46] On the facts there was no danger of tampering with witnesses or fabrication of evidence by the defendant. Refusal of inspection would probably produce delays during the trial.

Rule 16 of the Federal Criminal Rules, entitled "Discovery and Inspection," provides the following:

> 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, paper, 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 order shall specify the time, places and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.[47]

Rule 16 of the Federal Rules of Criminal Procedure affords the

43. *Ibid.*
44. Edwards v. United States, 312 U.S. 473 (1941).
45. *Ibid.*
46. United States v. Warren, 53 F. Supp. 435, 436 (D. Conn. 1944).
47. 18 U.S.C., Fed. R. Crim. P 16, App. (1964).

defendant limited right to pre-trial inspection for the purpose of discovery Since the rule provides that the court "may" rather than that the court "shall" direct inspection, the court has discretion to deny inspection on grounds not specified in the rule.[48]

In the only Supreme Court decision construing Rule 16,[49] Justice Minton stated for the Court:

> It was intended by the rules to give some measure of discovery Rule 16 was adopted for that purpose. It gave discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be numerous and difficult to identify The Rule was to apply not only to documents and other materials belonging to the defendant, but also to those belonging to others which had been obtained by seizure or process. This was a departure from what had theretofore been allowed in criminal cases.
>
> Rule 16 deals with documents and other materials that are in possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such materials so as to inform himself.[50]

The importance of this case rests in its statement of the intention and application of Rule 16. The case points out that Rule 16 deals with documents and other materials that are in possession of the Government and provides how they may be available to the defendant for his information.

The only language of the rule which has received any degree of explicit construction is the requirement that the designated materials be "obtained from" the defendant. In *United States v Black*,[51] however, statements made by the defendant to Government agents were held outside the coverage of Rule 16, on the ground that the rule applied only to those documents and objects which were in existence and in the custody of a defendant or other person prior to the government's obtainment of them by process or seizure.

48. United States v. Schneiderman, 104 F Supp. 405 (S.D. Cal. 1952).
49. Bowman Dairy v. United States, 341 U.S. 214, 218 (1951).
50. *Ibid.*
51. 6 F.R.D. 270 (N.D. Ind. 1946).

It follows that any statement made to government agents after the commission of the alleged crime are excluded from inspection under the rule.[52]

Rule 17 (C) entitled "For Production of Documentary Evidence and of Objects" provides:

> 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 on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. 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 evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.[53]

The wording of this rule does not contain the express limitations upon the source of the documents and papers or the manner in which they were obtained that exist under Rule 16. But, as the Supreme Court made clear in *Bowman Dairy Co. v United States*,[54] Rule 17 was not intended to give a right of discovery in the broadest terms or to authorize a "fishing expedition." Its chief innovation was to expediate the trial for the inspection of the subpoenaed materials.[55]

An additional element of discretion may be found in the provision of Rule 17 (C) which allows, but does not require, pre-trial inspection. It is pointed out that whether materials subject to subpoena are to be produced and inspected prior to trial rests within the sound discretion of the court.[56] Thus, before granting a motion for pre-trial inspection under Rule 17 (C), the trial court should exercise its discretion to require some showing of specificity, materiality, and pre-trial necessity, the defendant can inspect under Rule 17 (C) materials which might not be available to him under Rule 16, such as his statements or confessions, those of other persons, and materials given to or prepared by the government.

Three arguments may be advanced in favor of granting discovery not specifically authorized by Rules 16 and 17 (C) They

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52. *Ibid.*
53. 18 U.S.C., Fed. R. Crim. P 17 (C), App. (1964).
54. *Supra* note 49.
55. *Supra* note 49 It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 (C) was not intended to provide an additional means of discovery.
56. United States v. Janizzio, 22 F.R.D. 223, 227 (D. Ct. Del 1958), United States v. Ward, 120 F Supp. 57, 59 (S.D.N.y. 1954), United States v. Schneiderman, 104 F Supp. 405 (S.D. Cal. 1952).

are: (1) court's inherent power, (2) court's supervisory power over public officers, (3) Criminal Rule 57 (b)

In the first place a court has inherent power to order discovery As early as 1927 it was asserted that only a minority of the state courts deny inherent power to order discovery [57] In later years, it was pointed out that the "majority of states, although without statute or rule of court on the subject, allow discovery in criminal cases at the discretion of the trial court."[58] The doctrine of inherent power was applied in a decision of the Court of Appeals of the Eighth circuit.[59] The Supreme Court has also relied on the doctrine of inherent power in a case where the United States attorney was unwilling to return books and papers acquired by illegal search and seizure.[60]

In the second place the courts have supervisory powers over public officers. This is based on a 1927 statement by Chief Justice Cardozo of the New York Court of Appeals.[61] "The power frequently asserted to compel the return of property illegally impounded is based upon the assumption of a supervisory jurisdiction over the acts of public prosecutors. There may be something of a kinship here to the power to compel inspection in furtherance of justice."[62]

In the third place, discovery may be available under Criminal Rule 57 (B) [63] This rule seems to empower the courts to follow common law precedents not written into the rules and to preserve the inherent power of the courts to develop the law An example of this is that the rules are silent as to inspection of documents during the trial. Before the adoption of the rules, the court granted motions for inspection at the trial.[64] After the rules went into effect the Supreme Court held erroneous the denial of a motion for production and inspection at the trial.[65]

CASE FOR AND AGAINST EXPANDING DISCOVERY

The major argument against criminal discovery is that, instead

57. People v. Gatti, 167 Misc. 545, 4 N.Y.S.2d. 130 (City Ct. 1938) People *ex rel* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (Sup. Ct. 1927).

58. State v. Superior Court of Santa Cruz County, 81 Ariz. 127, 302 P.2d. 263 (1956) This case is very significant as Arizona had a rule of court modeled on Federal Rule 16, yet relief was given on the theory of inherent power. People v. Skoyec, 183 Misc. 764, 50 N.Y.S.2d. 438 (Sup. Ct. 1944).

59. Shores v. United States, 174 F.2d. 838, 843 (8th Cir. 1949).

60. Wise v. Henkel, 220 U.S. 556, 558 (1911).

61. People *ex rel.* Lemon v. Supreme Court, *supra* note 57, See also Wise v. Henkel, *supra* note 60.

62. People *ex rel.* Lemon v. Supreme Court, *supra* note 57 at 85.

63. 18 U.S.C., Fed R. Crim. P 57 (b) app. (1964). "If no procedure is specially prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

64. United States v. Krulewitch, 145 F.2d. 76, 78 (2d Cir. 1944).

65. Gordon v. United States, 344 U.S. 414, 418 (1953).

of aiding, it would deter accurate fact-finding. Advance discovery, it is said, gives defendants the opportunity to falsify and suppress evidence.[66] The criminal, if he knows the case against him, will procure perjured testimony to establish a false defense.[67] In addition, the argument continues, the accused, if informed of adverse witnesses' testimony, may cajole, bribe, or frighten them into changing their stories.[68] Such misuse of discovery is more likely in criminal than in civil cases, because litigants have a much higher stake in the outcome, and their actions may keep witnesses from coming forward with information during investigation of the crime.[69]

Another major argument is that the prosecution is at a disadvantage. It begins with the premise that criminal procedure is weighted in favor of the accused, and concludes that it would be unjust to the public to give the defendants the additional help of discovery In a leading case against discovery,[70] Judge Hand stated the argument:

> 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 the 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. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and watery sentiment that obstructs, delays and defects the prosecution of crime.[71]

In civil litigation parties are on an equal footing, but in criminal trials such rules as the presumption of innocence give the accused all the advantages. In the *Rhoads* case it was stated that "in these days, criminals are both skilled and cunning, and it is a contest between the people and criminals for the mastery "[72]

66. State v. Tune, 13 N.J. 203, 98 A.2d. 881, 884 (1953), State v. Rhoads, 81 Ohio St. 397, 423-4, 91 N.E. 186, 192 (1910), See generally Symposia, 33 F.R.D. 47, (1964).
67. *Supra* note 66.
68. *Supra* note 66.
69. State v. Tune, 13 N.J. 203, 98 A.2d. 881, 884 (1953) People v. DiCarlo, 161 Misc. 484, 485, 486, 292 N.Y. Supp. 252, 254 (Sup. Ct. 1936).
70. United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923).
71. *Ibid.*
72. United States v. Rhoads, 81 Ohio St. 397, 423, 424, 91 N.E. 186, 192 (1910).

Moreover, while both sides must disclose their evidence in civil trials, this element of reciprocity is lacking in criminal cases; because of the accused's constitutional and statutory protections against self-incrimination, the state has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories. As stated in a leading case which dealt with lack of reciprocity:[73]

> The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then, why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule, to which we have been referred, nor the supposed sense of fair play, can be perverted as to sanction the demands allowed in this case.[74]

It has been pointed out that the right to discovery exists in civil cases, therefore, it should exist in criminal cases.[75] There is a vast difference between a civil and criminal case in that while both are a search for the truth, there is no mutual exchange of information in a criminal case as exists in a civil case. In a criminal case there is a one-sided search for the truth and there can be no equal exchange of information due to the very nature of the proceedings. This nature is simply that very little discovery is allowed by both parties in a criminal case.

Unfair disadvantage is advanced by the defense as an argument for not requiring the defendant to serve notice of special defenses such as insanity or alibi. This argument has been losing ground as evidenced by the fact that many states are passing statutes requiring notice.[76]

Increased reliance upon the trial as the principal device for protecting the accused makes it imperative that the defense come

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73. *Ibid.*

74. *Supra* note 72 See State v. Bunk, 63 A.2d 842, (N.J. City. Ct. 1949) "The element of reciprocity is present in the conduct of civil cases. Each party may examine the other, force disclosure of material evidence and thus reduce to a minimum the element of surprise or chance in the trial. In criminal causes no such reciprocity is possible. The State could not examine the defendant before trial without his consent, nor could any rule of court force such examination."

State v. Tune, *supra* note 66 , This case ties in with the above two cases by stating: "Except for its right to demand particulars from the defendant as to any alibi on which he intends to rely, the State is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforseeabe evidence he desires in his own defence. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable."

75. State v. Trippett, 317 Mo. 319, 296 S.W. 132, 135 (1927).

76. See notes 15 (alibi) and 16 (insanity).

to trial as well equipped as the prosecution to raise "doubt in the minds of any one of the twelve" men in the jury box.[77] Particularly in a system based, as is ours, upon a single trial held on a single occasion, the parties must come to trial prepared to make the most of their presentation on that occasion in their search for the truth.

A criminal prosecution should not be treated as a game.[78] That is to say, artificial barriers should not be erected to make it more difficult for a defendant to prove his innocence. It is the duty of the government to give all possible protection to the innocent as well as to to punish the guilty.[79] The defendant is entitled to have every opportunity to prove his defense.[80] Perhaps the principal argument is that discovery is necessary to help the defendant prepare his case.[81]

The principal role of an attorney is to advise his client. For his advice to be meaningful, it must be based upon knowledge of the facts and the consequences. One of these consequences is the probability of conviction if the client goes to trial. It may be impossible for counsel to make any intelligent evaluation of the alternatives if he knows only what his client has told him and what he has discovered on his own. This can be effectively shown by the recent Supreme Court decision which provides that the accused must be informed of constitutional privilege against self-incrimination and that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[82] This decision may be important to discovery procedure as it allows the accused's attorney to be present during the questioning. The attorney has immediately any statements that the accused may make.

The argument is sometimes made that discovery will encourage the defense counsel to be careless in trial preparation. This argument was refuted by a recent case which stated that: "Requiring government disclosure will not encourage defense counsel to be careless in trial preparation since there can be no assurance that

77. United States v. Garsson, *supra* note 70.

78. State v. Tune, 17 N.J. 203, 98 A.2d 881, 894-895 (1953), dissent by Brennan, J., See generally Symposia, 33 F.R.D. 47, 82 (1964).

79. United States v. Ebiling, 146 F.2d. 254, 258 (2d. Cir. 1944), State v. Tune, *supra* note 78, dissenting opinion of Brennan, J. Canon 5 of Professional Ethics adopted by the American Bar Association provides: "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."

80. United States v. Rich, 6 Alaska 670 (3rd Div. 1922).

81. *Supra* note 80.

82. See Miranda v. Arizona, 384 U.S. 436, 478, 479 (1966), Escobedo v. Illinois, 378 U.S. 478 (1964).

the government, even with all its resources, will discover all significant evidence favorable to the defense."[83]

The argument is made that the defendant needs no disclosure since he knows what he did, and, therefore, has all the information necessary.[84] This argument lacks sincerity because only guilty defendants could know the facts and details of the crime. Presumed to be innocent rather than guilty, it must be assumed "that he is ignorant of the facts on which the pleader founds his charges."[85]

In having discovery for the defendant, the prosecution should disclose any evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt as to the prosecution's duty to disclose evidence that may reasonably be considered admissible and useful to defense, the prosecution is not to decide for the court what is admissible or for the defense what is useful.[86] Discovery is designed to ascertain the truth in criminal as well as in civil cases.[87] Absent some governmental requirement that information be kept confidental 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.[88] To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.[89]

Just as the State may have a legitimate interest in keeping confidential certain information "for the purpose of effective law enforcement," it may also in special circumstances have cogent reasons for keeping confidential — in order to give some assurance

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83. Levin v. Katzenbach, 34 U.S.L. Week 2652 (D.C. Cir. May 19, 1966).

84. United States v. Smith, 16 F.R.D. 372, 375 (W.D. Mo. 1954).

85. *Supra* note 84 United States v. Allied Chemical & Dye Corp., 42 F Supp. 425 (S.D.N.Y. 1941) Fontana v. United States, 262 F. 283, 286 (C.A. 8th Cir. 1919).

86. Barbee v. Warden, Maryland Penitentiary, 331 F.2d. 842, 845 (4th Cir. 1964), Griffin v. United States, 183 F.2d 990, 993 (D.C.Cir. 1950), Judge Edgerton stated the role of prosecutor is to uphold justice, not to win a case. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation at all, and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice shall be done."

87. Jones v. Superior Court of Nevada County, 58 Cal.2d. 56, 22 Cal. Rptr. 879, 372 P.2d. 919, 920 (1962), See Greyhound Corp v. Superior Court, 56 Cal. 2d. 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).

88. Jones v. Superior Court of Nevada County, *supra* note 87 Powell v. Superior Court, 48 Cal.2d. 704, 312 P.2d. 698, 699 (1957), When the Supreme Court first granted the defendant the right to pretrial discovery, it referred to the broad basis of discovery announced in *Riser* and added. "To deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather only through the truth upon a public trial fair to the defendant and the state alike." People v. Riser, 47 Cal.2d. 566, 305 P.2d 1, 13 (1956), Defendant can compel the People to produce statements of prospective witnesses relating to matters covered in their testimony.

89. *Ibid.*

that the truth can be presented — the names of prospective witnesses. In a California case, *People v Lopez*,[90] the defendant, a previously convicted criminal, was refused immediate disclosure of the State's witnesses' names. Two witnesses informed police that they were "in fear of physical injury or death and they would not like anyone to know who they are." The court concluded that there must be a balancing of the right of a defendant to discover potentially material witnesses with the probability that such discovery might lead to the elimination of an adverse witness or the influencing of his testimony In balancing these competing factors the trial court must be allowed great discretion. The State was ordered to produce the information at least twenty-four hours prior to the time the subject witnesses were to be called.[92]

Practical discovery by the prosecution is far reaching, and it cannot in any sense be matched by what is available to the defendant or by what he can keep from the prosecution even when his immunity from self-incrimination is thrown into the scales. While the possibility that the defendant may produce a hitherto undisclosed witness or theory of defense is always present, the opportunity for surprise is rendered practically illusory by the government's broad investigatory powers and by the requirement in many states that the defenses of alibi and insanity be specially pleaded.[93]

California, which is the leader of the states in advancing discovery, also provides that pre-trial discovery should not be a one-way street. The Supreme Court of California[94] upheld that portion of a trial court's order which required the defendant in a rape case to reveal the names and addresses of the witnesses he intended to call and to produce before trial reports and x-rays he intended to introduce in evidence to support his defense of impotence. The court concluded that, absent the privilege against self-incrimination or other privilege provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access by discovery procedures to evidence that can throw light on issues in the case.[95]

The most striking aspect of these cases is that the principal initiators of change have been trial court judges.[96] The trial judge

90. 32. Cal. Rptr. 424, 384 P.2d. 16, 29 (1963).
91. *Ibid.*
92. *Ibid.*
93. See notes 15 (alibi) and 16 (insanity).
94. Jones v. Superior Court of Nevada County, *supra* note 87.
95. *Ibid.*
96. State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954), State v. Haas, 188 Md. 63, 51 A.2d 647 (Ct. of Appeals 1947), State *ex rel.* Sadler v. Lackey, 319 P.2d. 610 (Okla. Crim. App. 1957), State v. Thompson, 338 P.2d, 319 (Wash. 1959).
97. State v. Tune, 13 N.J. 203, 98 A.2d. 881 (1953).

is more likely to appreciate the policy factors behind granting or denying discovery He sees cases at the formative stage where the advantages of discovery techniques in civil cases are most striking, he sees the burden on the defense counsel in criminal cases prior to trial, and he sees the ignorance of defendants entering a guilty plea. He is able realistically to determine the relative advantages each side will have with or without discovery He also knows personally the attorneys appearing before him with such requests and is able to appraise their integrity and trustworthiness in using information derived from the prosecutor's case.

In ordering discovery, the trial courts have acted on a long standing invitation issued by the appellate court that it is within the discretion of the trial court to grant or deny requests for discovery This is not necessarily true all the time as is shown by a New Jersey case[97] where the appellate court ruled on discovery In that case the trial court did exercise its discretion and granted discovery, but was reversed by the Supreme Court. In 1958 the New Jersey court reversed its stand in *State v Johnson.*[98] In that case the trial court had been impressed with the decision in the *Tune* case.[99] The appellate court, largely because of changes in personnel between 1953 and 1958, did not cling to its restrictive view of discovery, but changed its approach and provided a liberal basis upon which discovery of a confession could be obtained.[100]

In California, the most liberal in providing pre-trial discovery, the change has also come through the appellate courts starting with *Powell v Superior Court,* rather than through the trial courts.[101]

If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties, but rather must assure that such inequality will be minimized as much as human ingenuity can do so.

A possible solution is the creation of a free deposition and discovery procedure[102] 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. If the trial is to be the occasion at which well-prepared adversaries test each other's evidence and legal contentions

98. 28 N.J. 133, 145 A.2d. 313 (1958).
99. *Supra* note 97.
100. *Supra* note 98, Defendant previously couldn't inspect his own previous statements but the court provided defendant could inspect statements.
101. See Cal.2d. 704, 312 P.2d 698 (1957).
102. See generally, Goldstein, *Advantages in Criminal Procedure,* 69 YALE L. J., 1149 1192 (1960).

in the best tradition of the adversary system, there can be no substitute for a deposition, discovery, and pre-trial procedure.

The argument customarily advanced in opposition to such a reform is that advice to the accused as to details of the case against him will be an invitation to fabricate evidence, to suborn others to do so, or to intimidate the witnesses against him.[103] This argument assumes that all persons are guilty, and since they expect to be convicted for what they did, they can be expected to take any measure necessary to prevent conviction. This view treats existing laws against bribing and intimidating witnesses as ineffective.

If full discovery were adopted, it would be open to the prosecution to claim that it would not have as much access to the defendant himself as he would have all the prosecution's witnesses. Three responses may be made to this line of argument.[104]

The first 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. This would be both for his own sake and for the benefit of society seeking to impress upon police and prosecutors the high obligation to proceed against a citizen only when they have independent evidence of his crime.

The second would demand of the accused who wishes to participate in an intelligent procedural system that he pay a price for such participation. This would involve a waiver of his special status as an accused, though not his status as witness in return for full rights of discovery because he would still have the privilege of the witness to refuse to answer particular incriminating questions.

The third would be as a condition of enjoying full rights of discovery, the accused could be required to waive all immunity from self-incrimination regarding the crime charged, at the time he enters his plea of not guilty He would then become as much subject to deposition, discovery and testimony at trial as is any witness in a civil case. The choice would be his to make — to participate in either a criminal or a civil type procedural system.

FEDERAL RULES OF CRIMINAL PROCEDURE PROPOSALS

The Advisory Committee on Criminal Rules appointed by the Chief Justice of the United States under the program of the Judicial Conference of the United States submitted in December of 1962 a draft of proposed amendments to certain of the Federal Rules of

103. See notes 66, 69, and 70.
104. *Supra* note 102, 1197-1198.
105. 31 F.R.D. 665-694 (1962).
106. 34 F.R.D. 411, 418-426 (1965).

Criminal Procedure.[105] In March of 1964, a new draft[106] was submitted which supersedes the 1962 draft. It withdrew some of the proposals made, changed the language of others, and added a number of new proposals not previously made public.

The committee withdrew its earlier proposal requiring defendants to give advance notice if they intended to rely on an alibi. The committee proposed in Rule 12.1, that notice be given by a defendant who intends to rely on the defense of insanity The special nature of the insanity defense, with the expert testimony required to combat it, lends merit to this proposal.

Rule 15 would be amended to permit depositions to be taken at the instance of the government. A new subdivision (G) would be added to provide protection for the defendant where this procedure is employed.

Rule 16 would be changed in many ways. Subdivision (A) would extend discovery to confessions of the defendant, the reports of physical examinations, scientific tests and the like, and to recorded testimony of the defendant before a grand jury Though the court would apparently have discretion whether to permit such discovery, no standard is stated which the defendant must satisfy Subdivision (B) would permit inspection by the defendant of other documents or tangible objects in the possession or control of the government subject to the limitations of the Jencks Act[107] and subject to a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. Subdivisions (D) through (G) would spell out procedure for discovery in a manner similiar to that familiar under the civil Rules.

Subdivision 16 (C) would provide that if the court grants discovery sought by the defendant under Rule 16, it may condition its order by requiring the defendant to permit inspection by the government of statements, scientific, or medical reports, documents, and other tangible objects, which the defendant intends to produce at the trial and which are within his possession or control. In a Committee Note, an alternative draft of Rule 16 (C) is set forth which would allow discovery by the government of matter which the defendant intends to produce at the trial regardless of whether the defendant has himself sought discovery Proposed Rule 17.1 would permit pre-trial conferences in criminal cases.

Naturally these proposals raise some questions of constitution-

107. 18 U.S.C. § 3500 (1964). In any criminal prosecution brought by the United States a statement made by a government witness (other than the defendant) to an agent of the Government shall not be subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

ality, especially in terms of the privilege against self-incrimination. With respect to the proposal which conditions the government's right to discovery on the defendant having sought relief under Rule 16, it might be argued that by his own request for discovery, the defendant has waived his right to object on constitutional grounds to the discovery by the government of the documents or objects in his own possession.

CONCLUSION

A trend toward an expanded right of discovery for defendants in criminal cases is underway in state and federal courts. The availability of this right, together with constitutional requirements that every accused be provided with legally trained counsel to represent him, will reduce some of the disadvantages suffered by an indigent defendant.

It would be a favorable result to allow the defendant the right to his confession, tangible evidence, witnesses names and addresses, to confessions of a co-defendant and to records of prior convictions, subject to a protective order If the prosecution has any reason to believe that a certain counsel or a certain defendant is going to intimidate or bribe anyone, let the prosecution appear before the trial judge and get an order protecting it from the ordinary obligation of disclosure. If disclosure were in the discretion of a judge, there could be a lack of uniformity and a "shopping for judges."[108] People might continue their cases until certain judges who are known to be favorable toward discovery would try the case. Actually discretion of the trial judge has been pretty much the rule in criminal discovery for many years with the result that in most jurisdictions there has been no such discovery The advantages of discovery decisively outweigh the disadvantages. In the long run, the possibility of abuse of discovery, although real, should not be permitted to condemn the entire technique itself.

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108. See generally Symposia, 33 F.R.D. 47, 96 (1964).