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Right of an Accused to Obtain Pre-Trial Inspection of His Confession, The

Ronald N. Mora

CRIMINAL LAW CASE NOTES AND COMMENTS

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THE RIGHT OF AN ACCUSED TO OBTAIN PRE-TRIAL INSPECTION OF HIS CONFESSION

Trial courts have rather consistently refused to compel the prosecution to permit pre-trial examination by defense counsel of confessions allegedly made by the accused. This refusal has had its basis in the early common law practice of uniformly denying a defendant access to any of the prosecution's evidence.[1] Although inroads have been made into this attitude in other areas of discovery,[2] the view has generally prevailed that the accused is not entitled to an inspection of his alleged confession.[3] Moreover, legislation concerning pre-trial examination generally has been narrowly construed in favor of the prosecution. Recent cases, however, appear to forecast a more liberal attitude towards such disclosure.

The problems involved in the discovery of statements and confessions vary according to whether such discovery is governed by the common law, state legislation, or by the Federal Rules of Criminal Procedure.[4]

Inspection in the Absence of Statute

It is generally assumed that, in the absence of statute, a defendant is not entitled as of

[1] The earliest leading case is *Rex v. Holland*, 4 T. R. 691, 100 Eng. Rep. 1248 (1792). It was said that no principle or precedent warranted discovery, and if such were permitted, it would subvert the whole system of criminal law. It was also thought that discovery in a criminal case would lead to tampering with the documents and perjury by the defendant. For jurisdictions that have adopted this common law attitude see 6 Wigmore, Evidence § 1859 (g) (3d ed. 1940); Comment, 60 Yale L. J. 626 (1951); Note, 53 Colum. L. Rev. 1161 (1953).

[2] The defendant has been permitted to examine grand jury minutes. *United States v. Kaskel*, 18 F.R.D. 477 (E.D.N.Y. 1956), and *People v. Brundage*, 147 N.Y.S.2d 45 (1955). Inspection has been granted of witnesses' statements. *Fryer v. United States*, 207 F.2d 134 (D.C. Cir.), *cert. denied*, 346 U. S. 885 (1953); *Drozewski v. State*, 84 So.2d 329 (Fla. 1955).

[3] *State v. Kupis*, 37 Del. (7 W. W. Harr.) 27, 179 Atl. 640 (1935); *People v. Parisi*, 270 Mich. 429, 259 N.W. 127 (1935); *Territory v. McFarlane*, 7 N.M. 421, 37 Pac. 1111 (1894) (inspection of the defendant's testimony at a preliminary hearing denied); *Pettigrew v. State*, 289 S.W.2d 935 (Tex. 1956); *Lopez v. State*, 158 Tex. Crim. 16, 252 S.W.2d 701, *cert. denied*, 344 U.S. 893 (1952) (inspection denied before confession offered into evidence); *Abdell v. Commonwealth*, 173 Va. 458, 2 S.E.2d 293 (1939); *Brown v. Commonwealth*, 90 Va. 671, 19 S.E. 447 (1894); *Steensland et al v. Hoppmann*, 213 Wis. 593, 252 N.W. 146 (1934); *Santry v. State*, 67 Wis. 65, 30 N.W. 226 (1886).

[4] Fed. R. Crim. P., 18 U.S.C. following §3771 (1946).

right to a pre-trial inspection of his statements.[5] It has been held, however, that a trial court has the inherent power to require, in its discretion, the production of tangible evidence.[6] But this power has been rarely used to permit the inspection of confessions.[7] In addition, appellate courts have generally approved the denial of such discovery.[8] Furthermore, on at least one occasion an appellate court has reversed the order granting inspection by a trial court.[9]

Appellate courts have justified the denial by trial courts of confession discovery by imposing upon the defendant the burden of establishing the necessity of the discovery sought. This prerequisite has taken the form of two basic requirements.[10] First, the defendant must have had no access or opportunity prior to the trial to examine the requested documents.[11] Failure to have taken advantage of prior access has been held to constitute, in effect, a waiver of the privilege of inspection.[12] Second, the documents sought must be material to the preparation of the defense,[13] and materiality in this context has been held not to have been established by a general allegation that the confession is needed to prepare an adequate defense.[14]

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[5] *State v. Kupis*, 37 Del. (7 W. W. Harr.) 27, 179 Atl. 640 (1935); *People v. Parisi*, 270 Mich. 429, 259 N.W. 127 (1935); *Territory v. McFarlane*, 7 N.M. 421, 37 Pac. 1111 (1894); *Pettigrew v. State*, 289 S.W.2d 935 (Tex. 1956); *Lopez v. State*, 158 Tex. Crim. 16, 252 S.W.2d 701, *cert. denied*, 344 U.S. 893 (1952); *Abdell v. Commonwealth*, 173 Va. 458, 2 S.E.2d 293 (1939); *Brown v. Commonwealth*, 90 Va. 671, 19 S.E. 447 (1894); *Steensland et al v. Hoppmann*, 213 Wis. 388, 252 N.W. 146 (1934); *Santry v. State*, 67 Wis. 65, 30 N.W. 226 (1886); *State v. Leland*, 190 Ore. 598, 227 P.2d 785 (1951) (denial of inspection not prejudicial error).

In Louisiana, however, the defendant was granted inspection as a matter of constitutional right. *State v. Dorsey*, 207 La. 928, 22 So.2d 273 (1945). But see *State v. Lea*, 228 La. 724, 84 So.2d 169 (1955); *State v. Shourds*, 224 La. 955, 71 So.2d 340 (1954).

[6] *State v. Superior Court of Santa Cruz County*, 81 Ariz. 127, 302 P. 2d 263 (1956). *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

[7] See, *e.g. Commonwealth v. Chapin*, 333 Mass. 610, 132 N.E.2d 404 (1956); *Commonwealth v. Lundin*, 326 Mass. 551, 95 N.E.2d 661 (1950); *Commonwealth v. Galvin*, 323 Mass. 205, 80 N.E.2d 825 (1948); *State v. Echevarria*, 38 N.J.Super. 415, 119 A.2d 183 (1955); *State v. Cicenia*, 6 N.J. 296, 78 A.2d 568 (1951), *cert denied*, 350 U.S. 925 (1955).

[8] See, *e.g., Padgett v. State*, 64 Fla. 389, 59 So. 946 (1912); *State v. Cicenia*, 6 N.J. 296, 78 A.2d 568 (1951), *cert. denied*, 350 U.S. 925 (1955); *State v. Leland*, 190 Ore. 598, 227 P.2d 785 (1951); *State v. Clark*, 21 Wash.2d 774, 153 P.2d 297 (1944).

[9] In the case of *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953), the appellate court waived the rule not to review orders except final judgments and reviewed the order relating to the defendant's right to pre-trial discovery. The appellate court reversed the trial court's granting of inspection. The defense counsel argued that he was not appointed until more than two months after the accused had been arrested and made statements to the police, and these statements were needed for a psychiatric examination of the accused.

[10] In *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953), the appellate court reversed the granting of inspection because the trial court imposed the burden upon the state to show how it would be hampered if pre-trial discovery were granted; the burden was upon the defendant to show how the document would be material to his defense.

Some courts have imposed the additional requirements that the object sought be evidentiary. See *People v. Santora*, 51 Cal.App.2d 707, 125 P.2d 606 (1942) (inspection denied of confidential police reports which were not admissible in evidence), *People v. Meadows*, 108 Cal.App. 67, 291 Pac. 226 (1930); *People v. Fuski*, 49 Cal.App. 4, 192 Pac. 552 (1920).

[11] See *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505 (1955); *Drozewski v. State*, 84 So.2d 329 (Fla. 1955); *Perez v. State*, 81 So.2d 201 (Fla. 1955). *Cf. United States v. Scully*, 15 F.R.D. 402 (S.D.N.Y. 1954) (dictum). This first requirement assumes that the defendant has been unable to recollect the contents of his confession.

[12] *Perez v. State*, 81 So.2d 201 (Fla. 1955); *Commonwealth v. McCarter*, 385 Pa. 236, 122 A.2d 714 (1956).

[13] *State v. Superior Court of Santa Cruz County*, 81 Ariz. 127, 302 P.2d 263 (1956); *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505 (1955).

[14] *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505 (1955); *Commonwealth v. Chapin*, 333 Mass. 610, 132 N.E.2d 404 (1956); *Commonwealth v. Lundin*, 326 Mass. 551, 95 N.E.2d 661 (1950); *Commonwealth v. Galvin*, 323 Mass. 205, 80 N.E.2d 825 (1948).

The defendant must show that pre-trial examination is required for the preparation of a specific defense. For example, where the prosecution indicated that it intended to use a confession for the purpose of impeaching the defendant's testimony, inspection has been permitted.[15] If the confession were alleged to be a forgery or to be inaccurately recorded, the requirements of materiality should be considered sufficiently satisfied to warrant discovery.[16]

In contrast to a majority of jurisdictions, the Louisiana Supreme Court has held that the denial of inspection of a defendant's written statements would deprive him of his constitutional rights to a fair trial.[17] However, recent Louisiana cases have narrowly construed and severely restricted the application of that right.[18] Nevertheless, the United States Court of Appeals for the Third Circuit has suggested that, in a jurisdiction which allows the court to decide before trial the question of the voluntariness of the confession, denial of inspection may violate the due process clause of the fourteenth amendment.[19] The court maintained that the truth and accuracy of the statements contained in an alleged confession are significant in determining the question of voluntariness. If the defense counsel were unable to learn the contents of the confession before the question of voluntariness was decided, the court concluded that he would be unable to adequately argue the question.[20] However, the issue of voluntariness usually involves a consideration of the circumstances surrounding the taking of the confession rather than its contents.[21] If, in deciding this question the court only considers whether the defendant was subjected to duress or coercion, the denial of an opportunity for the defendant to examine his confession should not be considered a violation of due process.

It is apparent that only in rather unique situations has a defendant obtained pre-trial inspection of his confession. The injustice that may result from this attitude is somewhat tempered by the fact that the prosecution is foreclosed from examining the defendant's evidence because of the constitutional mandate against self-incrimination.[22] Moreover, if discovery were freely granted, the dangers of perjury might be increased since it would create an opportunity for the accused to explain away whatever admissions he may have made in his confession.[23] On the other hand, it is arguable that a searching cross-examination

[15] *State v. Superior Court of Santa Cruz County*, 81 Ariz. 127, 302 P.2d 263 (1956).

[16] See *State v. Tune*, 13 N.J. 203, 234, 98 A.2d 881, 897 (1953) (dissenting opinion).

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

[18] The Louisiana Supreme Court refused to grant inspection of transcripts of an oral confession and limited the *Dorsey* rule to its facts in *State v. Lea*, 228 La. 724, 84 So.2d 169 (1955); *State v. Shourd*, 224 La. 995, 71 So.2d 340 (1954).

[19] In Application of Tune, 230 F.2d 883 (3d Cir. 1956), *cert. denied*, 349 U.S. 907 (1955), the defense counsel sought to inspect the defendant's confession alleging that it was needed for an essential psychiatric examination of the defendant. The state submitted affidavits to the defense containing pertinent parts of the confession. The trial judge authorized the defense counsel to retain a psychiatrist to examine the defendant, but held that, while denial of inspection of a defendant's confession may not be the better practice, failure to do so would violate due process only if prejudice could be shown. Since the state informed the defense that sodomy and robbery were connected with the case and did afford psychiatric assistance due process was held not to have been denied. The court inferred that in other cases the practice of allowing the judge to decide the question of voluntariness before trial without granting pre-trial inspection, might lead to a denial of due process.

[20] Even though the jury was to make the ultimate determination as to whether or not the confession was true, the court felt that once the trial judge ruled that the confession was voluntary the jury would be unlikely to think that the statements therein were false.

[21] In the preliminary examination to determine whether an alleged confession is admissible in evidence, the only issue before the court is whether the confession was freely and voluntarily made without coercion or promise of immunity. See INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 198 (3d ed. 1953); MCCORMICK, *The Scope of Privilege in the law of Evidence*, 16 TEXAS L. REV. 447 (1938). *Cf. People v. Fudge*, 342 Ill. 574, 587, 174 N.E. 875, 880 (1931).

[22] U. S. CONST. amend. V. 6 WIGMORE, EVIDENCE §1859 (g) (3d ed. 1940).

[23] 6 WIGMORE, EVIDENCE §1845 (3d ed. 1940). The fear that discovery may lead to tampering with

would mitigate this danger.[24] Furthermore, since the risks involved to a defendant in a criminal case greatly out weigh those involved in civil cases where discovery is freely accorded,[25] inspection should be permitted in appropriate cases.

The determination of an appropriate case should depend upon the necessity of such examination for the adequate preparation of the defense. In addition, such opportunity to inspect should be limited by the requirements of necessity presently adhered to by the courts. However, these requirements should be employed as tests for determining when pre-trial examination will be granted rather than as a rationale for consistently denying such inspection.

INSPECTION UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

In the federal courts discovery in criminal cases is governed by rules 16 and 17(c) of the Federal Rules of Criminal Procedure.[26] Rule 16 is the general discovery provision under which the defendant may inspect and copy requested documents. Rule 17(c) provides for a subpoena duces tecum and, in addition, authorizes the court to require that subpoenaed documents be produced prior to the trial. Pre-trial discovery of the defendant's statements has been sought under both rules 16 and 17(c).

Federal Rule 16. This rule provides, in part, that a defendant may inspect documents or tangible objects that may be material to the preparation of his defense which have been obtained from or which belong to the defendant if such a request is reasonable.[27]

A majority of the federal courts have interpreted Rule 16 in such a way that confessions do not fall within its scope.[28] Primary significance has been given to the words "obtained from" or "belonging to" the defendant. It has been held that this language refers to documents which were in existence prior to the time that the government obtained possession of them.[29] A confession or similar statement related to the police after arrest has been held not to be a document in existence prior to the time it was transcribed by the government and thus not something obtained from or belonging to the defendant.[30]

On the other hand, a minority of federal courts have declared that a statement made after arrest is, in fact, something obtained from or belonging to the defendant and, therefore, subject to discovery under rule 16.[31]

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the documents sought is no longer present as the defendant will be given a copy of his statement rather than the original.

[24] See, *e.g.*, *United States v. Peace*, 16 F.R.D. 423, 424 (S.D.N.Y. 1954). See also 5 WIGMORE, EVIDENCE §§1367–68 (3d ed. 1940).

[25] FED. R. CIV. P. 34, 28 U.S.C. (1946). See *Karlsson v. Wolfson*, 18 F.R.D. 474 (D.C. Minn. 1956); *Sheffield Corp. v. George F. Alger Co.*, 16 F.R.D. 27 (S.D. Ohio 1954); *Dulansky v. Iowa & Illinois Gas & Elec. Co.*, 10 F.R.D. 146 (S.D. Iowa 1950).

[26] 18 U.S.C. following § 3771 (1946).

[27] 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. FED. R. CRIM. P. 16.

[28] *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955) (statements by the defendant after arrest are not "obtained from" or "belonging to" him); *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949); *United States v. Louie Gim Hall*, 18 F.R.D. 384 (S.D.N.Y. 1956) (legislative history held to indicate that it does not extend to discovery of statements made by the accused when in custody); *United States v. Gogel*, 19 F.R.D. 107 (S.D.N.Y. 1956); *United States v. Anthony*, 145 F.Supp. 323 (M.D.Pa. 1956); *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955); *United States v. Kiame*, 18 F.R.D. 421 (S.D.N.Y. 1955); *United States v. Chandler*, 7 F.R.D. 365 (D.Mass. 1947), *cert. denied*, 336 U.S. 918 (1948); *United States v. Black*, 6 F.R.D. 270 (N.D. Ind. 1946). See Note, 67 HARV. L. REV. 492 (1954).

[29] See cases cited note 28 *supra*.

[30] *Ibid.*

[31] *In United States v. Peace*, 16 F.R.D. 423, 424 (S.D.N.Y. 1954), the court granted pre-trial inspection of a defendant's confession under rule 16

These cases represent a liberal construction of the language of the rule and are in direct conflict with the majority view.

A smaller number of federal courts have held that a written statement *signed* by the defendant after his arrest is a document "belonging to" the accused just as is a document which had been prepared by him before arrest.[32] However, a paper found in the defendant's possession before arrest is certainly not something belonging to him merely because his signature appears thereon. For this reason, it is difficult to understand why the failure to place a signature upon a confession obtained after arrest prevents the document from being considered as obtained from or belonging to the defendant. Moreover, it is the content of the confession which the defendant seeks to inspect. This has, in fact, been obtained from the accused.[33] However, the distinction drawn between a signed and an unsigned statement may indicate that the courts consider an unsigned statement a part of the prosecution's "work product" and, therefore, not subject to discovery.[34] In *United States v. Singer*,[35] for example, the court indicated that an unsigned statement made by an accused after his arrest might be a privileged document because it constitutes the work product of the prosecution.

The lawyer's work product has been held to include such things as his notes, personal beliefs and mental impressions which he has acquired while conducting his investigation.[36] If a confession were considered part of the prosecution's work product it would be a document prepared by the prosecution rather than an object obtained from the defendant, and thus would not be subject to discovery under rule 16. However, a confession, by definition, cannot be a part of the work product since a statement is made up of what the defendant has said. The function of a confession as an admission of guilt requires that it represent the exact language of the confessor; it cannot consist of the personal beliefs and mental impressions of the prosecution obtained in preparation for trial.[37] Furthermore, a confession is admissible in evidence. It has been held that material which is admissible in evidence is not part of an attorney's work product.[38] In addition, courts have allowed the defendant to inspect statements made voluntarily to the prosecution by witnesses.[39] In that instance the work product argument would seem a more rational basis for the denial of dis-

adopting the dicta in *Shores v. United States*, 174 F. 2d 838 (8th Cir. 1949). See also *United States v. Klein*, 18 F.R.D. 439 (S.D.N.Y. 1955); *United States v. Schluter*, 19 F.R.D. 372 (S.D.N.Y. 1956).

[32] *United States v. Singer*, 19 F.R.D. 90 (S.D.N.Y. 1956). *Contra*, *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955). The District of Columbia court would permit inspection, prior to trial, of any written statement signed by the defendant and in the possession of the prosecution. *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954).

[33] Since it is the contents of the confession which is sought to be inspected, it is arguable that a confession transcribed by the prosecution is not a tangible object obtained from the accused as is required by the rule. See note 27 *supra*. But it is clear that if the defendant has written the confession himself the document given to the prosecution would be a tangible object. To hold that, if the prosecution has written down what the defendant has said, the document prepared is not a tangible object would be unrealistic.

[34] *See United States v. Singer*, 19 F.R.D. 90 (S.D. N.Y. 1956). *Cf. United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955).

[35] *United States v. Singer*, 19 F.R.D. 90 (S.D.N.Y. 1956).

[36] *Hickman v. Taylor*, 329 U.S. 495 (1947), *cert. denied*, 336 U.S. 906 (1949); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D.Cal. 1954). See Note, 28 TEXAS L. REV. 257 (1949).

[37] See note 36 *supra*.

[38] *Ibid.*

Even if a confession were to be considered part of the work product it should not be exempt from discovery since the rule as finally adopted is silent on the question of privilege. Because the preliminary draft of rule 16 excluded documents that were privileged it might be inferred that even privileged documents which met the requirements of the rule were intended to be subject to discovery. On the other hand, if privileged documents are not subject to discovery under rule 16, a confession even if considered a part of the work product, should not be excluded as privileged since the work product is not a common law privilege and only the common law privileges may be exempt. *Cf. Hickman v. Taylor*, 329 U.S. 495 (1947).

[39] 18 U.S.C. § 3432 (1946), accords the defendant in a capital case the right to a list of witnesses to be

covery than it would when applied to statements of the accused. A confession should therefore not be excluded from pre-trial discovery on the ground that it is part of the prosecution's work product; it should be subject to inspection when the additional requirements of rule 16 have been satisfied.

In addition to requiring that the objects sought be obtained from or belong to the defendant, rule 16 further requires that the items be material to the preparation of the defense.[40] In order to satisfy the requirements of materiality it is not sufficient to allege that the documents are generally needed to prepare an adequate defense; the defendant must specifically indicate how the documents are important to his case.[41] For example, if the defense is insanity, it must be shown that the psychiatrist requires a copy of the confession in order to make a full and complete diagnosis of the defendant's mental condition.[42]

The additional provision of rule 16 which requires that the request for inspection be reasonable should be satisfied if the defendant cannot obtain the information by any method other than pre-trial discovery. The motion, however, must explicitly state what objects the defense seeks to inspect; a request to inspect any and all documents impounded by the government would be denied.[43]

Rule 16 should thus be applied so as to compel pre-trial disclosure of the defendant's confession. Such inspection, however, should be subject to the enumerated limitations which are contained in the language of the rule. Nevertheless, as a result of the strict interpretation placed on rule 16, defense counsel have resorted to the subpoena provisions of rule 17(c) in order to inspect statements before trial.

Federal Rule 17(c). This rule[44] was designed to expedite the conduct of the trial by enabling the defendant to obtain certain subpoenaed documents before the trial.[45] Since the materials designated in the subpoena must be produced prior to trial or prior to the time they are to be offered into evidence, counsel have attempted to invoke this provision in order to obtain inspection of an accused's confession.[46] Although some courts have suggested that inspection could be obtained under 17(c),[47] those courts which have ruled upon the question have uniformly denied such requests. These courts have relied upon the case of *United States v. Bowman Dairy Co.*[48] in which the United States Supreme Court held that rule 17(c) is not a discovery device.

Although the *Bowman Dairy* case did not involve the question of the discovery of con-

produced at the trial. See *Fryer v. United States*, 207 F.2d 134 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953); *United States v. Bell*, 126 F. Supp. 612 (D.D.C 1955) (non-capital case).

[40] See note 27 *supra*.

[41] See, *e.g.*, *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955).

[42] *Cf.* Application of Tune, 230 F. 2d 883 (3d Cir. 1956), *cert. denied*, 349 U.S. 907 (1955).

[43] *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955).

[44] 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 attorney. FED. R. CRIM P. 17(c).

[45] *United States v. Bowman Dairy Co.*, 341 U.S. 214 (1951). But see, *United States v. Gogel*, 19 F.R.D. 107 (S.D.N.Y. 1956) (inspection of the defendant's sixteen page confession denied on the ground that the trial would not be unreasonably delayed by giving the defendant time to inspect the documents at the time of its introduction into evidence).

[46] *United States v. Gogel*, 19 F.R.D. 107 (S.D.N.Y. 1956); *United States v. Louie Gim Hall*, 18 F.R.D. 384 (S.D.N.Y. 1956); *United States v. Kiamie*, 18 F.R.D. 421 (S.D.N.Y. 1955).

[47] In *Monroe v. United States*, 234 F.2d 49 (D.C.-Cir. 1956), the court indicated that the defendant might have been allowed to inspect tape recordings, analogous to a confession, under rule 17(c). See also *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954).

[48] 341 U.S. 214 (1951).

fessions,[49] the Court indicated that those documents which may be examined under the discovery provision of rule 16 may in addition, be subpoenaed under rule 17(c) if the purpose is to secure documents that the moving party might reasonably introduce into evidence.[50] However, since a confession is ordinarily damaging or impeaching, its use at the trial by the defendant is unlikely.[51] Consequently, it has been held that such a statement is not a document that might reasonably be offered into evidence by the accused, and for this reason discovery of confessions under rule 17(c) has been generally denied.[52]

Courts have nevertheless implied that, were the documents sought neither damaging nor impeaching, inspection might be granted. However, if the "confession" supported the testimony of the accused, the defendant obviously would want to use it at the trial but such use would be barred as self-serving statements.[53] It is apparent, therefore, that rule 17(c) is not a discovery device and that inspection should neither be sought nor granted under that rule.

Some courts have overlooked the evidentiary requirements and indicated that discovery is obtainable under rule 17(c).[54] However, these courts have construed rule 17(c) as requiring for its application a showing of good cause and have denied discovery for failure to satisfy this requirement.[55] It seems unnecessary for courts to impose the requirements of good cause when such disclosure is sought under this rule since a confession does not meet the expressed evidentiary requirement of the rule. This conclusion appears proper when it is considered that rule 17(c), unlike rule 16, was not intended to provide an additional method of discovery.[56] In addition, the suggestion that a federal court has the inherent common law power, irrespective of the federal rules, to grant pre-trial inspection would support the conclusion that only rule 16, which was intended to restate the common law procedure, should be utilized for discovery purposes.[57] Moreover, since a proper construction of rule 16 would empower the court, in its discretion, to permit an accused pre-trial inspection of his confession, a similar construction of rule 17(c) would be an unnecessary duplication.[58]

Inspection under State Statutes

Several states have enacted statutes regulating discovery in criminal cases.[59] Some expressly

[49] The defendant was not seeking discovery of his confession but sought to inspect voluntary statements made by third persons to the government.

[50] See note 48 *supra*.

[51] *Ibid.*

[52] *Ibid.*

[53] 6 Wigmore, Evidence §§ 815, 1766 (3d ed. 1940); McCormick, Evidence § 275 (1954).

[54] See *United States v. Scully*, 15 F.R.D. 402 (S.D.N.Y. 1954); *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954).

[55] In *United States v. Scully*, 15 F.R.D. 402 (S.D.N.Y. 1954), it was indicated that the mere allegation that the defendant cannot remember the statements was not a showing of good cause unless there had been a long passage of time to dim his recollection. The requirements of good cause are satisfied if: (1) the documents sought are evidentiary and revelant, (2) the defense after a diligent investigation must be unable to procure the statement in advance of the trial, (3) the documents are of such a nature that the defendant will be unable to prepare a proper defense without pre-trial inspection and failure to obtain such inspection may tend unreasonably to delay the trial; and (4) the motion to inspect must not be a fishing expedition. *United States v. Winkler*, 17 F.R.D. 213 (D. Rhode Is. 1955); *United States v. Ward*, 120 F. Supp. 57 (S.D.N.Y. 1954); *United States v. Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952).

[56] *United States v. Bowman Dairy Co.*, 341 U.S. 214 (1951).

[57] *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949).

Whether under existing law discovery may be permitted in criminal cases is doubtful, ... The courts have, however made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, ... The rule is a restatement of this procedure.... Note of Advisory Committe, 18 U.S.C. following Fed. R. Crim. P. 16.

See *United States v. Rosenfeld*, 57 F.2d 74 (2d Cir.), *cert. denied*, 286 U.S. 556 (1932).

[58] See Note, 67 Harv. L. Rev. 492 (1954).

[59] The court ... may, ... compel the production of any written document, or any other thing which