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## Criminal Procedure - Discovery - Judicial Discretion in Trial Court

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objection to the motion for discovery or deposition must be seasonably made<sup>17</sup> and carries with it the burden of proof.<sup>18</sup> The privilege, if recognized, relates to the communication.<sup>19</sup> But since copies of the return retained by the taxpayer have been held "communications,"<sup>20</sup> they are treated the same as returns in the government files.

Pursuant to section 6103 of the Internal Revenue Code of 1954, the Secretary of the Treasury has formulated regulations allowing inspection by an individual (or his "duly appointed attorney in fact") of his tax returns,<sup>21</sup> and provided for the furnishing of copies upon the payment of a reasonable fee.<sup>22</sup> In light of this, the majority of courts hold that a taxpayer who has not retained copies of his returns has such potential control of them that he may be ordered to get a copy and produce it for inspection and copying.<sup>23</sup> But after production, the courts will protect parties against unauthorized disclosure of the discovered information.<sup>24</sup>

What is the law in North Dakota? No case on this point has been decided by the North Dakota Supreme Court, the Eighth Circuit Court of Appeals or the Federal District Court in North Dakota. However, all three of the cases decided in the Federal District Courts in the other districts of the Eighth Circuit have held with the majority.<sup>25</sup>

PEDAR C. WOLD

CRIMINAL PROCEDURE — DISCOVERY — JUDICIAL DISCRETION IN TRIAL COURT — Defendant was charged with the murder of his wife. Defendant's counsel filed a motion for an order requiring the prosecuting attorney to produce the transcript of defendant's confession, taken shortly after his wife's death, so that a psychiatrist might examine it as a necessary preliminary to the psychiatric opinion he had been asked to render. The trial judge denied the motion on the grounds, "that there is no statute, case or rule in this state which in a criminal case provides for or authorizes any discovery such as defendant requests." On appeal, the Supreme Court of Michigan *held*, that an order to allow inspection of a written confession taken by a prosecuting attorney from an accused person rests within the sound discretion of the trial judge. *People v. Johnson*, 97 N.W.2d 739 (Mich. 1959).

The position many courts have taken is that the defense counsel in a

F. 2d 625 (3rd Cir. 1950), *cert. denied*, 340 U. S. 931 (1951), the court, while denying defendant's motion for discovery of tax returns under Rule 34 on the grounds that "good cause" was not shown, stated a reluctance to recognize the "no privilege" rule.

17. *Wilson v. David*, 21 F.R.D. 217 (W. D. Mich. 1957).

18. *McNeice v. Oil Carriers Joint Venture*, 22 F.R.D. 14 (E.D. Pa. 1958).

19. *United States v. O'Mara*, 122 F. Supp. 399 (D.D.C. 1954).

20. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn. 1940).

21. 26 C.F.R. § 458.50-.57 (1949).

22. 26 C.F.R. § 458.205 (Supp. 1957).

23. See, e.g., *Reeves v. Pennsylvania Ry.*, 80 F. Supp. 107 (D. Del. 1948), where it was also held that the movant must pay the expense involved. In *Mullen v. Mullen*, 14 F.R.D. 142 (D. Alaska 1953), defendant, on motion under Rule 34, was required to produce his wife's personal tax returns in the absence of denial of possession or control.

24. The proper form of the motion for production where there are no retained copies is to require the production of *copies*; a motion for the production of the returns is unenforceable since the Internal Revenue Service retains these in its files. See *Reeves v. Pennsylvania Ry.*, *supra*.

24. *Baim & Blank, Inc. v. Bruno-New York, Inc.*, 17 F.R.D. 346 (S.D.N.Y. 1955).

25. *Karlsson v. Wolfson*, 18 F.R.D. 474 (D. Minn. 1956); *Merriman v. Cities Service Gas Co.*, 11 F.R.D. 584 (W.D. Mo. 1951); *Volk v. Paramount Pictures, Inc.*, 19 F.R.D. 103 (D. Minn. 1950).

criminal prosecution has no right to inspect or compel the production of written statements in the possession of the state unless, in the discretion of the trial court, it is necessary for preparation to his defense and in the interest of a fair trial.<sup>1</sup> It has been held that the defendant has a right to see his confession held by the prosecuting attorney and a denial may be a violation of his constitutional rights.<sup>2</sup> On the other hand, some courts have denied discovery, reasoning that in the absence of a statute the district attorney is not bound to furnish defendant with a copy of the confession made by him.<sup>3</sup> Discovery in criminal cases has been denied in the belief that a confession is the private paper of the person who took the pains and trouble of making it.<sup>4</sup> The defendant has no inherent right to invoke the discovery process to see his confession merely in the hope that something may be uncovered which would aid his defense.<sup>5</sup>

Some arguments which have been advanced in favor of discovery are: (a) a criminal prosecution should not be treated like a game,<sup>6</sup> that is to say, artificial barriers should not be erected to make it difficult for a defendant to prove his innocence; (b) a prosecutor should act not as a partisan eager to convict but as an officer of the court whose duty it is to aid in arriving at the truth in every case;<sup>7</sup> (c) the element of surprise would be reduced.<sup>8</sup>

There is no purpose served in denying the defendant access to a copy of his confession unless indeed the People have so great an interest in convicting accused parties as to justify interposing every and any obstacle to the disclosure of facts.<sup>9</sup> Under the Federal Rules of Civil Procedure and similar state rules, pre-trial disclosure of documents is fairly well defined.<sup>10</sup> However, in criminal cases the courts differ as to the existence and limitations of pre-trial discovery.<sup>11</sup>

North Dakota has not adopted the Federal Rules of Criminal Procedure and no statutes or cases were found which would allow discovery in this jurisdiction.

There appears to be no valid reason why the discovery process should not be extended to include written confessions. The adoption of rules which allow discovery would be in harmony with the policy of the state to give every defendant a fair and impartial trial and an opportunity to meet every charge preferred against him.<sup>12</sup>

RONALD A. HOVERSON

1. Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957); Rosier v. People, 126 Colo. 82, 247 P.2d 448 (1952); State v. Haas, 188 Md. 63, 51 A.2d 647 (1947); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); State v. Cicienia, 6 N.J. 296, 78 A.2d 568 (1951); People v. Rogas, 158 Misc. 567, 287 N.Y. Supp. 1005 (1936).

2. State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945).

3. Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952); Robertson v. Steele, 117 Minn. 384, 135 N.W. 1128 (1912).

4. See Cochran v. State, 48 Ariz. 124, 59 P.2d 658 (1936).

5. Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957); Rosier v. People, 126 Colo. 82, 247 P.2d 448 (1952); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944).

6. People v. Preston, 13 Misc.2d 802, 176 N.Y.S.2d 542 (1958).

7. O'Neill v. State, 189 Wis. 259, 207 N.W. 280 (1926).

8. For a discussion see, Orfield, Criminal Procedure From Arrest to Appeal 321 (1947); For a detailed discussion of Pre-trial Disclosure in Criminal Procedure see, Note, 60 Yale L.J. 826 (1951).

9. See, People v. Preston, 13 Misc.2d 802, 176 N.Y.S. 2d 542 (1958).

10. Fed. R. Civ. P. 34; For a discussion of Rule 34 see, Holtzoff, *Instruments of Discovery Under the Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205, 218 (1942).

11. For a discussion see, Orfield, *Criminal Procedure From Arrest to Appeal* 328 (1947).

12. See, Fitzpatrick v. Commonwealth, 135 Va. 504, 115 S.E. 522 (1923).