

Spring 1952

Criminal Law Case Notes and Comments

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Recommended Citation

Criminal Law Case Notes and Comments, 42 J. Crim. L. Criminology & Police Sci. 774 (1951-1952)

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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern
University School of Law, under the
direction of student members of the
Law School's Legal Publication Board

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THE SCOPE OF DISCOVERY AGAINST THE PROSECUTION IN CRIMINAL CASES—HOW FAR SHOULD IT BE WIDENED?

Commodore McFarland Combs, Jr.*

The proper scope of pre-trial depositions and discovery is a part of that language which fast becomes a staple to one who would seek the law. The statutory provision will be recorded with no claim to do more than declare generally a purpose to serve a recognized need and the "inferential wraith" begins to live in the interpreting case law as we are reminded that each situation must be decided in the light of the particular fact pattern and the sound discretion of the court.

Both the Federal Rules of Civil Procedure and the Federal Criminal Code declare a right of discovery, but the bond of identity here ceases as the criminal species of discovery is figuratively likened to a "pretermitted heir" by comparison with its civil counterpart. Rule 16 of the *Federal Rules of Criminal Procedure*¹ 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. [Italics added.]

The right of discovery and production of documents is set forth under Rule 34 of the *Federal Rules of Civil Procedure*² as follows:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the

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1. 18 U.S.C.A. 223. (Note that this is in special volume of Title 18.)

2. 28 U.S.C.A. 281. (Note that this is in special volume of Title 28.)

purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). . . ."

The latitude of Rule 34 is further enhanced by the two references to Rule 26(b) which defines the scope of depositions for the purpose of discovery. There it is provided that deponents may be examined regarding any non-privileged matter,

" . . . including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. *It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.*"³

A later examination of some of the cases involving the statutory construction of the discovery rules in civil and criminal matters as treated in federal courts will show a rather uniform tendency toward the spirit of the law in civil matters while the austerity of the letter is indicated in criminal trials.

It is interesting to note the reasoning of some state courts which were faced with the discovery problem in criminal cases prior to and apart from the federal criminal code. Thus, in an early Wisconsin case,⁴ discovery of the testimony of the state's witnesses which had been given to the state's attorney was denied because there was no showing that the questions and answers in the recorded testimony were admissible or material. Review of testimony by witnesses given at the coroner's inquest was deemed to be the defendant's legal right in a Connecticut case.⁵ An Ohio court⁶ held grand jury testimony not discoverable. In Louisiana,⁷ the defendants to a murder charge were allowed discovery of the unsigned, unread stenographic recordings of their confessions. The Supreme Court of Missouri⁸ declared the defendant to have a right of inspection to any document that *may be material* to the crime for which he is accused. A statement given to a state's attorney by a witness in the District of Columbia was held to be privileged because given to a state officer in his official capacity.⁹ Judge Cardozo, with typical historical scholarship, found no

3. 28 U.S.C.A. 168.

4. *Santry v. State*, 67 Wis. 65, 30 N.W. 226 (1886) (Stenographer recorded questions and answers by four purchasers of intoxicating liquors procured from defendant. Somewhat abstruse is the logic which would proclaim that the knowledge and statements of states witnesses used to establish the defense are wanting in materiality).

5. *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405, (1888) (The clerk of superior court with whom the document containing witnesses' testimony was lodged alleged that proceedings of coroner's inquest were not a matter of public record, and necessarily confidential in the public interest; the court in advancing the legal right theory was concerned with safeguarding the defendant's right to prepare his defense free from unfair concealment or surprise on the part of the state).

6. *State v. Rhoads*, 81 Ohio 397, 91 N.E. 186 (1910) (where a witness appearing for defendant was cross-examined through the use of recorded grand jury testimony).

7. *State v. Murphy*, 154 La. 190, 97 So. 397 (1923) (State contended that the statements were incorrect and could not be submitted as evidence. State Supreme Court held that the defendants had a right to determine whether or not the statements would be used in the defense preparation and that it was a jury function to decide as to the effect of the confessions together with all the other evidence).

8. *State v. Tippet*, 317 Mo. 319, 296 S.W. 132 (1927). Here a witness gave to the prosecuting attorney a written statement relative to the accused's implication in a hit-and-run death case. The court explicitly recognized and contrasted the liberality of civil discovery with the gauntly rationed allowance in criminal cases. But see 324 Mo. 925, 25 S.W. 2d 459 *State Ex rel Page v. Terte* (1930).

9. *United States v. Arnstein*, 54 App. D.C. 199 (1924). The court also stated that dis-

precedent at common law, even in civil cases, to order inspection of documents before trial unless it could be shown that the document to be examined was the subject of the cause,¹⁰ as, for example, an allegedly forged document. Cardozo expressed the view that neither by statute nor by stare decisis was there authority for the proposition that courts of criminal jurisdiction have an inherent power to compel discovery of documents in the furtherance of justice, and therefore, the defendant was not entitled to an inspection of affidavits, letters, memoranda of post mortem examination, or of the confession of an accomplice in a murder case.¹¹

The varied reflections of the state courts in deciding the proper scope of discovery through the years provides a contrast to the uniformity of federal court opinions since 1944. Thus, a Connecticut federal court¹² labeled the all inclusive motion of the defendant a "fishing expedition" and denied that part which would afford opportunities for tampering with government witnesses and the manufacturing of evidence. A number of cases have referred explicitly to Rule 16, and interpreted what it means and precisely how far it goes. *United States v. Black*¹³ considered the "by seizure or by process" language of Rule 16 as an express limitation on the material subject to inspection. The defendants in that case were charged with kidnapping and violation of the National Motor Vehicle Theft Act, and the request was to inspect statements made by the defendants and other persons to government agents concerning matters charged in the indictment and to inspect minutes of the grand jury proceedings, relevant portions of F.B.I. reports and birth certificates of the defendants obtained by the government. In denying the request, the court said simply that the rule is clear and its scope is without question. The *by seizure or by process* embraces *documents* and *objects* only which were in existence and *in custody* of the defendant or other persons prior to the government's obtaining them.

*United States v. Chandler*¹⁴ was a treason charge in which the defendant petitioned for inspection of twenty assorted writings, including some statements of the defendant delivered to government authorities. In deciding that the objects at issue were not properly petitioned for, the court was moved to comment upon the rationale of Rule 16 as explained by the Supreme Court Advisory Committee. The court recollected that the preliminary draft of the Federal Rules of Criminal Procedure included "any designated books, papers, documents, or tangible objects" rather than books "obtained from and belonging to the defendant." The Second Preliminary Draft carried the latter, more restrictive phraseology with the additional requirement that the books must constitute evidence in the proceedings. Thus, the *Chandler* decision gives the reader enlightenment concerning the genealogy of Rule 16, but the results is quite the same as in the *Black* case and for the same reasons, viz., *no seizure or obtaining by process* within the purpose of the statute.

The ruling in *United States v. Hiss*¹⁵ may well have been founded upon the

covery for purposes of impeaching state's witness through prior statement was an unconscionable tour of investigation.

10. Cited *Carpenter v. Winn*, 221 U.S. 533 (1910).

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

12. *United States v. Warren*, 53 Fed. Sup. 435 (1944) (where photostats of writing on a package were allowed in an indictment for posting a threatening letter but "other articles enumerated" were refused as an unfair disclosure of government evidence prior to trial.

13. 6 F.R.D. 270 (1946).

14. 7 F.R.D. 365 (1947).

15. 185 F. 2d 822 (2nd Cir. 1950). The trial court was affirmed. There was not a word in the opinion relevant to improper denial of discovery rights, the appeal having been taken

same theory as the *Black* and *Chandler* cases, but the court was struck with prematureness of the defendant's subpoena and the application was denied. There, the defense anticipated that a certain Mrs. Hedda Massing would be a witness in behalf of the government and issued a subpoena duces tecum addressed to the Commissioner of Immigration and Naturalization Service requiring the production of certain papers¹⁶ relating to the witness and then in the custody of the Justice Department. The inspection was alleged to be necessary in preparation of the defense. The court agreed with the government that the inspection would be unreasonable because there was no certainty and assurance that the witness would be called to testify against the defendant or that her testimony would be admissible in the face of the defendant's argument as to its prejudicial character. "If the witness (Mrs. Massing) is called," the court said, "then it is time enough for the trial court to consider whether the document sought by aforesaid subpoena and order ought to be inspected."

Because of the defendant's depraved act in *Shores v. U. S.*¹⁷ any request to relax a rule in the name of justice or fairness would strain the court to find a place for any special leniency. The appellant was charged with knowingly transporting his wife in inter-state commerce for the purpose of prostitution. The court's decision concerning the defendant's right to a copy of his pre-trial confession again turns upon the fact that a voluntary confession is not a physical object, belonging to the defendant to which he had a previous right of possession and which had been appropriated from him by the government within the meaning of Rule 16. The decision contained the significant observation that the matter was ultimately one within the discretion of the court. The *Shores* case is singularly outstanding for the dicta which may augur the future, i.e., the memento in the opinion that, "as a matter of fundamental fairness, a defendant ought to be granted, in enlightened criminal administration, the right to have a copy of his confession in any case . . ." The court's thought that, "as an implement of conviction, its (the confession's) truth certainly ought to have strength to stand even after the defendant's re-reading it."

*Hickman v. Taylor*¹⁸ is the master pattern for the scope of discovery in federal court civil cases, and it has been cited as authority for allowing inspection of witnesses' signed statements in the possession of the non-moving party when the lack of said statements will unduly prejudice the preparation of the moving party's case.¹⁹

The foregoing *Hickman* case is the mother of the "Work Product" formula which is zealously excepted from the scope of discovery in Illinois by Supreme Court Rule 17.²⁰ "Work Product" has been defined as any instance in which

on the grounds of improper instructions and insufficiency of evidence to sustain an indictment for perjury.

16. Description of the papers is lacking in the opinion.

17. 174 F. 2d 838 (8th Cir. 1949).

18. 329 U.S. 495 (1946).

19. *Hanke v. Milwaukee Elec. Ry. Co.* (7 F.R.D. 540) (1947) See also *Lindsay v. Prince* (8 F.R.D. 233) (1948) where the only two witnesses were in the employ of the original defendant whom the plaintiff had released from liability and subsequently joined the present moving party defendant. When it was shown that the witnesses refused discussion with the moving party, the court, citing the *Hickman* Case, ruled that good cause had been shown under Rule 34.

20. "Any party may apply for an order directing another party to file a sworn list of all the documents, including photographs, books, accounts, letters, and other papers which are or which have been in his possession or power material to the merits of the matter in said cause. . . . This rule shall not apply to memoranda, reports or documents prepared by or for either party in preparation for trial or to any communication between any party or his agent and the attorney for such party."

the mental processes of an attorney have been in operation to some extent. The skilled lawyer interviewing a witness and evoking a statement of fact, but in the words of the attorney, has been cited as an illustration of "Work Product."²¹ In the instant case, interrogatories were addressed to the defendants seeking copies of written and oral statements. The Supreme Court reversed the appellate court's holding that such information was a part of the "Work Product" and hence not discoverable. It was decided that upon a showing of undue prejudice, hardship or injustice in the preparation of the moving party's case, that even the "Work Product" is subject to discovery.

The Circuit Court of Appeals, 7th Circuit, held that the trial court was in error when it declined to require an assistant to the Attorney General to comply with defendant's subpoena for designated books, papers and documents in a recent criminal Anti-Trust Act indictment. The court held the government assistant to be in contempt and the case went up. In *Bowman Dairy Co. et al. v. United States*²² the Supreme Court struck down the "by seizure or process" requisite of documents procured from confidential informants through solicitation or volunteered documents.

The case is deceptive, however, in its newly announced latitude because, (1) there is an express commitment to the confines of Rule 16, (2) a requirement that the materials to be reached by subpoena under Rule 17(c) be evidentiary.²³ The subpoena²⁴ requested all books, papers and documents which had been obtained by the government in the course of its preparation, other than by seizure or by process and which had been presented to the Grand Jury and which "are relevant to the allegations or charges contained in said indictment whether or not they might constitute evidence with respect to the guilt or innocence of any defendant."²⁵ This request to the court partook of the "odious fishing expedition," not in keeping with the good faith requirement of seeking evidentiary material and thus rendered the subpoena partially bad. As such, it was insufficient to constitute the basis for a contempt charge.

A "where do we go from here" question is apt but agonizing when we have no absolute gauge from which to seek the right answer in trying to draft a true rule of proper scope, one of necessary limitation. Surely the fears of the more conservative thinking are not unreal ones. That some unscrupulous attorney would seize every opportunity to twist a broadened rule of criminal discovery to serve an evil scheme is an almost conclusive presumption. In isolating this precious element of "proper scope" our first attention must be to an identity of the important fears of a broadened rule and to know a safeguard from a stricture. The confinements of Rule 16 were formally challenged last year when a Special Committee on the Uniform Rules of Criminal Pro-

21. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COL. L. REV. 1026 (1950).

22. 314 U.S. 214 (1951).

23. 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 properly 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. Rule 17 (c) 18 U.S.C.A.

24. See Note 22 *supra*.

25. Even the language of the request, as though anticipating futility, excepts "memoranda prepared by government counsel and documents or papers solicited by or volunteered to government counsel which consist of narrative statements of persons or memoranda of interviews." See Note 22 *supra*.

cedure proposed under its Rule 29 that written statements or confessions made by the defendant, co-defendants or witnesses be written into the language of criminal discovery. If Rule 29²⁶ of the Proposed Federal Rules of Criminal Procedure were to be adopted, certainly it can be expected that some shrewd defense counsel will appear at trial with the defendant or the "approached" witness and try to explain away confessions and statements as the indiscreet penmanship of misguided men. The fact should not come as a new wound to state's attorneys already heavily scarred in the battles of confession admissibility to a realization that there is a "delicacy involved which imposes a special official responsibility in relation to the taking. Objective standards of validity must be met and it is only on the basis of the confession having such validity that it is recognized at all."²⁷ The barriers of timely arraignment, voluntariness, promises of leniency etc., appear destined as the perennial dangers to the prosecution. Once these have been met, it is hard to recognize the jeopardy in permitting a re-reading by the defendant before trial, notwithstanding the known tendency of the guilty to manufacture, suborn, distort and deny. If it is true that it has been "early recognized that the right of an honest defendant to have every reasonable opportunity to prepare his defense and to be protected against false and malicious prosecution far outweigh the necessity of keeping a dishonest defendant from having a chance to prepare perjured testimony,"²⁸ may we not trust to the collective judgments of the jury to fan the innocent from the dishonest? Nothing in Proposed Rule 29 before alluded to shackles the power of the state's cross-examination. A more vigilant preparation of the state's case may be required; but if the temptation to rely upon the convicting force of a confession is reduced and supplanted by a greater vigilance in estimating its true worth toward establishing innocence or guilt, who can say that the result is bad? About the *Bowman Dairy* case it's too soon to know. Perhaps a freak, perhaps the germ of compromise from strict *seizure or process*. In any event, it would seem to be at present the infant voice of newly born authority for a defendant's right to make application for discovery of evidentiary information even if volunteered to the government by third parties. That the case is not to be construed as affecting Rule 16 is explicit in the court's opinion.²⁹

Some suggested norms to decide whether the right to discovery should be granted in a particular case are, "the sound discretion of the trial court taking into consideration the reasonableness of the demand, the intricacy of the subject matter sought and the defendant's good faith."³⁰ It is submitted that a way to know who is and who is not the good faith defendant defies certainty and is amenable to no pre-ordained objective standard. Materiality to the de-

26. Proposed by a Special Committee on Uniform Rules of Criminal Procedure (Report of Sept. 10-15, 1951) and provided that: Upon motion of a defendant at any time after the filing of the indictment or information and on a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court may order the prosecuting attorney 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 including written statements or confessions made by the defendant or a co-defendant and written statements of witnesses. The order shall specify the time, place and manner of making the inspection and of taking copies or photographs and may prescribe such terms and conditions as are just.

27. 39 Col. L. Rev. 287 (1939).

28. *Supra* Note 27.

29. *Bowman Dairy v. United States*, *supra* at p. 679: "it was not intended by Rule 16 to give a limited right of discovery and then by Rule 17 to give a right of discovery in the broadest terms."

30. Berge, *The Proposed Federal Rules of Criminal Procedure*, 42 MICH. L. REV. 353 (1943).