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NOTES

THE BASES FOR PRE-TRIAL DISCOVERY IN CRIMINAL CASES

Since the case of *Rex v. Holland*¹ in 1792 the common law courts have repeatedly denied the existence of any power to compel criminal discovery. A modern trend,² however, has been to allow discovery in criminal cases at the discretion of the trial court.³ Only a few states expressly purport to maintain the old common law position,⁴ while others have simply denied discovery under the facts of the case.⁵

The new rule was first codified in 1946 when the *Federal Rules of Criminal Procedure* authorized comparatively liberal pre-trial disclosure in the federal courts.⁶ Florida, Idaho, and Maryland now have discovery statutes patterned after the Federal Rules.⁷ In addition, statutes allowing a limited measure of pre-trial inspection have been enacted in several other states.⁸

A recent Montana case is illustrative of decisions which create doubt as to the status of discovery where there is no statute.⁹ The actual holding is only that under the facts no discovery should be granted. However, the court did indicate that perhaps, if a proper showing is made, the trial judge

¹4 T.R. 691, 100 Eng. Rep. 1248 (K.B. 1792).

²The momentum for this trend is usually credited to the case of *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (1927).

³See cases cited notes 33, 34, and 35 *infra*. No cases in point have been found in Georgia, Hawaii, Maine, Nevada, North Carolina, North Dakota, South Carolina and Wyoming.

⁴*Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *State v. Kupis*, 37 Del. 27, 179 Atl. 640 (1935); *People v. Kuberacki*, 310 Mich. 162, 16 N.W.2d 703 (1944); *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); *May v. State*, 129 Tex. Crim. 2, 83 S.W.2d 338 (1935); *Abdell v. Commonwealth*, 173 Va. 458, 2 S.E.2d 293 (1939).

⁵*Howell v. State*, 220 Ark. 278, 247 S.W.2d 952 (1952); *State ex rel. Keast v. District Court*, 342 P.2d 1071 (Mont. 1959); *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707 (1950); *Steenland v. Happmann*, 213 Wis. 593, 252 N.W. 146 (1934).

⁶Rule 16 provides: "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. 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." For a discussion of this rule see Note, 67 HARV. L. REV. 492 (1954), and Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957).

⁷FLA. STAT. ANN. § 909.18 (1959); IDAHO CODE ANN. § 19-1530 (Supp. 1959); MD. ANN. CODE, Rules of Proc., Rule 728 (1957).

⁸ARIZ. REV. STAT. ANN., Rules of Crim. Proc., Rule 195 (1956) (documentary evidence). At least four states provide for inspection of grand jury minutes: CAL. PEN. CODE § 925; IOWA CODE § 772.4 (1950); KY. CRIM. CODE PROC. § 110 (1958); MINN. STAT. § 628.04 (1953).

⁹*State ex rel. Keast v. District Court*, 342 P.2d 1071 (Mont. 1959).

would have inherent power to grant such a motion. Two justices vigorously opposed ordering any pre-trial inspections without remedial legislation.¹⁰

Before considering the bases for pre-trial discovery in the absence of statute, it may be well to consider briefly the desirability of criminal discovery and to review certain limitations already imposed upon this procedure.

ARGUMENTS FOR AND AGAINST DISCOVERY

The often made objection to pre-trial discovery is that it affords the defendant an opportunity to manufacture refutations and encourages false alibis.¹¹ Other objections are the fear of loss or destruction of evidence,¹² lack of mutuality,¹³ and the adequacy of existing procedural safeguards.¹⁴

While the problem of perjury is present in any criminal proceeding it is difficult to see how disclosure would materially increase this threat. If the defendant is guilty he is familiar with the details of the crime and can fabricate accordingly. It is the innocent accused who is most likely to be unaware of the facts that pre-trial inspection could disclose.¹⁵ The danger of loss or destruction of state's evidence could be removed by proper procedural precautions.¹⁶ Nor can lack of mutuality be seriously urged since discovery by the state would infringe the defendant's constitutional guarantee against self-incrimination.

The policy of the law to give every man accused of crime a reasonable opportunity to prepare his defense is the foundation for criminal discovery.¹⁷ Furthermore, conviction by unfair concealment and surprise is not consonant with the presumption of innocence.¹⁸ Other arguments advanced for discovery are that it is required by basic fairness and justice,¹⁹ it avoids delay at trial,²⁰ and that it is needed to cope with the growing complexity of issues in criminal trials.²¹

Although it is true that the defendant has a right to inspection of evidence upon its introduction at the trial, and this may be sufficient in most cases, still to combat some damaging evidence may require extensive

¹⁰In the special concurring opinion of Justice Bottomly the following appears: "The only such exercise of 'inherent power' is by Almighty God, and certainly no court or judge thereof may presume to exercise such omnipotent authority or power." *Id.* at 1076.

¹¹*E.g.*, *State v. Shourds*, 224 La. 955, 71 So. 2d 340 (1954), and cases collected in Annot., 52 A.L.R. 207 (1928).

¹²*Abdell v. Commonwealth*, 173 Va. 458, 2 S.E.2d 293 (1939).

¹³*State v. Hall*, 55 Mont. 182, 175 Pac. 267 (1918).

¹⁴*May v. State*, 129 Tex. Crim. 2, 83 S.W.2d 338 (1935).

¹⁵Dean Wigmore's reply to the contention that criminal discovery would encourage perjury is as follows: "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 clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law to allow the accused to produce any witnesses at all." 6 WIGMORE, EVIDENCE § 1863 at 488 (3d ed. 1940).

¹⁶For example, see Federal Rule 16, note 6 *supra*.

¹⁷*State v. Dorsey*, 207 La. 928, 22 So.2d 273 (1945).

¹⁸*Ibid.*

¹⁹*State v. Naething*, 318 Mo. 531, 300 S.W. 829 (1927).

²⁰*Sttae ex. rel. Wagner v. Circuit Court*, 60 S.D. 115, 244 N.W. 100 (1932).

²¹Financial fraud, anti-trust violations, and conspiracy cases all require extensive investigation and research.

examination and investigation. However, just as total denial of pre-trial disclosure may work injustice in a particular case, so may discovery unlimited in scope seriously hamper the state in its preparation and conduct of the case. Thus all jurisdictions recognizing pre-trial discovery have in varying degree imposed limitations upon its use.

THE LIMITS OF CRIMINAL DISCOVERY

Most states permitting inspection of the prosecution's evidence require that the evidence be admissible at trial.²² Other jurisdictions have construed or drawn their statutes to exclude confessions,²³ expert reports,²⁴ or statements of witnesses.²⁵ California and Washington, on the other hand, are not restricted by the "admissibility at trial" test. As a result, disclosure has been allowed of F.B.I. reports,²⁶ of a tape recording of an interrogation of the accused,²⁷ of the name of an informer and his present whereabouts,²⁸ and even of witnesses' statements although not signed or otherwise acknowledged.²⁹ The California position on the scope of judicial discretion to order pre-trial discovery appears in the leading case of *People v. Riser*,³⁰ wherein it is stated:³¹

Absent some governmental requirement that information be kept confidential for the purpose of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.

This liberal view, as noted before, is not shared by most courts. To illustrate, in a recent Pennsylvania case³² the prosecution was ordered to make available to the defendant before trial a gun, allegedly the murder weapon, articles seized by the police, and photographs of fingerprints, if any, on the gun. The district attorney petitioned the supreme court for a writ of prohibition. The court modified the order and held that the district attorney should not be required to make available the photographs of fingerprints. The only reason given for this action was that the defendant

²²*People v. Preston*, 176 N.Y.S.2d 542 (Kings County Ct. 1958). See generally Dowling, *Pre-Trial Inspection of Prosecution's Evidence by Defendant*, 53 DICK. L. REV. 301 (1949).

²³*Williams v. State*, 143 Fla. 826, 197 So. 562 (1940) (confession held not tangible evidence under statute).

²⁴IDAHO CODE ANN. § 19-1530 (Supp. 1959).

²⁵Statutes cited note 7 *supra*.

²⁶*State v. Thompson*, 338 P.2d 319 (Wash. 1959).

²⁷*McAllister v. Superior Court*, 165 Cal. App. 2d 297, 331 P.2d 654 (1958).

²⁸*Castiel v. Superior Court*, 162 Cal. App. 2d 710, 328 P.2d 476 (1958).

²⁹*Funk v. Superior Court*, 340 P.2d 593 (Cal. 1959). For a complete review of the progress of criminal discovery in California, see Parsons, *Pre-Trial Discovery in Criminal Cases*, 19 LAW. GUILD REV. 46 (1959).

³⁰47 Cal. 2d 566, 305 P.2d 1 (1956).

³¹*Id.*, 305 P.2d at 13.

³²*DiJoseph Petition*, 394 Pa. 19, 145 A.2d 187 (1958). For a comprehensive analysis of the subject, see *Notes*, 61 MICH. L. REV. 531 (1959).

is not being denied anything needed to ascertain the truth. This modification seems to be an unwarranted limitation upon the trial court's discretion. It ignores the possibility that the defendant may want to prepare his own expert to testify. In any event, it does not appear how such a request if granted would hinder the prosecution or in any way tend to subvert the system of criminal law.

SOURCE OF POWER TO GRANT DISCOVERY IN CRIMINAL CASES

As indicated previously, the majority of American jurisdictions in the absence of statute have found a discretionary power in trial courts to compel pre-trial inspections. Generally, three sources for this power have been asserted.

Inherent Power of Trial Courts

The majority of states allowing pre-trial discovery without statute rely on the inherent power of courts. While some decisions clearly recognize inherent power to compel disclosure,³³ others merely imply recognition either by postulating a discretion in the trial court³⁴ or by analogizing to civil inspection statutes.³⁵

Inherent powers of a court have been described variously as those powers that are "essential,"³⁶ "necessary,"³⁷ or "indispensable,"³⁸ to a court's existence and protection, and to the due administration of justice. Although some judges reject the inherent power theory,³⁹ in most instances this conflict may be reduced to one of definition. Strictly speaking, there is no such thing as inherent power, if by that is meant either an authority possessed without its being derived from another, or a faculty of doing a thing without receiving that faculty from another. A court has only such power and jurisdiction as is directly granted by law and such further powers as ought to be inferred therefrom.⁴⁰ The difference between in-

³³State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); State v. Haas, 188 Md. 63, 51 A.2d 647 (1947); State *ex rel.* Regan v. Superior Court, 153 A.2d 403 (N.H. 1959); State *ex rel.* Sadler v. Lackey, 319 P.2d 610 (Okla. 1957).

³⁴Mabry v. State, 110 So.2d 250 (Ala. App. 1959); United States v. Rich, 6 Alaska 670 (1922); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956); Daly v. Dimock, 55 Conn. 579, 12 Atl. 405 (1887); People v. Gerold, 265 Ill. 448, 107 N.E. 165 (1914); Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941); State v. Burris, 198 Iowa 1156, 198 N.W. 82 (1924); State v. Furthmeyer, 128 Kan. 317, 277 Pac. 1019 (1929); Wendling v. Commonwealth, 143 Ky. 587, 137 S.W. 205 (1911); Commonwealth v. Noxon, 319 Mass. 495, 66 N.E.2d 814 (1946); Bellev v. State, 106 So.2d 146 (Miss. 1958); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (1927); State v. Cala, 66 Ohio App. 535, 35 N.E.2d 758 (1940); DiJoseph Petition, 394 Pa. 19, 145 A.2d 187 (1958); State v. Di Noi, 59 R.I. 348, 195 Atl. 497 (1937); State v. Lack, 118 Utah 128, 221 P.2d 852 (1950); State v. Truba, 88 Vt. 557, 93 Atl. 293 (1915); State v. Payne, 10 Wash. 545, 39 Pac. 157 (1895); State v. Tabet, 136 W. Va. 239, 67 S.E.2d 326 (1951).

³⁵State *ex rel.* Wagner v. Circuit Court, 60 S.D. 115, 244 N.W. 100 (1932); State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S.W.2d 459 (1930).

³⁶Fuller v. State, 100 Miss. 811, 57 So. 806 (1912).

³⁷State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954).

³⁸McQuigan v. Delaware, L. & W. R.R. Co., 129 N.Y. 50, 29 N.E. 235 (1891).

³⁹For example, see Justice Bottomly's special concurring opinion in State *ex rel.* Keast v. District Court, 342 P.2d 1071 (Mont. 1959).

⁴⁰*Ex parte* Hughes, 133 Tex. 505, 329 S.W.2d 270 (1939).

herent power and jurisdiction is important to note. Jurisdiction is conferred by a constitution and statutes, while inherent power is that which is necessary to the ordinary and efficient exercise of jurisdiction.⁴¹ Inherent power, therefore, may be defined as that power arising upon the creation of a court, because it is implied in the concept of a court.

In this connection, the Washington Supreme Court, quoting Justice Works' treatise on *Courts and Their Jurisdiction*, has stated:⁴²

All courts of general and superior jurisdiction are possessed of certain inherent powers, not conferred upon them by express provisions of law, but which are necessary to their existence and the proper discharge of the duties imposed upon them by law.

The New York Court of Appeals, upon consideration of the power of a court to compel one who sues for personal injuries to submit to a physical examination, made this statement:⁴³

We cannot say that the exercise of the power claimed might not in some cases promote the cause of justice. . . . But we have to deal only with the question of the power of the courts in the absence of any legislation. . . . Its existence is not indispensable to the due administration of justice.

Thus the exercise of any inherent power seems properly limited to situations where the existence of the power claimed is essential to the due administration of justice. Clear instances of this are: power to punish for contempt;⁴⁴ power to grant an appeal, where the appeal within the time limited by law is prevented by the fraud of the appellee or his counsel;⁴⁵ and, the power to correct clerical errors in judgments.⁴⁶

Of the few decisions clearly enunciating the doctrine of inherent power to compel discovery,⁴⁷ only one does more than summarily treat that concept. In *State ex rel. Mahoney v. Superior Court*,⁴⁸ the Arizona Supreme Court delineates the scope of inherent power, and enumerates matters illustrative of it. The court then frames the basic issue with this question: "[W]as the order of inspection so necessary to the due administration of justice as to fall within the scope of these inherent powers?"⁴⁹ Their affirmative finding is based solely upon the citation of cases that do not answer the question. It is true that the majority of the courts confronted with the problem of criminal discovery and having no statute governing the matter have recognized the inherent power of the trial court to enter these orders, but they have done so without really considering the fundamental issue. A case often cited for the proposition that courts of general jurisdiction have inherent power to compel discovery is *State v. Haas*.⁵⁰

⁴¹*State ex rel. Andrews v. Superior Court*, 39 Ariz. 242, 5 P.2d 192 (1931).

⁴²*In re Waugh*, 32 Wash. 50, 72 Pac. 710, 712 (1903).

⁴³*McQuigan v. Delaware, L. & W. R.R. Co.*, 129 N.Y. 50, 29 N.E. 235, 238 (1891).

⁴⁴*Ex parte Wetzel*, 243 Ala. 130, 8 So. 2d 824 (1942).

⁴⁵*Smythe v. Boswell*, 117 Ind. 365, 20 N.E. 263 (1889).

⁴⁶*Edgar State Bank v. Long*, 85 Mont. 225, 278 Pac. 108 (1929).

⁴⁷See cases cited note 33 *supra*.

⁴⁸78 Ariz. 74, 275 P.2d 887 (1954).

⁴⁹*Id.*, 275 P.2d at 889.

Although in that case the Maryland court took pains to review the decided cases the rationale of the decision seems limited to the following:⁵¹

There can be no doubt that the recognition of the right in a trial court to permit the defendant to examine his confession in advance of the trial was not recognized at common law. But law is a growth and a great many matters, commonplace to us now, were not thought of many years ago . . . the tendency in the courts of this country is to permit discretion in the trial judge.

From an examination of this case and others it is evident that the courts there did no more than assume inherent power extended to discovery, putting forth the proposition almost axiomatically.

Without a court's inherent power to punish for contempt, obviously due administration of justice would be impossible. Yet, while it can be argued that pre-trial discovery would facilitate due administration of justice, even in the most extreme cases the defendant in a criminal action may still inspect the evidence upon its introduction at the trial. If necessary, an extended recess could be granted to permit a detailed inspection. But to rely upon the inherent power of trial courts as a foundation for criminal discovery seems out of line with the traditional view of that concept. As the New York Court of Appeals wrote with reference to an analogous power there claimed: "Its existence is not indispensable to the due administration of justice."⁵²

Constitutional Right to Discovery

The United States Supreme Court has rejected in two recent cases contentions that the due process clause of the fourteenth amendment requires pre-trial discovery.⁵³ Certiorari has been denied where discovery was refused in at least two other states.⁵⁴ In addition, California has held that the *Federal Rules of Criminal Procedure* have no application to state courts, and cannot be subsumed under the fourteenth amendment as a limitation on state action.⁵⁵

In *State v. Dorsey*⁵⁶ the Louisiana court found that defendant's constitutional right to a fair trial included pre-trial inspection of his written confession. This is the only decision found giving criminal discovery a constitutional basis. However, the *Dorsey* case has been strictly limited to written confessions.⁵⁷

Statutory Interpretation

Many state codes contain a statute making the law of evidence in civil actions also the law of evidence in criminal actions. In the only case

⁵¹*Id.*, 51 A.2d at 653.

⁵²*Supra* note 43.

⁵³*Leland v. Oregon*, 343 U.S. 790 (1952); *Cicenia v. Lagay*, 357 U.S. 504 (1958).

⁵⁴*Lopez v. State*, 158 Tex. Crim. 16, 252 S.W.2d 701, *cert. denied*, 344 U.S. 893 (1952); *State v. Clark*, 21 Wash. 2d 774, 153 P.2d 297, *cert. denied*, 325 U.S. 878 (1945).

⁵⁵*People v. Kross*, 112 Cal. App. 2d 602, 247 P.2d 44 (1952).

⁵⁶207 La. 928, 22 So. 2d 273 (1945).

⁵⁷*State v. Lea*, 228 La. 724, 84 So. 2d 169 (1955); *State v. Shourds*, 224 La. 955, 71

clearly so holding,⁵⁸ the Oregon Supreme Court decided that such a provision⁵⁹ was broad enough to include the authority vested in the court by the civil inspection laws. The court was influenced by Justice Cardozo's somewhat equivocal statement in *People ex rel. Lemon v. Supreme Court*,⁶⁰ that "the provisions of the Civil Codes for the discovery of documents are not rules of evidence in the strict sense. They are closely akin, however, to such rules, for they govern and define the remedies whereby evidence is made available."⁶¹

This seemingly strained statutory construction has been rejected by the Arizona Supreme Court.⁶¹

CONCLUSION

The defendant in a criminal case has no right to a pre-trial inspection of the prosecution's evidence. In the majority of jurisdictions discovery is now permitted but entirely within the sound discretion of the trial court. In the absence of statute this discretion has been founded upon either an unwarranted extension of the doctrine of inherent power or doubtful statutory construction. It is now generally felt that pre-trial discovery is a needed addition to criminal procedure, and that its application should be extended except where the prosecution can show the likelihood of substantial harm. But, to accomplish this, it would seem that comprehensive remedial legislation,⁶² rather than the development of an unworkable body of case law founded upon questionable premises, is the better way.

DAVID O. DEGRANDPRE

THE CONSTITUTIONALITY OF CIVIL INSPECTIONS*

Recent years have brought a marked increase in civil inspections.¹ Big city slums, with their attendant health and safety hazards, are no new problem, but in recent years new concern has been shown for finding some solution to this urban blight. Some answers are spectacular, like wholesale redevelopment; others are more prosaic, such as legislation giving public

⁵⁸State v. Leland, 100 Ore. 598, 227 P.2d 785 (1951).

⁵⁹ORE. CODE ANN. § 26-932 (1930) (now ORE. REV. STAT. ch. 136, § 510 (1953)).

⁶⁰245 N.Y. 24, 156 N.E. 84, 86, 52 A.L.R. 200, 206 (1927).

⁶¹State ex. rel. Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954).

⁶²Federal Rule 16 would serve as a useful guide, but any future legislation should also permit discovery of expert reports, confessions, and statements of witnesses in the hands of the prosecution.

*This Note is an outgrowth of the 1959 National Moot Court Competition, sponsored by the Association of the Bar of the City of New York. The hypothetical case posed for argument raised the issues discussed herein. The joint authors of this note, and in addition Arthur Ayers, participated in the law school intramural moot court competition, using the same factual situation. Thereafter, the moot court team participated in regional competition at Moscow, Idaho, and placed second.

¹As used herein, "civil inspections" means those inspections conducted by state or municipal authorities primarily to ascertain and correct a particular deplorable situation, rather than to punish a person for a violation of the law.