

1962

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Recommended Citation

Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 Neb. L. Rev. 127 (1963)

Available at: <https://digitalcommons.unl.edu/nlr/vol42/iss1/5>

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PRETRIAL DISCOVERY IN CRIMINAL CASES: A NECESSITY FOR FAIR AND IMPARTIAL JUSTICE

Sheldon Krantz*

Ralph Defendant was arrested in the middle of the night for the murder of Sally Sly, who was allegedly his girl friend. After police officers had continuously questioned Defendant for eight hours at a local police station, he confessed that he had shot the girl, and dictated a confession to a police stenographer. His apartment was later searched and a pistol, shells, and bloodstained shirt were discovered among his personal effects. All of these items were sent to the Federal Bureau of Investigation in Washington, D.C. for analysis. Two days after the confession, Richard Revenge, identifying himself as Sally Sly's boy friend, gave the police a signed statement to the effect that he overheard Defendant and Sly having a violent argument two hours before her body was found. The confession, pistol, shells, bloodstained shirt, and the statement of Revenge are the only evidence against Defendant.

Defendant is eighteen years old and has been in the United States only one year. He is indigent, and two months after signing the confession, the trial court appoints counsel for him. He now denies killing Sly and cannot remember anything that he told the police officers. Before trial, the court-appointed counsel moves that the prosecuting attorney produce for his inspection Defendant's confession, pistol, shells and bloodstained shirt, or the FBI reports on these items. He further demands the statement of Richard Revenge. The prosecuting attorney vehemently opposes, arguing that: (1) there is no precedent for this motion at common law; (2) the state has no statute authorizing pretrial criminal discovery; (3) the state has no equal method to discover evidence from a defendant; and (4) that such a procedure would open the door to perjury.

Should Ralph Defendant be allowed to inspect his own confession, the FBI reports or the items examined, and the statement of a prosecution witness prior to trial? The purpose here is to answer this question after examining the various policy considerations and the present state of the law in Nebraska and other jurisdictions.

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I. HISTORY OF PRETRIAL DISCOVERY IN CRIMINAL CASES

Pretrial discovery in criminal cases was an utter stranger to the common law.¹ The leading early English case was *Rex v. Holland*,² where the King's Bench left no doubt that there was no right to pretrial discovery at common law and a trial court was without discretionary power to grant it. The rationale of the decision was apparently the fear that any inspection of state's evidence would "subvert the whole system of criminal law," although no reason was given why pretrial discovery would cause this result.³ Some limited exceptions to this rule were subsequently made by the English courts,⁴ but *Holland* was still the basic common law rule when the question of pretrial discovery appeared in the United States at the turn of this century. Our courts unhesitatingly adopted the holding in the *Holland* case, expressing a similar fear of subverting our criminal system.⁵

¹ 6 WIGMORE, EVIDENCE §§ 1859(g), 1863 (3d ed. 1940). See Louisell, *Criminal Discovery; Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 57 (1961); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960). For judicial discussion of the common law rule see *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1928). All the early cases are annotated in 52 A.L.R. 207 (1928).

² 4 DURN. & E. 691, 100 Eng. Rep. 1248 (K.B. 1792). In the *Holland* case, defendant was tried in England for misappropriating funds while serving in India in the West India Company. A board of inquiry had examined witnesses in India and had filed a report with the attorney general in England. One of the main reasons the defendant had asked to see the report was because of the hardship and expense of sending for witnesses from India.

³ In refusing the request for discovery Lord Kenyon, C.J., stated: "There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law." *Id.* at 692, 100 Eng. Rep. at 1249. Buller, J., added the following comment: "The practice on common law indictments, and on information on particular statutes, shews it to be clear that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial." *Id.* at 694, 100 Eng. Rep. at 1250.

⁴ An exception was allowed, for example, where the exhibit requested for inspection was the basis of the charge—the indictment was for sending a threatening letter. *Rex v. Harrie*, 6 Car. & P. 105, 172 Eng. Rep. 1165 (1833). Also, the inspection of the contents of the stomach was allowed defendant in a prosecution for homicide by poisoning. *Rex v. Spry*, 3 Cox Cr. Cas. 221 (1848).

⁵ For example, in *State ex rel. Robertson v. Steele*, 117 Minn. 384, 135 N.W. 1128 (1912), the Minnesota Supreme Court, in denying the motion of defendant to inspect a statement he gave to a fire marshal in advance of trial, held: "We ought not . . . establish a rule that would go far toward hampering prosecuting officers in criminal trials and make convic-

The leading early American case in pretrial discovery is *People ex rel. Lemon v. Supreme Court*,⁶ decided in 1928. Judge Cardozo, speaking for a unanimous New York Court of Appeals, held that prior to trial the defendant had no right to notes and other memoranda of prospective government witnesses in the hands of the prosecuting attorney when these items would not themselves be admissible into evidence. The point that these items might be admissible for impeachment purposes was regarded as immaterial. Judge Cardozo did not, however, completely foreclose the possibility of pretrial inspection:

Her demand is that a prosecutor who has gathered statements from prospective witnesses shall place the statements in her hands that she may study and repel them. She does not ask that she inspect any confession made in her name and admissible against her. Conceivably such inspection may be necessary at times, as, for instance, to enable a defendant to prove the forgery of a signature.⁷

In the thirty-five years that have passed since *Lemon*, and particularly in the past four years, the courts in nearly all jurisdictions have grappled with the question of whether to allow pretrial inspection of confessions, scientific reports and other items of evidence, and statements of prospective state witnesses, with a wide range of results occurring.

II. POLICY CONSIDERATIONS

Before any conclusions can be reached on the merits of pretrial discovery in criminal cases, the policy for or against such discovery in criminal cases must be determined. First, it must be recognized that at the time *Rex v. Holland*⁸ was decided, a totally different concept of rights of an accused existed. This can be illustrated by a statement by Stephen in his 1883 treatise, *History of the Criminal Law*, as quoted by Wigmore:⁹

[E]ven at the beginning of the eighteenth century, and after the experience of the State trials held under the Stuarts, it did not occur to the Legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favor that it ought to be

tions of the guilty exceedingly difficult." *Id.* at 386, 135 N.W. at 1129. See also *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.W. 205 (1911); *Territory v. McFarlane*, 7 N.M. 421, 37 Pac. 1111 (1894); *Santry v. State*, 67 Wis. 65, 30 N.W. 226 (1886).

⁶ 245 N.Y. 24, 156 N.E. 84 (1928).

⁷ *Id.* at 33, 156 N.E. at 87.

⁸ 4 Durn. & E. 691, 100 Eng. Rep. 1248 (K.B. 1792).

⁹ 6 WIGMORE, EVIDENCE § 1847 (3d ed. 1940).

reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offenses should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder . . .¹⁰

Policy must be examined, therefore, not in terms of eighteenth century concepts, but in light of more modern concepts of criminal justice.

A. WHY IS PRETRIAL DISCOVERY NECESSARY?

Under our American system of criminal law, the accused is presumed to be innocent until he has a fair opportunity to prepare his defense and is then proven guilty beyond a reasonable doubt. These rights are unquestioned. It is also the duty of the state to seek the truth rather than to achieve a record of indiscriminate convictions by concealment and surprise.¹¹ If pretrial discovery is found to be necessary to perpetuate these principles, it should be extended as a matter of right. The fact that the state may somehow be burdened by displaying evidence before trial, when weighed against the possibility that the defendant may not be given a fair opportunity to defend himself, becomes a subordinate consideration.¹² The state is also heavily burdened when it must prove a defendant guilty beyond a reasonable doubt, and yet the necessity of this burden is now beyond debate. The question which must be faced, however, is whether pretrial discovery is necessary in all or some cases or whether some contravening public policy should always prohibit it.

(1) Confessions

Discovery of a confession may constitute the most significant part of the preparation of a defendant's case.¹³ Typically, a defense counsel works under a serious handicap. He usually comes into a case after the confession was given. The state has already accomplished a type of discovery by obtaining the confession. By the time counsel sees the defendant, the latter has likely forgotten much

¹⁰ This is not meant to infer that our present system of criminal justice is beyond reproach. Even today a federal criminal defendant in other than capital cases is not entitled to a list of witnesses against him in advance of trial.

¹¹ A.B.A., Canons of Professional Ethics, Canon 5.

¹² *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1063 (1961); Fletcher, *Pretrial Discovery in State Criminal Cases*, *supra* note 1, at 312.

¹³ Comment, *Developments in the Law—Discovery*, *supra* note 12, at 1055.

of the essential information that he gave the police. On the other hand, the state has usually gathered all of its evidence, and defense counsel now has limited means of gaining necessary information. For these reasons alone, it would seem only fair that defense counsel be allowed to inspect the confession.

If there is any question as to whether the confession was involuntary, the signature forged, or defendant was mentally incompetent at the time the confession was given, defense counsel should have an opportunity to check out these possibilities as a matter of right. Otherwise, a defendant could be convicted on fraudulent evidence. Defense counsel will rarely have sufficient time during trial to check out these possibilities unless there is substantial delay.

Probably the most significant reason for pretrial discovery of a confession is its effect on a jury.¹⁴ When a jury hears a defendant carefully recreate the details of a hideous crime, little else is remembered. This was succinctly stated by the New Jersey court in *State v. Johnson*:¹⁵

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

For any of the above reasons, it appears clear that the discovery of a confession prior to trial is necessary to enable defense counsel to properly prepare his defense.

(2) *Items of Evidence and Scientific Reports*

In many cases the most damaging evidence against defendant are the fingerprints on a weapon, a scientific report on bloodstains, a ballistics test or an autopsy report. Even if these reports may not be admissible at trial, their results often prove innocence as well as guilt, and for that reason, may be quite vital to the defense for impeachment purposes. The state has unlimited access to modern scientific aids and it is making more and more use of these devices. The defendant, on the other hand, is often indigent and generally cannot afford to make independent tests on his own. Grave injustice may be done if scientific studies which tend to show innocence are

¹⁴ Fletcher, *Pretrial Discovery in State Criminal Cases*, *supra* note 1, at 306.

¹⁵ 28 N.J. 133, 137, 145 A.2d 313, 316 (1958).

never made known to defense counsel and are never introduced at trial. Because of the great probative value of such tests or reports and because of the extreme difficulty and expense of private duplication, such reports ought to be freely discoverable.¹⁶ If a report or an item of evidence is the essence of a case, it would seem particularly unfair to withhold its access from the defendant.

In most cases, these reports or tests are complex and require expert analysis. Unless counsel has sufficient time before trial to examine these materials, he will be at a severe disadvantage on cross-examination as he will not be familiar enough with the subject matter.¹⁷

(3) *Witness Statements*

Obtaining the statements of prospective state witnesses before trial may also be essential to the preparation of a defendant's case. The value of such inspection rests primarily in checking out the validity of a statement in order that defense counsel may intelligently impeach the witness on cross-examination. If counsel has sufficient time to do some checking, he may find gross exaggerations or outright fabrication which he might not have been able to discover if not allowed to see the statement until after direct examination of the witness.

The state should never be allowed to convict a defendant on untrustworthy evidence. If the statements are trustworthy, the state should have no fear of turning them over for a defendant's inspection.¹⁸

Thus, it can be seen that there are strong policy grounds for pretrial discovery of witness' statements. Probably the best expression of this policy was enunciated by the California court in *Cash v. Superior Court*.¹⁹

The basis for requiring pre-trial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial. . . . In other words, although there is a possibility that a defendant may be acting in bad faith and may be seeking merely to acquire advance knowledge of the details of the prosecution's case with a view to shaping his defense accordingly, such a possibility is subordinate in importance to the

¹⁶ Comment, *Developments in the Law—Discovery*, *supra* note 12, at 1061.

¹⁷ *Layman v. State*, 355 P.2d 444 (Okla. Crim. App. 1960); *State ex rel. Wagner v. Circuit Court of Minnehaha County*, 60 S.D. 115, 244 N.W. 100 (1932).

¹⁸ *Arens & Meadows, Psycholinguistics and the Confession Dilemma*, 56 COLUM. L. REV. 19 (1956). See *People v. Moses*, 11 Ill. 2d 84, 142 N.E. 2d 1 (1957).

¹⁹ 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

danger of convicting the innocent and does not warrant denying a request for production where there is a sufficient showing that the request should be granted in the interests of a fair trial.

If the goal of criminal prosecutions is to determine the truth, then pretrial discovery is necessary to give a defendant equal opportunity to discover the truth. Many courts argue, however, that pretrial discovery by a defendant will in many cases result in more harm than good. These arguments will now be analyzed.

B. ARGUMENTS AGAINST PRETRIAL DISCOVERY

The arguments against pretrial discovery have been so vehement by some courts that they deserve serious scrutiny.

(1) *Pretrial discovery will lead to perjury and the suppression of evidence.*

The argument most often employed for denying pretrial discovery is that once a defendant has access to evidence prior to trial he will use perjury and other devious means to meet the evidence. Probably the strongest advocate of this view was Justice Vanderbilt:²⁰

In criminal proceedings long experience has taught the courts that often discovery will not lead to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or in absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.

This argument would be tremendously persuasive if every defendant were guilty and would engage in perjury. However, this is certainly not the case, and "the possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clear-

²⁰ State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953).

ing himself."²¹ There is no evidence that present methods of impeachment are inadequate to uncover perjured testimony. No proof has been forthcoming to show that jurisdictions with liberal discovery procedures have been swamped by perjury.

Even if it be conceded that defendants will commit perjury to save themselves, do they really have an adequate opportunity to do so? In regard to confessions, little opportunity for perjury is possible. Since the state already has the confession, the opportunity for impeachment would negate any opportunity for fabrication.²² The possibility of perjury is even smaller in the discovery of scientific reports and items of evidence. Items of evidence are unchangeable, except by destruction or wilful alteration, and these acts can be prevented by proper supervision.²³ Scientific reports are likewise incapable of being refuted by perjury or subjected to tampering.²⁴ There is no reason, therefore, why confessions or scientific data should ever be withheld because of a fear of perjury.

It may be true, however, that discovery of statements of state witnesses may create the possibility of perjury or even the refusal of a witness to testify because of bribery or intimidation. One leading author has opined that the only time there is a danger of threats to witnesses and/or hired perjurers is when a criminal syndicate is involved and that this problem is, in actuality, nonexistent in the typical crime in a state court such as a passion killing.²⁵ He concludes, therefore, that the burden should be placed on the state to show that such an unusual threat is possible. This may be placing too great a burden on the prosecution, however. Possibly a better result would be to favor pretrial discovery of witness' statements in most cases, but to allow a trial court wide discretion to refuse to allow discovery when the public interest so dictates.

²¹ 6 WIGMORE, EVIDENCE § 1863 at 488 (3d ed. 1940).

²² Comment, *Developments in the Law—Discovery*, *supra* note 12, at 1054.

²³ *United States v. Rich*, 6 Alaska 670 (1922).

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

²⁵ Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, *supra* note 1 at 100: "Rather, it would seem that the law should take account of these realities, and draw the line between typical, and organized crime. In the usual criminal case, the norm would be discovery as full-fledged as that which now characterizes civil litigation in federal courts and those many jurisdictions which have emulated the federal civil discovery rules. Discovery, however, would be withheld, or perhaps allowed subject to restrictions, upon a showing by the state that by reasons of the nature of the accused's associations and representatives, it would likely lead to improper uses such as threats to witnesses, hired or professional perjury, or the like."

- (2) *Defendants in criminal cases already have an unfair advantage, and pretrial discovery would only increase this imbalance.*

Several courts have expressed the view that criminal defendants already have *too much of an edge*, and the granting of pretrial discovery would only increase the advantage. The point is made that a defendant must be found guilty beyond a reasonable doubt, that a jury of twelve must unanimously find a defendant guilty, that a defendant does not have to take the stand unless he so desires, and that he can introduce any unforseeable evidence he desires in his own defense. Judge Learned Hand's statement in *United States v. Garsson*,²⁶ is the most famous expression of this view:

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 where there is the least 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 always been 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.²⁷

First, the contended advantage that a criminal defendant has is undoubtedly exaggerated, particularly in state cases.²⁸ To say that the few constitutional safeguards granted to an accused overwhelm the combined investigative facilities at the hands of the state is unrealistic. But even if it were conceded that a defendant has some sort of advantage, this is no reason to deny pretrial discovery. Questions of procedural rights should not turn principally on questions of relative advantage since the aim of criminal procedure ought not be conviction, but rather justice through full disclosure of the truth.²⁹ At early common law, criminal litigation was equated to a game and it was considered unsportsmanlike for one adversary to have to disclose his evidence.³⁰ But this theory has no place in modern procedure. The important consideration must be the ferreting out of truth. There is no sound reason for the state to with-

²⁶ 291 Fed. 646 (S.D.N.Y. 1923).

²⁷ *Id.* at 649.

²⁸ Comment, *supra* note 12, at 1063.

²⁹ *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); 6 WIGMORE, EVIDENCE § 1863 (3d ed. 1940); *Louisell*, *supra* note 1, at 102.

³⁰ 6 WIGMORE, EVIDENCE § 1845 (3d ed. 1940).

hold inspection of evidence except when serious prejudice can be shown.

(3) *Pretrial discovery in criminal cases will subvert the whole criminal system.*

This argument was used in the early cases but no reasons were given why such a danger would result from discovery.³¹ Apparently, this argument was used whenever any advantage was taken away from the old method of "trial by ambush."³² Initially, a defendant could not call witnesses in his own behalf and he had no privilege against self-incrimination. Changes in these procedures have not subverted the entire criminal system, and there is no reason why pretrial discovery would have this effect.

(4) *The crime rate has increased so rapidly that we must tighten our criminal procedures instead of liberalizing them.*

One of the reasons asserted by the New Jersey Superior Court, in *State v. Tune*,³³ for denying discovery was that crime was on the upswing in that state and steps had to be taken to reverse the trend. This reasoning was rejected in a dissent in the *Tune* case,³⁴ and by the majority in the later case of *State v. Johnson*.³⁵ Both rebuked this reasoning on the grounds that: (1) discovery procedure has nothing to do with increased crime rates, and (2) the fact that crime is increasing is no basis to presume that every defendant is guilty. The reasoning carried to its extreme that the denial of pretrial discovery would reduce crime, would justify police brutality and mandatory self-incrimination to guarantee a conviction in every case.

(5) *Since the right against self-incrimination prevents the state from any discovery of an accused's case, the state should have the same protection.*

³¹ *Rex v. Holland*, 4 Durn. & E. 691, 100 Eng. Rep. 1248 (K.B. 1792); *State ex rel. Robertson v. Steele*, 117 Minn. 284, 135 N.W. 1128 (1912).

³² 6 WIGMORE, EVIDENCE § 1863 (3d ed. 1940).

³³ 13 N.J. 203, 98 A.2d 881 (1953).

³⁴ *Id.* at 227, 98 A.2d at 894. Mr. Justice Brennan's sarcastic remarks are worthy of mention: "That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes where liberal discovery has been allowed."

³⁵ 28 N.J. 133, 145 A.2d 313 (1958).

The case most often cited to support this proposition is an early Ohio case, *State v. Rhoads*,³⁶ where the court stated:

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 so perverted as to sanction the demands allowed in this case.

Again, this argument presumes that a criminal case is somewhat like a contest, in which each contestant must start out on an equal footing. The argument is emasculated by the California Supreme Court in *Cash v. Superior Court*.³⁷

In *Powell v Superior Court* . . . it was noted that an accused was denied production at early common law because he might fabricate evidence to meet the state's case and because the prosecution did not have a reciprocal right in view of the privilege against self-incrimination. In granting relief, however, this court pointed out that to deny production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the purpose of a trial, which is the ascertainment of truth, that nondisclosure partakes of the nature of a game; and that the state is so solicitous of according a defendant a fair trial that it will not hinder him in the preparation of his defense by depriving him of competent material and relevant evidence.

There is also some doubt as to how effective the right against self-incrimination is in many cases. Often, the state already has a defendant's confession and several states require that a defendant specially plead his defenses of alibi and insanity.³⁸

After close scrutiny of these various arguments, it is apparent that there is no strong policy for denying pretrial discovery in criminal cases. It is conceded that in some cases, such as where there is an apparent threat to state witnesses, discovery should be denied; but these instances are few. When such a case arises, it can be handled by giving a trial judge discretion to deny discovery when, in his opinion, discovery would be detrimental to the public interest.

³⁶ 81 Ohio St. 397, 425, 91 N.E. 186, 192 (1910).

³⁷ 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

³⁸ Louisell, *Criminal Discovery; Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 90 (1961); Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1062 (1962).

III. THE EFFECT OF LIBERAL PRETRIAL DISCOVERY METHODS IN MILITARY COURTS AND THE ENGLISH CRIMINAL SYSTEM.

The arguments that liberal pretrial discovery will result in substantial harm to effective criminal administration can also be effectively refuted by showing the success of liberal discovery in other jurisdictions. Contrary to the many fears raised, liberal pretrial discovery, where used, has been praised by prosecution and defense alike.

A. MILITARY PROCEEDINGS

The prevailing attitude in military justice is that a defendant be given every possible aid by the prosecution.³⁹ Access to government experts prior to trial is unobstructed.⁴⁰ A defendant has an absolute right, at government expense, to reports of psychiatrists, chemists and ballistics experts, among others.⁴¹ A defendant also has an absolute right to all evidentiary items, e.g., the murder weapon.⁴² Confessions are turned over as a matter of right and statements of informers or other witnesses are given to a defendant upon any showing of materiality. The success of this liberality is clearly illustrated by the following observation.⁴³

What I have described is, in fact, an open government file, in rather startling contrast to civilian practice where some widening of traditionally narrow pretrial area has been causing comment in the literature. Apparently Judge Learned Hand's remarks attract fewer adherents. That the ends of justice would be subverted by giving such "ammunition" to a defendant has been an oft-expressed fear. I cannot tell you how much perjury or coercion of witnesses is caused by this wide open policy. I can state to you that when I thought I had detected evidence of either, it seemed to me not to have sprung from or been discouraged by, any particular revelation of Government evidence before or at trial. Additionally, police and investigative powers in the Army are, to say the least, competent to deal with this form of threat if, in fact, it is real. Indeed, I have wondered if perjury would not be more likely where an accused "was in the dark" so to speak with regard to possible rebuttal evidence in the hands of the prosecutor.

³⁹ Keogh, *Military Indictment or Presentment, The Investigation, and Decision to Try by Court-Martial*, American Bar Association Panel Discussion on Pretrial Procedures and Discovery in Courts-Martial and the Civil Courts—A Comparison (American Bar Association 84th Annual Meeting, August 9, 1961).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

B. ENGLISH PROCEEDINGS

The English system of criminal procedure has progressed immeasurably since the days of *Rex v. Holland*.⁴⁴ The English courts still do not employ a discovery device as such, but their present pretrial procedures may even excel pretrial discovery in fairness to the defendant.

In England,⁴⁵ every indictable offense (with some exceptions not important to this discussion) must be initially investigated at a preliminary hearing. At this hearing all the evidence to be introduced at the trial must be introduced in the presence of the accused.⁴⁶ Each witness who will testify on behalf of the state at the trial must divulge all his information at the preliminary investigation, and he may be cross-examined by defense counsel.⁴⁷ This testimony is recorded, and after it is read back to the witness and he approves it, it becomes his deposition.⁴⁸ Copies of this deposition are then made available to a defendant if he is subsequently committed for trial.⁴⁹ A defendant also has the opportunity to present his case at this investigation, but because his evidence will be reduced to writing and available at trial, he rarely does so.⁵⁰ One obvious shortcoming of this system is that the prosecution can still withhold damaging evidence because only that evidence which will be used at the trial need be disclosed at the preliminary investigation. This procedure, taken as a whole, however, is extremely fair to a defendant because there is little opportunity for surprise at trial, and a defendant is given an adequate opportunity to prepare his defense.

The fact that the American military and English criminal law systems have been liberalized in an effort to assist a defendant, without any apparent ill effects, greatly strengthens the case for liberal pretrial discovery. It also casts doubt on the oft-heard expression that American courts are world leaders in fair criminal procedure. This will be further illustrated by the following section which shows the present state of the law in American jurisdictions.

⁴⁴ 4 Durn. & E. 691, 100 Eng. Rep. 1248 (K.B. 1792).

⁴⁵ MAGISTRATES' COURTS ACT, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, §§ 4-12, [hereinafter cited as MAGISTRATES' COURTS ACT].

⁴⁶ MAGISTRATES' COURTS ACT § 4(3).

⁴⁷ THE MAGISTRATES' COURTS RULES, 1952, Rule 5(1).

⁴⁸ *Ibid.*

⁴⁹ THE MAGISTRATES' COURTS RULES, 1952, Rule 13.

⁵⁰ Louisell, *supra* note 38, at 65.

IV. THE PRESENT LAW OF PRETRIAL DISCOVERY IN AMERICAN JURISDICTIONS

A. THE FEDERAL LAW

Procedure in federal criminal cases is governed by the Federal Rules of Criminal Procedure, promulgated in 1946 in an attempt to, procedurally at least, give defendants a fair trial. Discovery procedures are governed by Rules 16 and 17(c). Rule 16 provides:

Upon a motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

As Rule 16 vests a discretionary power in the court to grant inspection,⁵¹ it would appear that this rule would serve as a vehicle to extensive pretrial discovery equal to that authorized by the Federal Rules of Civil Procedure. Any hope that the criminal rules would be as liberal as the civil rules, however, has long since vanished. A close reading of Rule 16 indicates that inspection may be granted only as to those documents "obtained from or belonging to" the defendant or "obtained from others by seizure or by process."

Although there has been some conflict in the various district courts as to whether Rule 16 would allow a defendant to inspect his own statement prior to trial,⁵² a recent Court of Appeals case has clearly stated that a confession or statement could not be inspected prior to trial under Rule 16. In *United States v. Murray*,⁵³ the court held:⁵⁴

We hold that a transcription of a question and answer examination of one who later becomes a defendant in a criminal action is not discoverable by him under Rule 16 as within the category of "books, papers, documents or tangible objects, obtained from or belonging to the defendant." The language of Rule 16, its evolution

⁵¹ *United States v. Schiller*, 187 F.2d 572 (2d Cir. 1951); *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955). See also Kauffman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957).

⁵² A list of these cases can be found in *United States v. Fancher*, 195 F. Supp. 448 (D. Conn. 1961).

⁵³ 297 F.2d 812 (2d Cir. 1962).

⁵⁴ *Id.* at 820.

in the Advisory Committee . . . and the Committee's final explanatory Note all indicate that Rule 16 applies only to books, papers, documents or tangible objects in which a defendant has had some prior proprietary or possessory interest. The great weight of authority supports our unwillingness to stretch the word "belonging" to the point of saying that a stenographic transcript of a defendant's words "belongs" to him. . . . Although Murray's Q-and-A statements were not signed, we can see no reason why a signed statement would anymore have "belonged" to him within the meaning of the rule.

Carrying this argument to its logical conclusion, it is also apparent that a defendant would not be able to inspect any scientific reports prepared by the government.

Neither does a defendant have much opportunity to pretrial discovery under Rule 17 (c). This rule 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 prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

There was some early hope that Rule 17(c) would be construed somewhat more broadly than Rule 16, and as such, would be a useful discovery device. The Supreme Court in *Bowman Dairy Co. v. United States*⁵⁵ held that any document or other materials, admissible as evidence, obtained by the government by solicitation or voluntarily from third persons, was subject to subpoena. The Court stated that although Rule 16 was not intended to give such a right of discovery, Rule 17(c) does so since:⁵⁶

There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary.

The courts, since *Bowman*, however, have held that Rule 17(c) does not provide an additional means of discovery not available under Rule 16. In *United States v. Murray*,⁵⁷ for example, the court refused to allow the inspection of a defendant's statement under Rule 17(c) and stated that the mere likelihood that the government will

⁵⁵ 341 U.S. 214, 220 (1951).

⁵⁶ *Id.* at 219.

⁵⁷ 297 F.2d 812 (2d Cir. 1962).

use a defendant's statement as evidence does not make it evidentiary within the meaning of Rule 17(c):⁵⁸

If Rule 17(c) is interpreted to allow the defense to inspect any matter in the government hands which might be used by it as evidence, we see little meaning left in the court's clear statement in *Bowman* that it is not an additional discovery device. Rather we interpret *Bowman* as saying that Rule 17(c) is a device solely for the obtaining of evidence for the use of the moving party, permitting him to examine the material obtained before trial only where, in the discretion of the court, it is necessary that he do so in order to make use of the material as evidence.

The only apparent evidentiary use to which a defendant could put his own statement would be to impeach the testimony of a government witness about its contents or, perhaps, to bolster his own testimony by showing its consistency with the prior statement in the event that the government introduced evidence of some other inconsistent statement. To be sure, we see no reason why *after* the government introduces such testimony at trial a defendant could not use Rule 17(c) to subpoena his prior statement for his own use.

Thus it seems obvious that Rules 16 and 17(c) must be amended if they are ever to be effective in granting a defendant pretrial discovery of his own statements or of scientific reports.⁵⁹

The question of whether or not a defendant can inspect the statements of government witnesses in a federal court proceeding has had a tortured history. Prior to 1957, the rule in the federal courts was that a defendant could not inspect the statements of government witnesses for impeachment purposes until he could show an inconsistency between the testimony of the witness and the contents of his statement.⁶⁰ This rule was foolish because a defendant had no way of ascertaining whether there was an inconsistency as he never had an opportunity to examine the statement,⁶¹ and it was completely laid to rest in 1957 by the now famous case of *Jencks v. United States*.⁶² The United States Supreme Court held in *Jencks* that at the time of cross-examination the defense was entitled to relevant statements made by government agents without showing

⁵⁸ *Id.* at 821.

⁵⁹ Comment, *supra* note 12, at 1053, 1061.

⁶⁰ *Gordon v. United States*, 344 U.S. 414 (1953). Mr. Justice Brennan denied that *Gordon* stood for this rule in *Jencks v. United States*, 353 U.S. 657 (1957), but the lower federal courts interpreted *Gordon* in that manner. See, e.g., *Scanlon v. United States*, 223 F.2d 382 (1st Cir. 1955).

⁶¹ "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *United States v. Burr*, 25 Fed. Cas. 187 (C.C.D.Va. 1807), quoted by Mr. Justice Brennan in *Jencks v. United States*, 353 U.S. 657, 668 (1957).

⁶² 353 U.S. 657 (1957).

any inconsistency and without prior inspection by the trial court to determine whether an inconsistency in fact existed. The government might refuse the demand for production, but at the expense of dismissal of its case.

This liberal criminal discovery procedure lasted only three months. Congress, probably out of fear that the Supreme Court had opened the government files "to the criminal and thus afforded him a Roman holiday for rummaging through confidential information,"⁶³ enacted what is now known as the Jencks Act.⁶⁴ In essence, the Jencks Act provides: (1) no report or statement made by a government witness is subject to discovery and inspection until after that witness has testified on direct examination at trial; (2) after the direct examination, the defendant may move to inspect that part of the statement or report which relates to the testimony of the witness; (3) if the United States objects to production of a statement or report on the grounds that it does not relate to the subject matter of the testimony of the witness, then the court will examine the statement in camera and excise those portions not relating to the subject matter. "Statement" was defined in the act to mean:

- (1) a written statement made by said witness and signed or otherwise adopted by him; or
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a 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.⁶⁵

The Jencks Act was judicially construed by the Supreme Court for the first time in *Palermo v. United States*.⁶⁶ Mr. Justice Frankfurter, writing for the majority, stated that the terms of the act provided the only method of inspection of statements of government witnesses, and therefore no statement can be obtained until after that witness testifies at the trial. Also, the Court held that under the act's definition of "statement," a defendant can never obtain resumes, summaries or condensations of witness' statements.

The result of the Jencks Act and its judicial construction by the Supreme Court is that there is now no opportunity for pretrial discovery of a government witness' statement at all, and no opportunity, as a practical matter, to get anything but a signed state-

⁶³ Mr. Justice Clark dissenting in *Jencks* at 681-82.

⁶⁴ 71 Stat. 595 (1957), 18 U.S.C. 3500 (1958).

⁶⁵ *Ibid.*

⁶⁶ 360 U.S. 343 (1959).

ment of a witness during trial, since *verbatim* reports, transcriptions and recordings will probably be non-existent.

Thus, federal criminal procedure, supposedly the pacesetter for liberal criminal procedure, has taken a serious step backward in discovery methods. Add to this the fact that a defendant can rarely inspect his own confession or scientific reports prior to trial, and the result appears to be that criminal pretrial discovery in the federal courts is, for all practical purposes, nonexistent. This is truly an anomaly, for discovery procedure under the Federal Rules of Civil Procedure is ever expanding. It would appear that this liberality should certainly extend to criminal cases where error in result is far more serious to the parties involved.

B. THE STATE LAW

(1) *State Statutes*

Seven states have enacted statutes dealing with pretrial discovery or an aspect of it. Four states, Arizona,⁶⁷ Idaho,⁶⁸ Maryland,⁶⁹ and Vermont⁷⁰ have adopted statutes identical in nearly every respect to Federal Rule 16. These statutes are as useless as the federal rule since they do not authorize pretrial inspection of confessions, scientific reports, or tests and statements of prosecution witnesses.⁷¹ Two states, New Jersey⁷² and Delaware,⁷³ have also adopted the federal rule but have added provisions somewhat expanding discovery. New Jersey allows a trial judge to authorize discovery of the confession or statement of defendant if justice so requires, and Delaware allows discovery of confessions and statements of co-defendants. Thus, these two states, at least, have had the foresight to recognize some of the shortcomings of Rule 16, but they, too, still have avoided the problem of scientific reports or evidentiary items.

The other states, Illinois⁷⁴ and Florida,⁷⁵ have unique statutes. Illinois has recently enacted a statute requiring that a confession

⁶⁷ ARIZ. REV. STAT. ANN., Rules of Crim. Proc., Rule 195 (1956).

⁶⁸ IDAHO CODE ANN. § R19-1530 (Supp. 1961).

⁶⁹ MD. ANN. CODE, Rules of Proc., Rule 728 (1957).

⁷⁰ VT. STAT. ANN., tit. 13 § 6721 (Supp. 1961).

⁷¹ This is assuming that these state courts give their statutes the same construction that the federal rule was given.

⁷² N.J. Court Rules 3:5-11 (1958).

⁷³ Del. Super. Ct. (Crim.) R. 16, 17(c) (1953).

⁷⁴ ILL. ANN. STAT. ch. 38 § 729 (Smith-Hurd, Supp. 1961).

⁷⁵ FLA. STAT. ANN. § 909.18 (1959).

will not be admissible at a trial unless a copy of it was given to the defendant prior to trial. It provides as follows:

Whenever a written or oral confession shall have been made before any law enforcement officer or agency in this State by any person charged with any crime, a copy of such confession, if written, together with a list of the names and addresses of all persons present at the time such confession was made shall be given to the defendant or his counsel prior to arraignment, or at such later time as the court, in its discretion, may direct, upon motion by either the prosecution or defense at the time of arraignment. If such confession was not reduced to writing, then a list of the names and addresses of all persons present at the time the confession was made shall be furnished. If the confession is made between the arraignment and the time the case is set for hearing, such fact shall be grounds for a continuance of the case on motion of either party, and the confession shall thereafter be furnished as aforesaid. No confession shall be admitted as evidence unless the confession and/or list of names and addresses of persons present at the time the confession was made is furnished as required by this Section.⁷⁶

This statute appears to create an effective method of compelling the state to furnish confessions, but it has not yet been tested.

Florida, on the other hand, has a statute which does not cover confessions but does cover scientific reports and tests and evidentiary items:⁷⁷

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

It is quite possible that this statute will be strictly construed. As written, it does not authorize inspection of scientific reports made, but only allows a defendant to be present when the tests are being prepared. What happens if a defendant is not yet represented by counsel when the examination is performed? Can he later get

⁷⁶ *Id.* § 909.19 (1959).

⁷⁷ *Williams v. State*, 143 Fla. 826, 197 So. 562 (1940).

the report of the examination? One Florida case, *Ezzell v. State*,⁷⁸ refused to turn over to a defendant an outline of the testimony to be given at trial by a ballistics expert. The gun and bullets were, however, ordered produced. A 1957 Attorney General's Opinion indicated that a defendant has no right to a copy of a drunkometer report showing the result of an examination of a motorist after he was arrested for drunken driving.⁷⁹ Thus, this statute, too, apparently is going to be so strictly construed that it will lose its effectiveness.

None of the statutes deal with all discovery problems and only the Illinois and Florida statutes deal with any one of the problems with any hope of success.

(2) STATE CASES

State courts are hopelessly split as to whether a defendant has the right to pretrial discovery. Several states have unequivocally denied a defendant in a criminal case any right to pretrial discovery.⁸⁰ The reason generally given for this outright prohibition is that there was no right to such discovery at common law and

⁷⁸ *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956).

⁷⁹ Ops. Fla. Att'y Gen. 057-78 (1957).

⁸⁰ *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Mendelsohn v. People*, 143 Colo. 397, 353 P.2d 587 (1960); *Walker v. State*, 215 Ga. 128, 109 S.E.2d 748 (1959); *Martin v. State*, 96 Ga. App. 557, 100 S.E.2d 645 (1957); *Arthur v. Commonwealth*, 307 S.W.2d 182 (Ky. 1957); *Kinder v. Commonwealth*, 279 S.W.2d 782 (Ky. 1955); *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.W. 205 (1911); *Commonwealth v. Chapin*, 333 Mass. 610, 132 N.E.2d 404 (1956), *cert. denied*, 352 U.S. 857 (1956); *Commonwealth v. Bartolini*, 299 Mass. 503, 13 N.E.2d 382 (1938); *Commonwealth v. Jordan*, 207 Mass. 259, 93 N.E. 809 (1911); *State ex rel. Robertson v. Steele*, 117 Minn. 384, 135 N.W. 1128 (1912); *Territory v. McFarlane*, 7 N.M. 421, 37 Pac. 1111 (1894); *State v. Sharp*, 162 Ohio St. 173, 122 N.E.2d 684 (1954); *State v. Potts*, 69 Ohio L. Abs. 77, 124 N.E.2d 180 (Ct. App. 1953); *State v. Yeoman*, 112 Ohio St. 214, 147 N.E. 3 (1925). *But see*, *State v. Regedanz*, 54 Ohio Op. 76, 120 N.E.2d 480 (C.P. 1953); *State v. Major*, 60 Ohio L. Abs. 271, 101 N.E.2d 397 (C.P. 1950); *State v. Cala*, 20 Ohio Op. 400, 35 N.E.2d 758 (C.P. 1940); *Ivey v. State*, 207 Tenn. 438, 34 S.W.2d 907 (1960); *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707 (1950); *Freeman v. State*, 166 Tex. Crim. 626, 317 S.W.2d 726 (1958); *Hill v. State*, 167 Tex. Crim. 229, 319 S.W.2d 318 (1958); *Dowling v. State*, 167 Tex. Crim. 43, 317 S.W.2d 533 (1958); *Pettigrew v. State*, 163 Tex. Crim. 194, 289 S.W.2d 935 (1956); *Lopez v. State*, 158 Tex. Crim. 16, 252 S.W.2d 701 (1952); *Smith v. State*, 156 Tex. Crim. 253, 240 S.W.2d 783 (1951); *Board v. State*, 122 Tex. Crim. 487, 56 S.W.2d 464 (1933); *Taylor v. State*, 87 Tex. Crim. 330, 221 S.W. 611 (1919); *State v. Circuit Court of Dane County*, 116 Wis. 2d 197, 114 N.W.2d 114 (1962); *State v. Herman*, 219 Wis. 267, 262 N.W. 718 (1935); *State v. Page*, 206 Wis. 611, 240 N.W. 173 (1932).

the courts are powerless to act in the absence of remedial legislation.⁸¹ This reasoning must be questioned in light of the fact that nearly all jurisdictions, including the federal courts, have adopted the view that a trial judge has inherent power to order discovery, even in the absence of statute, when justice so requires.⁸² Other reasons given for a complete denial of pretrial discovery have even less validity: once pretrial discovery in any form is approved by the courts, the floodgates will swing open to unlimited discovery of all the state's evidence;⁸³ the state will be placed at an unfair disadvantage;⁸⁴ the state's evidence is privileged as "work-product,"⁸⁵ and the present procedure of denying discovery has worked well in the past so there is no need for change.⁸⁶ All of these arguments fail to analyze fairness to the defendant, his need for pretrial discovery and whether or not there is any actual harm to the state.⁸⁷

The remainder of the states accept the fact that trial judges do have inherent power to permit discovery in certain cases. The questions then arise as to when this power can be exercised and as to what the scope of review by appellate courts should be. Because confessions, scientific reports and witness' statements have been

⁸¹ See, e.g., *Walker v. People*, 126 Colo. 135, 162, 248 P.2d 287, 302 (1952): "It is readily apparent, however, that the tools of equity are in no wise fitted to the mechanics of the trial of a criminal case. The doctrine of discovery is therefore a complete and utter stranger to criminal procedure, unless introduced by appropriate legislation." See also *Walker v. State*, 215 Ga. 128, 109 S.E.2d 748 (1959); *State ex rel. Robertson v. Steele*, 117 Minn. 384, 135 N.W. 1128 (1912); *Territory v. McFarlane*, 7 N.M. 421, 37 Pac. 1111 (1894); *State v. Yeoman*, 112 Ohio St. 421, 147 N.E. 3 (1925); *Dowling v. State*, 167 Tex. Crim. 43, 317 S.W.2d 533 (1958).

⁸² *Supra* note 81. Also, a recent federal case, *United States v. Murray*, 297 F.2d 812 (2d Cir. 1962), while refusing to grant discovery under Rules 16 and 17(c), Federal Rules of Criminal Procedure, admitted that the trial judge has the discretion to do so.

⁸³ *Walker v. People*, 126 Colo. 135, 163, 248 P.2d 287, 302 (1952): "It takes little imagination to visualize the extremity to which such 'prowling' might be extended should opportunity be afforded, and the serious effect that might result therefrom."; *State v. Steele*, 117 Minn. 384, 386, 135 N.W. 1128, 1129 (1912): "[B]ut if the practice be once adopted that an indicted person is entitled to be furnished with some evidence in the possession of the county attorney, where is the line to be drawn?"

⁸⁴ *United States v. Garsson*, 291 Fed. 646 (S.D.N.Y. 1923).

⁸⁵ *State v. Zimmaruk*, 128 Conn. 124, 20 A.2d 613 (1941); *Lopez v. State*, 158 Tex. Crim. 16, 252 S.W.2d 701 (1952).

⁸⁶ *Kinder v. Commonwealth*, 279 S.W.2d 782 (Ky. 1955).

⁸⁷ *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959).

handled quite differently by the states, each will be dealt with separately.

(1) *Confessions*

Probably the greatest advance in pretrial discovery has evolved in the area of confession, particularly within the past few years.⁸⁸ There is still no consistent policy, however, as to what the rule should be. One state, Louisiana, has held that under the state due process clause, a defendant must be given a pretrial inspection of his own confession.⁸⁹ No other state, however, has placed pretrial discovery on constitutional grounds, and the United States Supreme Court has held on two separate occasions that there is no federal constitutional right to a pretrial inspection of a confession.⁹⁰ Within the past four years, California has decided that a defendant has nearly an absolute right to inspect his own confession upon practically any showing of need,⁹¹ and several other states have held that discovery of a confession should always be granted unless special circumstances exist.⁹² A few courts seem to indicate that inspection of a confession should be allowed as a matter of right when there is a question as to a forged signature⁹³ or the mental capacity of the defendant at the time the confession was given.⁹⁴

⁸⁸ *State v. Superior Court*, 81 Ariz. 127, 302 P.2d 263 (1956); *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *State v. Minor*, 177 A.2d 215 (Del. 1962); *People v. Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959).

⁸⁹ *State v. Dorsey*, 207 La. 928, 22 So. 2d 273 (1945). But it is interesting to note that this requirement ceases if the state does not plan to rely on or offer the confession at trial. *State v. Labat*, 226 La. 201, 75 So. 2d 333 (1954).

⁹⁰ *Cicenia v. Lagay*, 357 U.S. 504, 510-11 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952). In *Leland*, the Court held: "While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial." *Id.* at 801.

⁹¹ *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *People v. Garner*, 18 Cal. Rptr. 40, 367 P.2d 680 (1961); *McCarthy v. Superior Court*, 162 Cal. App. 2d 755, 328 P.2d 819 (1st Dist. Ct. App. 1958); *McAllister v. Superior Court*, 165 Cal. App. 2d 297, 331 P.2d 654 (4th Dist. Ct. App. 1958); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (3d Dist. Ct. App. 1958); *Cordy v. Superior Court*, 161 Cal. App. 2d 267, 326 P.2d 222 (1st Dist. Ct. App. 1958); *Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (3d Dist. Ct. App. 1957).

⁹² See note 87 *supra*.

⁹³ *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84, (1927); *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944).

⁹⁴ *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944).

The majority rule still seems to be, however, that whether or not a confession can be inspected depends on the discretion of the trial judge, and his discretion will not be overturned unless a clear abuse is shown.⁹⁵ In some states this rule of discretion is equivalent to outright prohibition because the trial courts have never authorized inspection and apparently will never do so until they are given statutory or appellate direction.⁹⁶

(2) *Items of Evidence and Scientific Reports*

The rules for discovery of items of evidence and scientific reports are as varied as the rules governing confessions. Louisiana, for example, which declared that a defendant had a constitutional right to inspect his confession, has held that he cannot discover anything else.⁹⁷ New York, on the other hand, which seldom allows inspection of a confession, has held that a scientific report would be discoverable as a matter of course since it is not subject to tampering or refutation by perjury.⁹⁸ Rhode Island has indicated that an autopsy report is one of few items that might be discoverable.⁹⁹ Eight states have now reached the stage where trial judges frequently allow inspection of scientific reports in the furtherance of justice.¹⁰⁰ Several other states deny the right, either absolutely,¹⁰¹

⁹⁵ *State v. Superior Court*, 81 Ariz. 127, 302 P.2d 263 (1957); *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 153 A.2d 403 (1959); *Weer v. State*, 219 Ind. 217, 36 N.E.2d 787 (1941); *State v. Haas*, 188 Md. 63, 51 A.2d 647 (1947); *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944); *Pinana v. State*, 352 P.2d 824 (Nev. 1960); *People v. D'Andrea*, 20 Misc. 2d 1070, 195 N.Y.S.2d 542 (King's County Ct. 1960); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959); *State v. Leland*, 190 Ore. 598, 227 P.2d 785 (1951).

⁹⁶ *Weer v. State*, 219 Ind. 217, 36 N.E.2d 787 (1941); *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944); *Pinana v. State*, 352 P.2d 824 (Nev. 1960); *State v. Leland*, 190 Ore. 598, 227 P.2d 785 (1951).

⁹⁷ *State v. Shourds*, 224 La. 955, 71 So. 2d 340 (1954).

⁹⁸ *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960).

⁹⁹ *State v. Di Noi*, 59 R.I. 348, 195 Atl. 497 (1937).

¹⁰⁰ *United States v. Rich*, 6 Alaska 670 (1922); *State ex rel. Helm v. Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961); *Norton v. Superior Court*, 173 Cal. App. 2d 133, 343 P.2d 139 (4th Dist. Ct. App. 1959); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (3rd Dist. Ct. App. 1958); *Walker v. Superior Court*, 155 Cal. App. 134, 317 P.2d 130 (3d Dist. Ct. App. 1957); *Layman v. State*, 355 P.2d 444 (Okla. Crim. App. 1960); *State ex rel. Sadler v. Lackey*, 319 P.2d 610 (Okla. Crim. App. 1957); *People v. Stokes*, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960); *In re Di Joseph's Petition*, 394 Pa. 19, 145 A.2d 187 (1958); *State ex rel. Wagner v. Circuit Court*, 60 S.D. 115, 244 N.W. 100 (1932); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959).

¹⁰¹ *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Mendelsohn v. People*, 143 Colo. 397, 353 P.2d 587 (1960); *Kinder v. Commonwealth*,

because trial judges never allow such inspection and the appellate courts will not interfere,¹⁰² or because it would take an exceptional case to allow discovery.¹⁰³ Florida has a specific statute authorizing a defendant to attend the examination of such things as blood, semen or bullets, but this section has been strictly construed.¹⁰⁴

A small minority of the states, therefore, allow pretrial discovery of essential scientific reports that may be the core of the state's case. One article mentioned, however, that because several states have not decided the question, prosecutors in those states must often allow a defendant to inspect such items without court compulsion;¹⁰⁵ this contention is of doubtful validity when the overall attitude of many of the states is considered.

(3) *Statements of Other Witnesses*

Few states authorize a defendant to inspect the statements of prosecution witnesses. Eleven states faced with the exact question have completely denied the right.¹⁰⁶ New Jersey, which has taken a very liberal position on confessions, has admitted that it is not yet ready to authorize pretrial inspection of other witnesses.¹⁰⁷

279 S.W.2d 782 (Ky. 1955); *Ivey v. State*, 207 Tenn. 438, 340 S.W.2d 907 (1960); *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707 (1950); *Freeman v. State*, 166 Tex. Crim. 626, 317 S.W.2d 726 (1958); *Pettigrew v. State*, 163 Tex. Crim. 194, 289 S.W.2d 935 (1956).

¹⁰² *Lander v. State*, 230 Ind. 680, 154 N.E.2d 507 (1958); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957); *Linder v. State*, 156 Neb. 504, 56 N.W.2d 734 (1953); *Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947); *Fisher v. State*, 140 Neb. 216, 299 N.W. 501 (1941); *Marshall v. State*, 116 Neb. 45, 215 N.W. 564 (1927); *Pinana v. State*, 352 P.2d 824 (Nev. 1960); *State v. Potts*, 69 Ohio L. Abs. 77, 124 N.E.2d 180 (Ct. App. 1953).

¹⁰³ *State ex rel. Keast v. District Court*, 135 Mont. 545, 342 P.2d 1071 (1959); *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 153 A.2d 403 (1959).

¹⁰⁴ *Supra* note 68.

¹⁰⁵ Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1061 (1961).

¹⁰⁶ *Mabry v. State*, 40 Ala. App. 129, 110 So. 2d 250 (1959); *State v. Zimmaruk*, 128 Conn. 124, 20 A.2d 613 (1941); *Russom v. State*, 105 So. 2d 380 (Fla. 1958); *Urga v. State*, 104 So. 2d 43 (Fla. 1958); *Walker v. State*, 215 Ga. 128, 104 S.E.2d 748 (1959); *Kinder v. Commonwealth*, 279 S.W.2d 782 (Ky. 1955); *State v. Shourds*, 224 La. 955, 71 So. 2d 340 (1954); *Mattox v. State*, 137 So. 2d 920 (Miss. 1962); *Bellew v. State*, 238 Miss. 734, 106 So. 2d 146 (1958), *appeal dismissed*, 360 U.S. 473 (1958); *Anderson v. State*, 207 Tenn. 486, 341 S.W.2d 385 (1960); *Hill v. State*, 167 Tex. Crim. 229, 319 S.W.2d 318 (1958); *State v. Lavalley*, 122 Vt. 75, 163 A.2d 856 (1960); *State ex rel. Byrne v. Circuit Court of Dane County*, 16 Wis. 2d 197, 114 N.W.2d 114 (1962).

¹⁰⁷ *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The New Jersey court suggested that the question should be submitted to the state judicial conference for analysis.¹⁰⁸ In a recent case,¹⁰⁹ Arizona also refused to answer the question of whether a defendant can inspect the statements of other witnesses. It did state, however, that it is up to the trial court to decide whether defendant can inspect a statement made by a co-defendant. Illinois and Michigan have left the entire question to the discretion of the trial judge.¹¹⁰ The only state that has developed much law on this question is California. In California, a defendant can get a pre-trial disclosure of the name of an informer as a matter of right upon some showing of necessity.¹¹¹ He can also get the statement of any witness on showing of need.¹¹² Little showing of need is apparently necessary, but mere blanket requests for all statements without sufficient reason have been denied.¹¹³

California undoubtedly leads the way in liberal pretrial discovery. The question now is whether other jurisdictions (including federal courts) will soon follow this lead. Many states have already indicated a desire to reject the old, misplaced fears of perjury and imbalance, and have recognized that defendants need pretrial inspection to adequately prepare their defense. An examination of the Nebraska position is now in order.

V. THE NEBRASKA LAW ON PRETRIAL DISCOVERY

In Nebraska, the question of pretrial discovery in criminal cases has seldom been raised.¹¹⁴ The Nebraska law can be summarized as follows: Whether or not a defendant can get pretrial disclosure

¹⁰⁸ *Id.* at 143, 145 A.2d at 319.

¹⁰⁹ *State v. McGee*, 370 P.2d 261 (Ariz. 1962).

¹¹⁰ *People v. Wolff*, 19 Ill. 2d 318, 167 N.E.2d 197 (1960); *People v. Moses*, 11 Ill. 2d 84, 142 N.E.2d 1 (1957); *People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1960).

¹¹¹ *Castiel v. Superior Court*, 162 Cal. 2d 710, 328 P.2d 476 (1958); *Mitchell v. Superior Court*, 50 Cal. 2d 837, 330 P.2d 48 (1958); *Tupper v. Superior Court*, 51 Cal. 2d 263, 331 P.2d 977 (1958).

¹¹² *People v. Lane*, 56 Cal. 2d 759, 366 P.2d 57 (1961); *Vetter v. Superior Court*, 10 Cal. Rptr. 890, 189 Cal. App. 2d 132 (3d Dist. Ct. App. 1961); *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959).

¹¹³ *People v. Cooper*, 3 Cal. Rptr. 148, 53 Cal. 2d 755, 349 P.2d 964 (1960).

¹¹⁴ There have only been seven cases in Nebraska on pretrial discovery. Two, *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958), and *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944), dealt with requests for confessions. *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957),

rests solely with the discretion of the trial judge, and even if abuse is shown, the trial judge will not be overruled unless the defendant can show substantial prejudice.¹¹⁵ It is interesting to note that in not one case has a trial judge authorized inspection. For some time, there was a feeling that the Nebraska Rules of Civil Procedure applied to criminal cases, but this feeling has now been laid to rest.¹¹⁶ The Nebraska position is probably best illustrated by the statement of Judge Carter in *Cramer v. State*:¹¹⁷

We do not appear to have passed directly upon the respective rights of the parties in a matter of this kind. We think that when a prosecution is based upon a written instrument, as in a forgery case, the defendant is entitled to inspect and make copies of such instrument under such conditions as the trial court may prescribe. If a prosecution is based upon the correctness or incorrectness of certain records, such as is oftentimes the case in a prosecution for embezzlement, the examination of such records by defendant should be granted. But as to all statements and documents not admissible in evidence in chief and obtained for impeachment or other purpose not going to the merits, the defendant has no basis for demanding an inspection of them. As to the rights of a defendant to demand an inspection or a copy of a written confession made by him, the authorities do not seem to be in accord. The rule generally is that a confession need not be so produced. However, we think the trial court should order a written confession produced where the interests of justice so require. If there be a question whether the signature thereto is forged, or if the written confession is necessary to a proper determination of the mental condition of the defendant at the time the confession was made, or for other reasons which tend toward establishing the merits of the litigation, we are of the opinion that such an application should be allowed. Where the only reason for the production of a written confession for the inspection of a defendant is that it would aid generally in preparing of the defense, no basis exists for requiring the state to produce it. The defense

concerned a request for the contents of a stomach. *Linder v. State*, 156 Neb. 504, 56 N.W.2d 734 (1953), dealt with the request for a medical examination report. *Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947), *Fisher v. State*, 140 Neb. 216, 299 N.W. 501 (1947), and *Marshall v. State*, 116 Neb. 45, 215 N.W. 564 (1927) all involved requests for records or documents that were the basis of the charge. These cases are all considered in detail in a note, *Criminal Discovery Practice in Nebraska*, 34 NEB. L. REV. 645 (1955) so they will not be thoroughly discussed here.

¹¹⁵ The best discussions of this rule can be found in *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323 (1944), and *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958).

¹¹⁶ *Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947). To see the arguments made for applying the Nebraska Rules of Civil Procedure to criminal cases see Note, *Criminal Discovery Practice in Nebraska*, 34 NEB. L. REV. 645 (1955).

¹¹⁷ 145 Neb. 88, 94-95, 15 N.W.2d 323, 327 (1944).

counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the state unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the state's evidence merely in the hope that something may be uncovered which would aid his defense. In the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon.

Cramer has been cited by subsequent cases holding that an abuse of discretion was not shown and, thus, there was no error.¹¹⁸ It seems apparent, therefore, that the Nebraska Supreme Court is not willing to take the initiative in creating a more liberal discovery procedure, and it is doubtful that trial judges will do so either because they have no real precedent authorizing them to take such steps. The only answer seems to be action by the legislature authorizing pretrial discovery in criminal cases. Nebraska should recognize, as many states have already, that discovery will increase the probability that verdicts will be based on the facts rather than on clever trial maneuvers, and that the fears of liberal discovery have already been discredited. The only possible harm which may exist is the chance that discovery of statements of other witnesses may result in the coercion of those witnesses to perjure themselves. But this would happen very rarely, and the statute could protect against this possibility by instructing a trial judge to deny such discovery when the public interest so requires. Confessions and scientific reports or tests should be made discoverable by statute as a matter of right unless some unusual circumstances exist, which the state should be required to prove. No harm has ever been shown in allowing such discovery, and the value would rest in allowing a defendant to adequately prepare himself for a trial in which he may lose his life. It must always be kept in mind that a criminal case is not a contest of wits and tactics between the defendant and the state.¹¹⁹ Justice dictates that a defendant be given every possible opportunity to prepare his case and prove his innocence.

VI. CONCLUSION

At the outset of this article, after posing a hypothetical situation, the following question was asked: Should Ralph Defendant be allowed to inspect his own confession, the FBI reports or the items examined, and the statement of a prosecution witness prior

¹¹⁸ See cases cited in note 107 *supra*.

¹¹⁹ 6 WIGMORE, EVIDENCE § 1845 (3d ed. 1940).

to trial? I have attempted to show throughout the article that Defendant should be allowed this discovery as a matter of right unless some supervening public policy would clearly prohibit it. The state of the law generally, however, is opposed to this point of view. Since the law in the majority of the jurisdictions is based on an archaic concept of the rights of a defendant in a criminal case, it is here suggested that pretrial discovery is essential in order to guarantee a defendant a fair trial. The following statute is proposed, therefore, in hopes that it will stimulate some thought among the various legislative bodies, and eventual legislative action.¹²⁰

MODEL PRETRIAL DISCOVERY STATUTE

Upon motion of the defendant at any time after the filing of the indictment or information, the court shall order the attorney for the government to permit the inspection or copying or photographing of any designated documents, including written statements or confessions made by a defendant or a codefendant (and written statements of witnesses), papers, books, accounts, letters, photographs, grand jury minutes and exhibits, and tangible objects not privileged, upon a showing that the items sought may be material to the preparation of his defense and that the request is otherwise reasonable. The court, in its discretion, may deny a request for inspection if a showing is made that such inspection would be detrimental to the public interest.

¹²⁰ For other proposals see, *The Problem of Discovery in Criminal Cases*, Joint Committee on Continuing Legal Education of the American Law Institute and American Bar Association (1961).