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Criminal Discovery

Albert C. Garber

INTRODUCTION

The Anglo-American system of jurisprudence is based upon the premise that truth will emerge from a contest between adverse parties before an impartial tribunal. After each litigant has presented all the evidence at his disposal and has, by cross-examination or otherwise, refuted or destroyed his opponent's case, it is presumed that a court or jury will be able to arrive at a proper decision.¹ For such a system to work properly, the adversaries should be relatively equal. If, however, the

material available to one litigant is grossly superior to that which is available to his opponent, an imbalance will be created which could result in an erroneous decision.

To avoid such an error, ideally, every party to an action should have at his disposal, prior to trial, all the evidence available to all parties.

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In recent years, tremendous strides have been made in the field of civil discovery toward the ascertainment of this ideal. The federal courts adopted the Federal Rules of Civil Procedure in 1938. This new system was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent, and sham claims and defenses; (3) to make available, in a simple, convenient, and inexpensive way, the facts which otherwise could not be proved without great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and (9) to expedite and facilitate both preparation and trial.²

Virtually every state has adopted similar procedural rules.³ It was

1. JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE ALT & ABA [hereinafter cited as JOINT COMM.], *THE PROBLEM OF A CRIMINAL DEFENSE* 2 (1961); cf. *Powell v. Superior Court*, 48 Cal. 2d 704, 707, 312 P.2d 698, 699 (1957).

2. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 376, 364 P.2d 266, 275 (1961).

3. See, e.g., CAL. STAT. ch. 1904 (1957).

obviously the intent of the state legislatures to remove the "game" element of trial preparation while still retaining the adversary nature of the trial itself. One of the principal purposes of discovery was to eliminate the sporting theory of litigation — surprise at the trial.⁴

Despite the overwhelming acceptance and approval of the civil discovery statutes, federal and state courts have been loath to extend discovery to the criminal field. Query:

Why do these principles not obtain in criminal cases? Indeed, there are many reasons why a defendant in a criminal case is in greater need of pre-trial disclosure than a civil defendant. The accused is often without means, represented only by assigned counsel or a public defender. He may be barred from fact-gathering efforts by the simple fact that he is in custody. The police are usually the first at the scene of the crime and, therefore, come into possession of most of the physical evidence. The State is well-equipped with scientific detection apparatus and trained investigators. In short, most criminal defendants are brought to litigate with an adversary who has more fact-gathering resources.⁵

HISTORICAL PERSPECTIVE

Under the inflexible rule of the common law, parties to an action were incompetent as witnesses and no means were provided by which an adverse party could be compelled to produce documents in his possession for use by his opponent at the trial. It was to cure this defect that equity established the remedy of discovery as ancillary to civil causes of action at law. However, this was never extended to criminal cases,⁶ and pre-trial discovery in the criminal field was denied almost without exception.

This universal opposition to criminal discovery was based on the following arguments:

(1) *Perjury, i.e.*, that discovery would lead to perjury and the manufacture of false testimony.⁷

(2) *Intimidation, i.e.*, that criminal discovery would lead to bribery and intimidation of witnesses to give perjured testimony or to absent themselves so that they would be unable to testify.⁸

(3) *Lack of Mutuality, i.e.*, that criminal discovery would be a "one way street" because the state could not compel the defendant to reveal his information.⁹

4. Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 364 P.2d 266, 275 (1961).

5. JOINT COMM., PAULSEN, THE PROBLEM OF DISCOVERY IN CRIMINAL CASES 4 (1961).

6. 6 WIGMORE, EVIDENCE § 1859(g) (3d ed. 1940); People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

7. State *ex rel.* Robertson v. Steel, 117 Minn. 384, 135 N.W. 1128 (1912); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

8. State v. Tune, *supra* note 7, at 210, 98 A.2d at 884.

9. *Id.* at 211-12, 98 A.2d at 885; State v. Rhoads, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910).

(4) *Subversion of the Criminal Process, i.e.*, that discovery would undermine the judicial process by giving the defendant insurmountable advantages.¹⁰

It [*i.e.*, a request to inspect grand jury minutes] 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. 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. . . . 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 the watery sentiment that obstructs, delays, and defeats the prosecution of crime.¹¹

Actually, there is no basis for the claimed opposition to criminal discovery on the theory that it would lead to perjury; this argument is ethereal rather than real. Every change in procedure where disclosure of the truth has been simplified has raised the specter of perjury to frighten the legal profession and judiciary, but the development of the law has shown these fears to be without any basis or foundation whatsoever.¹² Indeed, Justice Brennan maintains that liberal discovery far from abetting, actually deters perjury and fabrication.¹³

Although it may be conceded that witnesses could possibly be intimidated, there is no actual evidence that this has occurred. Further, since the granting of discovery is usually at the discretion of the trial court, if any danger of intimidation appears in a particular case, the court can deal with it by appropriate sanctions.¹⁴

Lack of mutuality and subversion of the criminal process presupposes that the state and the accused are equal adversaries. Realistically, this is an absurdity.¹⁵ In the usual criminal case, when a crime has been committed and reported, it is the state which first exerts force in the

10. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

11. *Ibid.* (L. Hand, J.).

12. *State v. Tune*, 13 N.J. 203, 227, 98 A.2d 881, 894 (1953) (Justice Brennan's dissent refers to the fear of perjury as "that old hobgoblin."); Sonderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 867 (1933) ("Perjury is one of the great bugaboos of the . . . law.").

13. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291.

14. *Id.* at 292; Louisell, *Criminal Discovery: Real or Apparent?*, 49 CALIF. L. REV. 56, 90, 98-101 (1961).

15. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 305 (1960); Garber, *The Growth of Criminal Discovery*, 1 AM. CRIM. L.Q. 3, 5 (1962); Goldstein, *The State and the Accused; Balance of Advantages in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

gathering of evidence and then holds it under its exclusive control.¹⁶ The average defendant can rarely, if ever, approach the power and resources of the prosecution. The prosecution has available an investigative staff of its own. In addition, the state can rely upon the investigative resources of various state, local, and federal agencies, such as the FBI, the Treasury Department, etc. Thus, the state is in a far better position to gather and evaluate the facts than is a defendant.

The defense attorney who seeks to protect his client's interest operates at a tremendous disadvantage in trying to ascertain the facts.¹⁷ Usually, he comes into the case entirely too late, whereas the prosecution has been there from the beginning. Undoubtedly, the defendant has been questioned and jailed without counsel for some time prior to arraignment. The police probably have obtained statements by way of admissions or confessions (is not this a form of discovery?), and being first at the scene of the crime, the police have had an opportunity to gather and analyze evidence in the absence of any representative of the accused.

When defense counsel is finally obtained, it may be weeks or months after the arrest. He will have a tremendous difficulty in gathering information. The accused will be of little help by the time he is interviewed; he may have forgotten the details of what occurred. And human nature being what it is, he is likely to tell counsel a slanted story. Even if defense counsel is in a position to investigate, he is not likely to get any cooperation from the public, whereas it is "respectable" to cooperate with the prosecution.¹⁸ In sum, the social and economic inequalities that exist between the average accused and the state place the accused at a considerable disadvantage.¹⁹

In addition, recent developments in the law have seriously impinged upon the privilege against self-incrimination. Fourteen states have statutes which require the defendant to give pre-trial notice if he intends to introduce evidence of an alibi.²⁰ A number of states require advance notice of intention to plead the defense of insanity.²¹ Washington has

16. Fletcher, *supra* note 15.

17. JOINT COMM., THE PROBLEM OF A CRIMINAL DEFENSE 3 (1961).

18. *Id.* at 3, 4.

19. Fletcher, *supra* note 15, at 305-16.

20. ARIZ. REV. STAT. ANN. § 192-B (1956); IND. ANN. STAT. §§ 9-1631 to -1633 (1956); IOWA CODE ANN. § 777.18 (1958); MICH. COMP. LAWS §§ 768.20.21 (1948); MINN. STAT. ANN. § 630.14 (1947); OHIO REV. CODE § 2945.58; OKLA. STAT. ANN. tit. 22, § 585 (1951); S.D. CODE § 34.2801 (1939); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. tit. 13, §§ 6561, 6562 (1958); WIS. STAT. ANN. § 955.07 (1957).

21. ARIZ. REV. STAT. ANN. § 192 A (1956); ARK. STAT. ANN. § 43-1301 (1947); CAL. PEN. CODE § 1016; COLO. REV. STAT. ANN. § 39-8-1 (1953); FLA. STAT. ANN. § 909.17 (1957); IND. ANN. STAT. § 9-1701 (1956); MICH. COMP. LAWS § 768.20.21 (1948); UTAH CODE ANN. § 77-22-16 (1953); VT. STAT. ANN. tit. 13, §§ 6561, 6562 (1958); WASH. REV. CODE § 10.76.020 (1951).

a statute which requires the prosecution and the defense to furnish a list of the witnesses to be called.²²

Query: Are not these statutes a form of pre-trial discovery by the prosecution? What about the recent decisions which have actually granted discovery motions to the prosecution?²³ Do not these statutes and decisions indicate that whenever a strong state interest conflicts with the privilege against self-incrimination, the privilege must surrender some of its force?²⁴

In answering Judge Learned Hand's observation that the accused in a criminal case has every advantage and that the granting of discovery to an accused would subvert the criminal process, Professor Goldstein of Yale has stated that if there is a subversion of the criminal process, it is in favor of the prosecution.²⁵ He points out that, increasingly, the prosecution is being freed from restrictions on pleading and proof; indictments are becoming more "elastic."²⁶ This leaves a great opportunity for "surprise" at trial.²⁷ The element of surprise can only be eliminated by the development of adequate pre-trial discovery procedures which will lessen the inequality that exists between the accused and the state.²⁸ In recognition of this problem, more and more of our state courts are beginning to grant an accused the right to pre-trial discovery.²⁹ The remainder of this article will deal with various aspects of the problems of criminal discovery, with emphasis on the trend toward greater liberality.

GRAND JURY MINUTES

Grand jury minutes traditionally have been denied to an accused.³⁰ An accused who sought to secure the disclosure of grand jury testimony has had to overcome not only the generally expressed common-law rule

22. WASH. REV. CODE § 10.37.03 (1951); In Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 316, Professor Fletcher points out that in practice the Washington statute is rarely observed by the defendant since there is no provision for the sanction of exclusion of an unlisted witness' testimony.

23. *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919 (1962); *McCann v. Superior Court*, 184 Cal. App. 2d 813, 7 Cal. Repr. 841 (1960).

24. See Comment, 51 CALIF. L. REV. 135, 136-38 (1963).

25. Goldstein, *The State and the Accused; Balance of Advantages in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

26. *Id.* at 1173.

27. *Id.* at 1180.

28. *Id.* at 1172-98. See also Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291.

29. Garber, *The Growth of Criminal Discovery*, 1 AM. CRIM. L.Q. 3 (1962). See *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827, 831 (Ct. Gen. Sess. 1960).

30. *United States v. Garsson*, 291 Fed. 646 (S.D.N.Y. 1923); *Pinana v. State*, 76 Nev. 274, 352 P.2d 824 (1960); *State v. Rhoads*, 81 Ohio St. 397, 91 N.E. 186 (1910); *State v. Selby*, 126 N.E.2d 606 (Ohio C.P. 1955); *Angle v. State*, 306 S.W.2d 718 (Tex. Crim. App. 1957). See 6 WIGMORE, EVIDENCE § 1850 (3d ed. 1940); Orfield, *The Federal Grand Jury*,

against discovery in criminal cases,³¹ but he also has been faced with the historical safeguards surrounding grand jury secrecy which have been propounded to preclude disclosure of any testimony before the grand jury.³²

The classically expressed values of grand jury secrecy have been summarized as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.³³

As Professor Louisell has commented,³⁴ once an accused is indicted and arrested, reasons (1) and (5) become inoperative. Reason (2) does not stand analysis as an argument against discovery because it is not disclosure of deliberation which is sought but testimony of witnesses. And discovery, of course, is not possible until after the indictment is rendered, when the chance to importune is gone. In reference to reason (3), the furnishing of a defendant with a basis for preparation of perjured testimony has little or no validity. If an accused will engage in

22 F.R.D. 343 (1959). In *Grady, Discovery in Criminal Cases*, 1959 U. ILL. L.F. 835, the author states that an Illinois defendant has no right to pre-trial inspection of the grand jury transcript. He indicates that there are very few reported cases and none of them indicate that the matter is even within the discretion of the trial court. Presumably, it is discretionary since no statute prohibits inspection by the defendant. See Note, *Discovery in Criminal Proceedings*, 13 U. FLA. L. REV. 242 (1960), wherein the commentator points out that a traditional cloud of secrecy normally renders grand jury testimony non-discoverable. FLA. STAT. ANN. § 905.27 (1959) provides that grand jury testimony need not be disclosed "except when required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that of the witness given before the court, or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor, or when permitted by the court in furtherance of justice." The notewriter summarizes the Florida decisions as prohibiting a defendant from examining grand jury testimony except when perjury or subornation of perjury is involved. Despite the language of the statute, which permits discovery at the court's discretion, in the light of the procedures in the leading cases, grand jury testimony is virtually unattainable in Florida. See *Gordon v. State*, 104 So. 2d 524 (Fla. 1958); *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957); *State ex rel. Brown v. Dewell*, 123 Fla. 785, 167 So. 687 (1936); *Minton v. State*, 107 So. 2d 143 (Fla. Dist. Ct. App. 1958), *aff'd*, 113 So. 2d 361 (Fla. 1959).

31. *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

32. Note, *Criminal Discovery — The State of the Law*, 6 UTAH L. REV. 531, 538 (1959).

33. *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954), *citing* *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D.C. Md. 1931); *cf.* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1960). See also LOUISELL, *MODERN CALIFORNIA DISCOVERY* 338, 389 (1963).

34. LOUISELL, *supra* note 33 at 789.

such unlawful machinations, the time element will have little effect; other processes of law must cope with such unlawful conduct.³⁵ Reason (4) likewise is without merit since a person who testifies before the grand jury can anticipate that he will be a future witness.³⁶

In other words, the necessity for secrecy is a mere shibboleth. More and more states are becoming aware of the fundamental unfairness of denying an accused the information produced before the grand jury on the sacred grounds of secrecy.³⁷ As the Utah court stated after taking cognizance of the grand jury's activities and the alleged necessity for secrecy:

On the other hand the rights of one accused of crime are in no wise to be belittled nor ignored. The fundamental purpose of criminal trial is not solely to convict the accused. It is to seek the truth and administer justice. While secrecy may be justified at certain stages of the proceedings . . . all fair-minded persons will concede that ultimately the full truth should be revealed to the Court and Jury. In such instances the truism should be recognized that the truth should have nothing to fear from light.³⁸

Four states provide that the minutes of grand jury hearings shall be transcribed, the accused being provided with a copy of the transcript.³⁹ The traditional dire dangers predicted from the disclosure of grand jury testimony have not occurred in these states. It is submitted, therefore, that the experience which has been gained in these states clearly indicates that the dangers of disclosure of grand jury testimony are seriously over-rated.⁴⁰

In a number of the states which do not have specific statutes providing for a transcript of the minutes, it usually is held that the granting of such discovery is within the discretion of the trial court.⁴¹

Where grand jury minutes are not obtainable by statute, the accused is not entitled as a matter of right to be furnished with evidence taken by the grand jury in support of the indictment.⁴² A presumption exists that an indictment is based upon legal and sufficient evidence until there

35. *State v. Faux*, 9 Utah 2d 350, 351, 345 P.2d 186, 187 (1959).

36. *Id.* at 353, 345 P.2d at 188.

37. *Missouri ex rel. Clagett v. James*, 327 S.W.2d 278 (Mo. 1959); *State v. Moffa*, 64 N.J. Super. 69, 165 A.2d 219 (Super. Ct. 1960); *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960).

38. *State v. Faux*, 9 Utah 2d 350, 354-55, 345 P.2d 186, 188-89 (1959).

39. CAL. PEN. CODE § 938.1; IOWA CODE ANN. § 772.4 (1950); KY. CRIM. CODE § 110 (1959); MINN. STAT. ANN. § 628.04 (1953).

40. 48 CALIF. L. REV. 160, 161 (1960).

41. *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960); *People v. Quinn*, 24 Misc. 2d 111, 201 N.Y.S.2d 582 (Oneida County Ct. 1960).

42. *People v. Meehan*, 30 Misc. 2d 659, 219 N.Y.S.2d 84 (Sup. Ct. 1961); *People v. Carde*, 28 Misc. 2d 733, 218 N.Y.S.2d 438 (Orleans County Ct. 1961), *rev'd*, 11 N.Y.2d 279, 183 N.E.2d 651 (1962).

is satisfactory proof to the contrary.⁴³ The granting of a right to inspection of such minutes rests in the court's sound discretion.⁴⁴ The court can not surmise and conjecture that the evidence before the grand jury was insufficient or illegal. Rather, facts must be set forth in the moving papers on which the court, using its discretion, can act.⁴⁵ The evidence before the grand jury should be disclosed only where the court finds that the application rests on proven facts.⁴⁶ The principles enunciated herein certainly do not indicate any tremendous break-through in the field of criminal discovery. But, they do indicate that the courts are becoming increasingly aware of the problem. As stated in a recent New York case, "It is likely, and perhaps inevitable, that the presently evolving practice of liberal discovery in criminal cases may ultimately lead to the automatic granting of discovery"⁴⁷

CONFESSIONS AND STATEMENTS OF THE ACCUSED

The right of an accused to obtain a pre-trial examination of his own admissions or confession has always been denied to defendants in the federal courts.⁴⁸ This traditional view has been followed in many jurisdictions; it is based on the erroneous idea that examining one's own confession will enable a defendant to fabricate explanations for his statements.⁴⁹ All of the traditional arguments which have been used to oppose the growth and development of criminal discovery have been used to prevent an accused from obtaining copies of his own statements.⁵⁰

Although this traditional view has been followed in numerous jurisdictions, more and more states are beginning to permit inspection and examination of a defendant's own statements.⁵¹ Courts are increasingly

43. *People v. Glen*, 173 N.Y. 395, 403, 66 N.E. 112, 115 (1903); *People v. Quinn*, 24 Misc. 2d 111, 112, 201 N.Y.S.2d 582, 584 (Oneida County Ct. 1961).

44. *People v. Bolivar*, 146 N.Y.S.2d 529 (Sup. Ct. 1955).

45. *People v. O'Keefe*, 198 Misc. 682, 684, 99 N.Y.S.2d 895, 897 (Broome County Ct. 1950).

46. *People v. Dally*, 174 Misc. 830, 832, 21 N.Y.S.2d 774, 776 (Sup. Ct. 1940); *People v. Quian*, 24 Misc. 2d 111, 112, 201 N.Y.S.2d 582, 584 (Oneida County Ct. 1961); *People v. McCann*, 166 Misc. 269, 270, 2 N.Y.S.2d 216, 218 (Ct. Gen. Sess. 1938).

47. *People v. Stokes*, 24 Misc. 2d 755, 760, 204 N.Y.S.2d 827, 833 (Ct. Gen. Sess. 1960).

48. Kaufman, *Criminal Discovery and Inspection of Defendants Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 242 (1957).

49. *Rosier v. People*, 126 Colo. 82, 247 P.2d 448 (1952); *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953); *State v. Sharp*, 162 Ohio St. 173, 122 N.E.2d 684 (1954).

50. Comment, 6 UTAH L. REV. 531, 535 (1957).

51. Arizona: *State ex rel. Polly v. Superior Court*, 81 Ariz. 127, 302 P.2d 263 (1956). Louisiana: *State v. Dorsey*, 207 La. 928, 22 So. 2d 273 (1945) (the only state which unequivocally states that the denial of pre-trial inspection of defendant's conversation in a murder case constitutes a denial of due process). Maryland: *State v. Haas*, 188 Md. 63, 51 A.2d 647 (1947); MD. ANN. CODE, Rules of Criminal Procedure, Rule 5 (1952). Michigan: *People v. Johnson*, 97 N.W.2d 739 (Mich. 1959). New Jersey: *State v. Johnson*, 28 N.J.

recognizing that in the conduct of a criminal case, a defendant is entitled to the "fundamental requirement of fairness."⁵² An essential right included within this proposition is the right of a defendant to prepare his defense. Obviously, in view of the often crucial role of a confession in a criminal trial, pre-trial examination of a defendant's statements may be the most important aspect of the whole case.⁵³

Perhaps the leading case which enunciates the importance of the right of a defendant to a confession is *State v. Johnson*.⁵⁴ Chief Justice Weintraub of New Jersey, in a masterful opinion, declared that in a prosecution for murder, the defendant is entitled to inspect any statements or confessions taken from him which would be offered at the trial. After pointing out that truth is best revealed by a decent opportunity to prepare in advance of trial, Chief Justice Weintraub stated:

We must be mindful of the role of 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.⁵⁵

One must bear in mind that a confession is ordinarily obtained in a tension filled atmosphere and a setting designed by the authorities. A statement obtained under such circumstances may not always reflect accurately the true picture of the events at the scene of the crime.⁵⁶ Under such circumstances, "there seems to be a measure of elemental justice in permitting one accused of crime to see a confession alleged to have been made by him, which he expects to be produced against him

133, 145 A.2d 313 (1958); *State v. Moffa*, 64 N.J. Super. 69, 165 A.2d 219 (Super. Ct. 1960). New York: *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960). Washington: *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959). In California, beginning with *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957), there has been a dynamic growth in the scope of criminal discovery. See *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959); *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *McCarty v. Superior Court*, 162 Cal. App. 2d 755, 328 P.2d 819 (1958); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (1958); *Cordry v. Superior Court*, 161 Cal. App. 2d 267, 326 P.2d 222 (1958).

52. *Roviaro v. United States*, 335 U.S. 53, 61 (1957).

53. *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960).

54. 28 N.J. 133, 145 A.2d 313 (1958).

55. *Id.* at 137, 145 A.2d at 316.

56. *People v. Stokes*, 24 Misc. 2d 755, 759, 204 N.Y.S.2d 827, 832-33 (Ct. Gen. Sess. 1960).

at his trial."⁵⁷ The notion that the prosecution has some vested tactical interest in withholding a defendant's statement, the details of which he may not recall, so that it may be "sprung" upon him at the trial, is a form of "trial by ambush."⁵⁸ It is a practice which is inconsistent with the modern and enlightened concepts of the goal of a trial — the accurate ascertainment of the facts.⁵⁹

In line with this liberal trend toward greater discovery, Illinois has adopted a statute which provides that "no . . . confession shall be received in evidence which has not been furnished [to defendant upon his motion] . . . unless . . . the prosecutor was unaware . . . of the confession . . ."⁶⁰ Minnesota also has adopted a statute which precludes the admission in evidence of any confession or statement of which the accused has not been furnished a copy.⁶¹ Maryland has adopted a procedural rule similar to federal rule 16 but with the addition of the phrase: "including written statements by the defendant."⁶² Although virtually all of these cases in states allowing a defendant to examine his confession and/or admission⁶³ seem to indicate that permission to examine the statements lies within the sound discretion of the trial court, it is possible that discovery will go much further in reference to confessions.⁶⁴ A New York court indicated:

It is likely, and perhaps inevitable, that the presently evolving practice of liberal discovery in criminal cases may ultimately lead to the automatic granting of discovery of a defendant's written statement in the absence of showing of prejudice to the People.⁶⁵

The most significant growth of criminal discovery in any state has been that of the state of California.⁶⁶ As late as 1956, discovery was denied at both the trial and the appellate court level on the ground that it was beyond the court's jurisdiction. In 1957, in the landmark case of *Powell v. Superior Court*,⁶⁷ a defendant who was indicted for embezzlement of public funds sought to inspect and copy his signed statements made in the police chief's office. He also wanted to obtain a typewritten transcript of a tape recording made there several days later.

57. *State v. Haas*, 188 Md. 63, 76, 51 A.2d 647, 653 (1947).

58. *State v. Thompson*, 54 Wash. 2d 100, 109, 338 P.2d 319, 324 (1959).

59. *People v. Stokes*, 24 Misc. 2d 755, 759, 204 N.Y.S.2d 827, 833 (Ct. Gen. Sess. 1960).

60. ILL. CODE OF CRIM. P. § 114-10 (1963).

61. MINN. STAT. § 611.033 (Supp. 1963).

62. MD. R. CRIM. P. 5.

63. See cases cited note 51 *supra*.

64. *People v. Stokes*, 24 Misc. 2d 755, 760, 204 N.Y.S.2d 827, 833 (Ct. Gen. Sess. 1960).

65. *Ibid.*

66. Garber, *The Growth of Criminal Discovery*, 1 AM. CRIM. L.Q. 3, 18 (1962).

67. 48 Cal. 2d 704, 312 P.2d 698 (1957). This decision was preceded by *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956), which was the first California case to permit criminal discovery at trial.

The Supreme Court of California issued a writ of mandamus to compel the trial court to order the pre-trial inspection of the documents, stating:

In the circumstances of the present case, 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 establishing the truth upon a public trial fair to defendant and the state alike.⁶⁸

Since the landmark *Powell* decision, the growth of discovery in reference to a defendant's right to inspect his own statements has been phenomenal. It is now settled in California that a defendant has the right to inspect his own statements made to the police, whether signed, recorded, transcribed, or merely in the form of notes.⁶⁹ Further, the California cases have stated that the defendant's right is not dependent upon the admissibility of the statement.⁷⁰ The defendant does not have to show that he cannot recall the facts; all that he must indicate is that he does not recall the contents of the statements made to the investigating officers or other law enforcement officials at the time that the statements were taken.⁷¹ When a proper showing is made, the trial court does *not* have discretion to deny a motion for discovery.⁷²

Only one state, Louisiana, has held that the denial of inspection of a confession constitutes denial of due process.⁷³ It is foreseeable, however, that more and more courts will adopt this position, despite the fact that the United States Supreme Court has held that denial of discovery does not constitute a violation of due process.⁷⁴

STATEMENTS OF WITNESSES AND DOCUMENTARY EVIDENCE

The traditional view concerning the right of a defendant to inspect statements of witnesses or documents in the hands of the prosecution has always been that such statements and documents are not discoverable. At common law and in most of the states, in the absence of statute, inspection of statements or documents of prospective witnesses has been denied.⁷⁵ The reasons for denying an accused the right to inspect such

68. *Powell v. Superior Court*, 48 Cal. 2d 704, 707, 312 P.2d 698, 699-700 (1957).

69. *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959).

70. *People v. Silberstein*, 159 Cal. App. 2d 848, 323 P.2d 591 (1958).

71. *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958).

72. *People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959); *McAllister v. Superior Court*, 165 Cal. App. 2d 297, 331 P.2d 654 (1958).

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

74. *Cicenia v. Lagay*, 357 U.S. 504 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952).

75. Comment, 1961 U. ILL. L.F. 187. See *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

statements or documents were the traditional objections which have always been raised, *i.e.*, to prevent the subornation of perjury or the fabrication of phoney defenses.⁷⁶

The Federal Rules of Criminal Procedure ostensibly provided for a broad basis of discovery of witnesses' statements or documents in the hands of the prosecution. Rule 16 provides as follows:

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

A number of states have adopted statutes patterned after the federal rules which permit limited discovery of documentary evidence at the discretion of the trial court.⁷⁷ Generally, such statutes were construed by both the state and federal courts to exclude pre-trial statements of witnesses.⁷⁸

Then, in 1957, the case of *Jencks v. United States*⁷⁹ was decided. Jencks, a union official, was accused of false swearing. The government's case rested on the testimony of two undercover agents. These agents indicated that they had made reports to the FBI, and the defendant sought, by appropriate motion, to inspect these reports. The trial court denied inspection. The Supreme Court held this withholding of the reports to be error and stated that the defendant was entitled to inspect all the reports of the undercover agents touching on matters as to which the agents testified. The impact of the *Jencks* decision was tremendous.⁸⁰ Dire predictions were made to the effect that the decision would seriously hamper the activities of the FBI, and within a matter of months Congress passed the so-called Jencks Act.⁸¹ As interpreted by *Palermo v.*

76. *People ex rel. Lemon v. Supreme Court*, *supra* note 75; *Urga v. State*, 104 So. 2d 43, 44 (Fla. Dist. Ct. App. 1958); *Commonwealth v. Wable*, 332 Pa. 80, 14 A.2d 334 (1955).

77. FED. R. CRIM. P. 7(f) provides for a bill of particulars, but this has very limited practical value since the granting of a bill of particulars is completely discretionary. Rule 15 provides for depositions, but this is not a true discovery procedure and is only applicable where the witness is leaving the jurisdiction and is unable to attend the trial. Rule 17 authorizes the production of books, etc. by subpoena duces tecum and gives the court discretion to direct their production, but, in practice, the courts limit the scope of this rule very narrowly.

78. Note, 13 U. FLA. L. REV. 242 (1960); Comment, 1961 U. ILL. L.F. 187.

79. 353 U.S. 657 (1957).

80. Comment, *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 297 (1959).

81. 18 U.S.C. § 3500 (1957): "Demands for production of statements and reports of witnesses.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the

United States,⁸² the United States Supreme Court determined that the Jencks Act provides the exclusive measure of discoverability of government witnesses' statements. The *Palermo* case enunciates the following set of principles with reference to inspection of statements: (1) inspection is not permitted until the witness has testified on direct examination; (2) no discovery is permitted of the government's resumés, summaries, or condensations of the witnesses' statements; (3) production of the papers, documents, etc. is made to the judge who excises portions not relevant to the subject matter of the testimony before delivering them to the defendant; (4) if the government elects, the case is not to be dismissed, but is to continue with the direct testimony of the witness stricken, unless the court grants a mistrial. This narrow interpretation considerably limits the language of the Jencks Act. Although the statute is positively phrased in terms of giving a right to the defendant, its effect is largely negative because all "statements" do not come within the technical requirements of the act; and unless they meet the technical requirements as interpreted by the *Palermo* case, such "statements" are unavailable to the defendant.⁸³

court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means — (1) A written statement made by said witness and signed or otherwise adopted or approved by him; or (2) A stenographic, mechanical, electrical or other recording or a transcription thereof which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

82. 360 U.S. 343 (1959).

83. See Comment, 1961 U. ILL. L.F. 187, 193, wherein the commentator points out that in the case of *People v. Wolff*, 19 Ill. 2d 318, 167 N.E.2d 197, *cert. denied*, 364 U.S. 874 (1960),

A number of states, in line with the trend toward more liberal criminal discovery, have begun to permit inspection of such statements and/or documents.⁸⁴ The value of obtaining such statements, particularly where they were made before time dulled the memory of the witness, is obvious. Such statements may contain contradictions of the testimony of the witness, may omit some facts related by the witness at the trial, or may reveal a contrast in the emphasis placed on the same facts.⁸⁵ As stated in the case of *People v. Rosario*:⁸⁶

A pre-trial statement of a witness for the prosecution is valuable not just as a source of contradictions with which to confront him and discredit his trial testimony. Even statements seemingly in harmony with such testimony may contain matter which will prove helpful on cross-examination. They may reflect a witness' bias, for instance, or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor. Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light.⁸⁷

The appellate courts of California have enunciated most clearly the right of an accused to inspect and/or copy the statements of eye witnesses, victims, police officers, etc., in the hands of the prosecution, or to examine documents which the prosecution controls.⁸⁸ The right of inspection is not limited by the fact that the statement is unsigned or unacknowledged.⁸⁹ The sole test to determine admissibility of such statements or documents is a simple one — will it lead to ascertainment of the facts.⁹⁰ But "blanket" requests for information will be denied.⁹¹ In

the Illinois court expressly adopted the rule of the Jencks Act. *Cf. People v. Moses*, 11 Ill. 2d 84, 142 N.E.2d 1 (1957).

84. *Layman v. State*, 355 P.2d 444 (Okla. Crim. App. 1960). This case illustrates the extreme importance of the production of this type of evidence. The defendant was charged with obtaining money from the state by false pretenses for construction projects. The bases of the accusation against the defendant were too highly technical scientific engineering reports which had taken many months to prepare. The court granted the motion for inspection and pointed out that to deny the same would be to place an unbearable burden upon counsel for the defense at the time of trial; special, highly technical and scientific data would require analysis by scientists rather than lawyers. *People v. McCallum*, 13 App. Div. 2d 31, 213 N.Y.S.2d 672 (1961), *cert. denied*, 369 U.S. 830 (1962), involved a larceny charge in which the defendant's sobriety was a primary issue. The court held that the original police report should have been discoverable. *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (1961), involved a felony-murder arising out of a robbery in which the defendant sought to examine statements of the prosecuting witnesses. The court granted the motion.

85. *People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959).

86. 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 883 (1961).

87. *Id.* at 289, 213 N.Y.S.2d at 450, 173 N.E.2d at 883.

88. Garber, *The Growth of Criminal Discovery*, 1 AM. CRIM. L.Q. 3, 21 (1962).

89. *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959).

90. *People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959); *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930 (1957), *appeal dismissed*, 358 U.S. 646 (1959); *Brenard v. Superior Court*, 172 Cal. App. 2d 314, 341 P.2d 743 (1959); *People v. Silberstein*, 159 Cal. App. 2d 848, 323 P.2d 591 (1958).

91. *People v. Cooper*, 53 Cal. 2d 755, 349 P.2d 964 (1960).

an appropriate criminal case, it is not only the right, but the duty of an attorney for a defendant to demand such statements and documents in the hands of the prosecution that are material to the defendant's case.⁹²

DEPOSITIONS

It generally has been held that there was no common-law right to take depositions in criminal cases.⁹³ In the absence of specific statutes, the courts do not have the power to compel a witness to submit to a deposition in a criminal case.⁹⁴ The few statutes which provide for depositions are not really discovery statutes, but rather are "perpetuation" statutes.⁹⁵

Even in those states which have adopted the liberal civil discovery rules patterned after the Federal Rules of Civil Procedure, depositions are limited to civil, not criminal, cases.⁹⁶ For all practical purposes, depositions are not available in criminal trials.⁹⁷

REAL OR TANGIBLE EVIDENCE

The traditional common-law view prohibits the right of discovery of real or tangible evidence in the hands of the prosecution.⁹⁸ However, there has been a significant trend away from this limited view. It has become increasingly apparent that the usual arguments for denying discovery⁹⁹ cannot reasonably be applied to this type of evidence. The defendant who acquires knowledge of blood tests, ballistic findings, chemical analyses, etc. has little resulting opportunity to create a false defense, suborn perjury, or alter the evidence.¹⁰⁰ A greater number of states are beginning to permit an accused to examine real or tangible evidence in the hands of the prosecution,¹⁰¹ and there are indications that

92. *Vetter v. Superior Court*, 189 Cal. App. 2d 132, 10 Cal. Repr. 890 (1961).

93. *Clark v. Superior Court*, 190 Cal. App. 2d 739, 12 Cal. Repr. 191 (1961).

94. *Ibid.*

95. FED. R. CRIM. P. 15(a) (involving witnesses leaving the jurisdiction and unable to attend trial); MD. RULES 727; CAL. PEN. CODE §§ 1335-36.

96. *Ex parte Denton*, 266 Ala. 279, 96 So. 2d 296 (1957); *Clark v. Superior Court*, 190 Cal. App. 2d 739 (1961); *Reed v. Allen*, 121 Vt. 202, 153 A.2d 74 (1959); *State v. Christenson*, 40 Wash. 2d 329, 242 P.2d 755 (1952).

97. An obvious problem that is presented when dealing with the topic of criminal deposition is, of course, the right of confrontation.

98. *People v. Walker*, 126 Colo. 135, 248 P.2d 287 (1952); *State v. Martinez*, 220 La. 899, 57 So. 2d 888, cert. denied, 344 U.S. 843 (1952); *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

99. See notes 7-11 *supra* and accompanying text.

100. Note, 6 UTAH L. REV. 531, 538 (1959).

101. Arizona: *State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 275 P.2d 887 (1954). California: *Brenard v. Superior Court*, 172 Cal. App. 2d 314, 341 P.2d 743 (1959); *Norton v. Superior Court*, 173 Cal. App. 2d 133, 343 P.2d 139 (1959); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (1958); *Walker v. Superior Court*, 155 Cal. App. 2d

several others will permit the accused to examine chemical findings, criminal identification reports, blood tests, ballistic tests, etc. in an appropriate situation.¹⁰² Inspection of tangible evidence is provided for at the federal level within the strict limitations set forth in the statute.¹⁰³ Discovery is limited to papers and objects obtained from or belonging to the defendant or secured from others by seizure or by process.¹⁰⁴

The criminal codes of six states provide for the discovery of tangible evidence in criminal prosecutions.¹⁰⁵ The Florida statute provides:

When . . . 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 . . . may order the state to produce and permit the inspection and copying or photographing . . . of any designated papers, books, accounts, letters, photographs, objects, or other tangible things.¹⁰⁶

Despite the broad language of the statute, it has been narrowly interpreted.¹⁰⁷ A broad interpretation would better serve the ends of justice.

CONCLUSION

Since the purpose of a criminal trial is to ascertain the facts from the material at hand, the revelation of such facts prior to trial will aid toward the realization of that goal. Our whole system concerning the administration of justice is based on the assumption that the adversary proceeding, wherein the parties to an action are responsible for developing the facts before an impartial tribunal, is best suited to develop the truth.

The recent developments in the field of civil discovery have clearly shown that pre-trial disclosure and inspection fosters a more thorough development of the facts at the trial by reducing the elements of con-

134, 317 P.2d 130 (1957). Illinois: *People v. Buzan*, 351 Ill. 610, 184 N.E. 890 (1933); *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914). Oklahoma: *State ex rel. Sadler v. Lackey*, 319 P.2d 610 (Okla. Crim. App. 1957). Pennsylvania: *In re Di Joseph Petition*, 394 Pa. 19, 145 A.2d 187 (1958). Washington: *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959). *Contra*, Pennsylvania: *Commonwealth v. Evans*, 190 Pa. Super. 179, 154 A.2d 57 (1959); *Commonwealth v. Gockley*, 411 Pa. 437, 192 A.2d 693 (1963).

102. *State ex rel. Keast v. District Court*, 135 Mont. 545, 342 P.2d 1071 (1959); *State v. Lavalley*, 122 Vt. 75, 163 A.2d 856 (1960).

103. FED. R. CRIM. P. 16.

104. *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954).

105. ARK. STAT. ANN. § 43-2010 (1947); FLA. STAT. ANN. § 909-18 (1959); IDAHO CODE ANN. § 19-1530 (Supp. 1963); MD. RULES 728; MO. RULES § 25.19 (1959); N.J. RULES 2:5-8(c).

106. FLA. STAT. ANN. § 925.04 (Supp. 1933).

107. Note, *Discovery in Criminal Proceedings*, 13 U. FLA. L. REV. 242 (1960).

cealment and surprise. Concealment and surprise were typical at common-law trials and are still too prominent in today's criminal proceedings. It is difficult to comprehend *why* in criminal actions, where defendants are subject to loss of liberty or life, discovery procedures lag far behind those that have been developed in civil actions.

Fortunately, a growing awareness has developed during the past decade of the necessity to permit an accused in a criminal action to obtain discovery and inspection to balance the social and economic inequalities that exist between an accused and the state in the fact finding process, *i.e.*, the trial. It is submitted that when this inherent inequality is reduced, a fairer trial will result and the administration of justice will be better served.