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## Criminal Procedure—State Trends in Criminal Discovery

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than "or."<sup>43</sup> The defendant was convicted of murder in the first degree, and he appealed upon the basis that the erroneous wording of the statute in the charge was prejudicial. The Court of Appeals found that the incorrect wording was a technical, and not a prejudicial, error, and that the subject was properly covered in other portions of the charge. The court must, after hearing the appeal, give judgment without regard to technical errors or defects which do not effect the substantial rights of the parties.<sup>44</sup>

(b) An information may be sworn to before certain officers who are not notaries public where a traffic summons has been served.<sup>45</sup> However where it is established that no traffic summons has been served, then this authority does not exist. In *People v. Polle*,<sup>46</sup> the defendant had been convicted of a violation of the Vehicle and Traffic Law upon an information which was sworn to before a sergeant of the Sheriff's Office who was not a notary public. It was testified to that at the time no traffic summons had been issued and the defendant immediately moved to dismiss the information. The Court of Appeals, applying a very strict interpretation of the law, found that the dismissal should have been granted because Section 208 of the Vehicle and Traffic Law would not apply, and the court, therefore, had no jurisdiction.

(c) The case of *Fisher v. State* was an action against the State of New York for damages suffered as a result of the tortious actions of a County Assistant District Attorney.<sup>47</sup> The action was brought upon a respondeat superior theory under which the State would be held liable for the actions of the county officer. The action was dismissed below for failure to state a cause of action.<sup>48</sup> Local county officers are either elected to their posts or appointed from the county in which they reside. They are paid by the county and although they operate within the framework of the law of New York State, their responsibility is to their own country. The Court of Appeals found that the officer in the present case could not be considered a state officer within the meaning of present New York Statutes<sup>49</sup> and case law.<sup>50</sup>

*Bd.*

## CRIMINAL PROCEDURE

### STATE TRENDS IN CRIMINAL DISCOVERY

While civil discovery has undergone rapid change, its criminal counterpart has remained relatively dormant. There has been a great resistance to any

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43. N.Y. Penal Law § 1120.

44. N.Y. Code Crim. Proc. § 542.

45. N.Y. Vehicle and Traffic Law § 208.

46. 9 N.Y.2d 349, 214 N.Y.S.2d 369 (1961).

47. 10 N.Y.2d 60, 217 N.Y.S.2d 52 (1961).

48. *Fisher v. State of New York*, 23 Misc. 2d 935, 203 N.Y.S.2d 363 (Ct. Cl. 1959).

49. N.Y. Public Officers Law § 2.

50. *Ritter v. State of New York*, 283 App. Div. 833, 128 N.Y.S.2d 830 (3d Dep't 1954).

advancement in this area. For this reason every new development takes on great significance, and a forward looking decision sets up a hue and cry that can be heard throughout the nation. There are many willing fingers to plug the dike, and many fingersore people after the Supreme Court's decision in *Jencks v. United States*.<sup>1</sup> The *Jencks* case has provided an impetus to state action as may be noted from New York's recent decision in *People v. Rosario*.<sup>2</sup>

The *Jencks* case overruled prior federal holdings that the judge must first examine pretrial statements of a witness for inconsistency before they could be obtained by defense counsel. The Supreme Court held that defendant was entitled to examine reports without, as some previous cases had required, a preliminary showing of inconsistency between the reports and the witness' testimony at the trial, or a preliminary *in camera* inspection of the reports by the judge to determine relevancy. A sufficient foundation for these reports was established by the testimony of the witness that the reports were of events and activities related in his testimony. The Court said that to require a showing of inconsistency would be clearly incompatible with our standards for administration of criminal justice in the federal courts and must therefore be rejected.<sup>3</sup> Only the defense is adequately equipped to determine the effective use of the reports for purposes of discrediting the Government's witness and thereby furthering the accused's defense. The defense must initially be entitled to see them to determine what use may be made of them. "Justice requires no less."<sup>4</sup> The holding of the *Jencks* case affects only discovery at the trial.<sup>5</sup> The prior statement is obtainable only after a showing by counsel that the evidence is relevant, competent and outside of any exclusionary rule.<sup>6</sup>

Some of the federal district courts interpreted the *Jencks* case as a broad statement of policy and attempted to expand the holding to include pretrial discovery. Congress was jarred by the decision,<sup>7</sup> and fearing further expansion of the principle, it hastily enacted legislation to limit the scope and application of the rule.<sup>8</sup> The legislation follows the basic approach of the case, inasmuch as no prior inconsistency between statement and testimony need be laid. The judge, by *in camera* inspection, determines if the statement relates to the testimony; if it does, it is admissible.<sup>9</sup>

The legislation differs from the *Jencks* holding in two respects: 1. The trial court has discretion either to strike the witness' testimony or declare a mistrial if the Government fails to produce the requested statement. Under the *Jencks* rule a governmental claim of privilege resulted in dismissal of the

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1. 353 U.S. 657 (1957).

2. 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961).

3. Supra note 1 at 668-669.

4. Ibid.

5. *United States v. Benson*, 20 F.R.D. 602 (S.D.N.Y. 1957).

6. *Gordon v. United States*, 344 U.S. 414, 420 (1953).

7. 103 Cong. Rec. 7401-02 (Daily Ed. June 4, 1957).

8. 18 U.S.C. § 3500 (1957).

9. 18 U.S.C. § 3500 (B), (C), (D) (1957).

action. 2. The statute only allows for the production of written statements made by the witness and signed or otherwise adopted by him or a substantially verbatim recital of a contemporaneously recorded oral statement;<sup>10</sup> whereas, the case covered all reports in the government's possession covering events testified to at the trial.

The *Jencks* case as modified by the statute is the present rule in all the federal courts. Although some writers feel that the Supreme Court's statement "justice requires no less" was an expression of the minimal constitutional requirement,<sup>10a</sup> the opinion was not specifically based on constitutional grounds; therefore, the states have not been obliged to adopt the rule. Even though not required, some states have felt it desirable to follow the federal approach and New York has recently seen fit to do so in *People v. Rosario*.<sup>11</sup>

Prior to the Court of Appeals' holding in the *Rosario* case, New York had required a preliminary showing of inconsistency before defense counsel could obtain the witness' statement.<sup>12</sup> The approach was identical to pre-Jencks practice in the federal courts. Upon the urging of defense counsel, the Court of Appeals in the *Rosario* case changed this rule and adopted one similar to the *Jencks* holding. Speaking for the majority Judge Fuld said:

A right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination.<sup>13</sup>

The Court then asks that we compare U.S. Code, title 18, Section 3500. This is an indication but not a clear expression of intent to adopt the *Jencks* legislation.

The *Rosario* rule differs from the *Jencks* legislation in two important respects: 1. If the statement is determined to be privileged, defense counsel may not obtain it. In the federal courts a claim of privilege results in either striking the witness' testimony or declaring a mistrial. 2. A statement is clearly defined by the federal legislation; whereas, the New York interpretation is much broader in that it would allow memoranda of the witness' statement.

Since New York has adopted the philosophy and basic rule of the federal courts, later decisions may fill the gap between *Rosario* and the federal legislation. It is the opinion of this writer that since the government is given the advantage of invoking its privilege, the defendant in a criminal case should not bear the cost of this protection. If it can be shown that there is a subject-

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10. Supra note 8.

10a. See 34 Ind. L.J. 441 (1959).

11. Supra note 2.

12. *People v. Bai*, 7 N.Y.2d 152, 196 N.Y.S.2d 87 (1959); *People v. Walsh*, 262 N.Y. 140, 186 N.E. 422 (1933).

13. Supra note 2 at 289, 213 N.Y.S.2d at 450.

matter relationship between the privileged statement and the witness' testimony, both should be excluded from the trial. However, at this time it is not possible to predict the Court's action on this matter.

The change in the New York rule is not a drastic departure when considered in the light of the advances made by other states, notably California.<sup>14</sup> However, it is significant as part of a growing trend which has been long in coming. A typical opinion was expressed by Judge Cardoza as recently as 1927, when he stated that he could see only the faint beginnings of a doctrine which would allow discovery in a criminal case.<sup>15</sup> The lag in this area can be attributed to the abhorrence of criminal discovery at common law.<sup>16</sup>

The objections to criminal discovery at common law are much the same as today, and may be stated as follows: 1. Discovery would wholly subvert criminal law administration. This objection is based more on fear than analysis, but it does reflect the feeling of some that the scales of justice are already far too overbalanced in favor of the accused.<sup>17</sup> 2. Discovery would greatly increase the opportunity for, and the incidence of, perjury. Concomitant with this would be tampering with evidence. Taken together, this would lead to the fabrication of a false defense.<sup>18</sup> 3. A true system of disclosure presupposes mutuality.<sup>19</sup> Our rule against compulsory self-incrimination makes mutuality impossible.<sup>20</sup>

The Supreme Court in the *Jencks* case, referring to discovery at the trial said, "justice requires no less."<sup>21</sup> In the light of the Supreme Court's attitude, many states have taken pause to review the traditional objections to criminal discovery.<sup>22</sup>

The first objection is really only a conclusion drawn from other reasons and belies analysis. Some of the arguments which give rise to the inference will be discussed under objection three.

The second objection is more appropriate to pretrial discovery than the situation presented in *Jencks* or *Rosario*, but considering discovery as a whole

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14. E.g., *Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (3d Dist. 1957), granted inspection of autopsy report; *State v. Haas*, 188 Md. 63, 51 A.2d 647 (1947); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958), discretionary inspection; *DiJoseph Petition*, 394 Pa. 19, 145 A.2d 187 (1958), granted inspection of a gun found by the police; *Commonwealth v. Stepper*, 54 Lac. Jur. 205 (Pa. 1952), murder case, ordered inspection of a confession prior to trial. *Contra*, *Watts v. State*, 222 Ark. 427, 261 S.W.2d 402 (1953); *State v. Leland*, 190 Ore. 598, 227 P.2d 785 (1951), aff'd, 343 U.S. 790 (1952); *State v. Lack*, 118 Utah 128, 221 P.2d 852 (1950). For an excellent discussion, see Fletcher, "Pretrial Discovery in State Criminal Cases," 12 *Stan. L. Rev.* 293 (1960).

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

16. See 6 *Wigmore, Evidence* § 1859g (3d ed. 1940); 2 *Wharton, Criminal Evidence* § 671 (12th ed. 1955).

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

18. See *State v. Tune*, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953).

19. See *State v. Rhoads*, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910).

20. See Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 *Yale L.J.* 1149, 1197 (1960).

21. *Supra* note 1 at 669.

22. See Fletcher, *supra* note 14.

is not without some merit. If the defendant has access to the prosecution's files, he will have a greater incentive to concoct a false defense, and certainly will be able to make the defense itself more credible. Although discovery may facilitate perjury, it must be remembered that we have overlooked this possible abuse in our civil procedure. While it is true that there is more likelihood of perjury in a criminal case due to the penalties involved, it must not be forgotten that we consider all men innocent until proven guilty. To assume a greater incidence of perjury in the criminal case, is to brand all defendants as criminal before they are so adjudged. The theory of civil procedure, that full disclosure will best lead to an accurate ascertainment of the truth, can also be applied to criminal cases.

The pith of the third argument against discovery is that full disclosure is not possible in a criminal case. On the surface this would seem to be a valid objection destroying the analogy to civil procedure. To this writer, however, it appears that the state already has the advantage in pretrial discovery. The constitutional protection against self-incrimination does not bar the state from interrogating the accused either before or after arraignment. Quite often the accused is an indigent, and much of this interrogation is done when the accused is without the benefit of counsel. Witnesses are also more accessible to the state. In some cases the state has taken the criminal law counterpart of a deposition, the confession of the accused. The vast resources of the state in gathering and scientifically analyzing evidence cannot in any way be compared to the limited facilities of the accused. If the accused voluntarily takes the witness stand, he is subject to the rule of the *Rosario* and *Jencks* cases, in the same manner as the state's witness. To say that extension of the discovery rules in a criminal case will give undue advantage to the accused because of the lack of mutuality seems at best an ostrich-type approach to the law.

The privilege against self-incrimination is not an insurmountable obstacle. The privilege may be voluntarily waived by the defendant.<sup>23</sup> Many times the defendant would choose this alternative if he knew that it would lead to free and open discovery of the prosecution. We should leave a way open for the defendant to do this, since this would obviate what appears to be the major objection to criminal discovery, the lack of mutuality. An argument might be made against this in that it leaves the choice entirely at the discretion of the accused; however, the purpose of a criminal trial is not to convict, but to see that justice is done. As was said in *Reynolds v. United States*, "The rationale of the criminal case is that since the Government, which prosecutes the accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."<sup>24</sup> At the very least, discovery should be allowed when the accused has offered reciprocity.

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23. *McCain v. Superior Court*, 184 A.C.A. 853, 7 Cal. Rptr. 841 (1960).

24. 345 U.S. 12 (1952).

Justice can be best served by allowing discovery in criminal cases. It is unfortunate that the Supreme Court did not decide the *Jencks* case on purely constitutional grounds. The states, however, are gradually adopting the policy considerations of the Court and we may look forward to an enlightened policy of criminal discovery in future years. For the present though, we will have to content ourselves with limited advancements in "at trial" discovery. Pretrial discovery is subject to the most serious objections and will be strongly resisted. Perhaps eventually, the legislature will take the initiative away from the courts and declare a policy consonant with justice and modern procedural reform. Until then, we must praise the leaders and hope for followers.

F. P. M.

#### ADMISSIBILITY OF CONFESSION ELICITED AFTER INDICTMENT

In *People v. Waterman*,<sup>25</sup> the defendant was convicted of robbery in the first degree, second degree grand larceny and assault. A complete confession made by Waterman after indictment and in the absence of counsel was admitted into evidence at the trial. The confession was obtained through interrogation by a police officer who knew that defendant had been indicted. At this interrogation after indictment the defendant did not request counsel, nor was the defendant told that counsel could be present. The Appellate Division, in a three to two decision, relying on the recent Court of Appeals decision of *People v. DiBiasi*,<sup>26</sup> reversed the conviction and ordered a new trial.<sup>27</sup> The court stated that the confession was inadmissible as evidence because it was obtained after indictment in the absence of counsel in violation of defendant's constitutional rights to counsel and against self-incrimination. The Court of Appeals affirmed the Appellate Division's decision on similar grounds.

The dissenting opinion written in the Appellate Division was adopted by two of the dissenters in the Court of Appeals. The dissent refused to recognize *People v. DiBiasi* as indicative of a broad exclusionary rule of evidence and would have limited *DiBiasi* to the peculiar facts therein. The dissent pointed out that Waterman, unlike DiBiasi, had not surrendered to authorities by arrangement of counsel but had been apprehended by the police. This factual differentiation formulated by the dissent is without merit. A reasonable conclusion, albeit disagreeable, from the dissent's argument would be: that if law enforcement authorities are put on notice that defendant has an attorney, his right to counsel during police interrogation after indictment is safeguarded; however, if defendant has the misfortune of being apprehended by authorities without an attorney representing him, then his right to counsel for post-indictment interrogation ceases.

Implicit within the *DiBiasi* and *Waterman* cases is a contest between individual liberties and the effective solution of crimes against society. The

25. 9 N.Y.2d 561, 216 N.Y.S.2d 70 (1961).

26. 7 N.Y.2d 544, 200 N.Y.S.2d 21 (1960).

27. 12 A.D.2d 84, 208 N.Y.S.2d 596 (1st Dep't 1960).