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Louisiana and Criminal Discovery

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logically extended, calls for the availability of counsel at the revocation proceeding. It is submitted that if, as recognized in *Mempa*, there is a right to counsel at the initial sentencing stage, there should be a corresponding right at the probation revocation because a revocation, like initial sentencing, determines the length of imprisonment and is part of the prosecution process.

It should be noted that the Supreme Court has granted certiorari in the Scarpelli case thus paving the way for a definitive ruling on this question. The Advisory Committee favors the approach indicated in *Scarpelli* by recommending that the probationer be entitled to counsel at probation revocation proceedings regardless of constitutional requirements.[107]

Conclusion

This comparison of Louisiana probation laws and the American Bar Association recommendations suggests several areas which are in need of legislative consideration. It is submitted that not only do certain procedural changes need to be made, but new policies and guidelines should be implemented to aid in the effective application of probation in the correctional process. By adopting the Standards, these necessary changes may be accomplished.

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LOUISIANA AND CRIMINAL DISCOVERY

In recent years, the subject of discovery in criminal cases has inspired great interest and much discussion. This is undoubtedly due in no small measure to the success of discovery in civil proceedings. The question is often asked, why should there be a difference between civil and criminal proceedings with respect to discovery? The varied responses to this question will be discussed in some detail. Perhaps the best answer is that given by Justice Traynor of the California supreme court who characterized the resistance to criminal discovery as founded in "the force of adrenal reaction against seemingly plausible menaces."[1]

107. ABA STANDARDS, PROBATION 69.

1. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

The profuseness of materials recently published on the subject suggests that the problem is a new one. By comparison to the development of civil discovery, however, the question of criminal discovery is ancient. It was involved in a 1792 English case[2] in which the defendant, charged with peculation and corruption, applied for an order allowing him to inspect a report made in India on his activities in that country. Without discussing the admissibility or the materiality of the report, Chief Justice Lord Kenyon wrote, "There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law."[3]

The question was raised for the first time in our country only fifteen years later in *United States v. Burr*.[4] That decision suggested that the United States would not follow the English common law in this respect. A request was made for pre-trial inspection of a letter addressed to the President of the United States which was in the possession of the United States Attorney. Although Chief Justice Marshall, who wrote the opinion, did not hold that there was an absolute right to discovery, he did express the view that fairness would not permit the letter to be withheld from the defendant if it had evidentiary relevance or would be useful in cross-examination of a government witness.

Ironically, it seems that both of these cases were forgotten. In England today, the discovery available to a defendant charged with a serious offense that is prosecuted upon indictment is greater than that available in any state or under federal procedure.[5] The requirement of disclosure is so strictly enforced that the prosecution cannot use at trial the testimony of any witness discovered subsequent to the preliminary hearing unless the defendant has been informed of the identity of the witness and the content of his expected testimony. At the preliminary hearing, the defendant is informed of the entire case against him.[6]

2. King v. Holland, 100 Eng. Rep. 1248 (K.B. 1792).
3. *Id.* at 1249.
4. 25 F. Cas. 30 (C.C.D. Va. 1807).
5. H. PALMER, WILSHIRE'S CRIMINAL PROCEDURE (4th ed. 1961); Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964).
6. The Louisiana supreme court discussed English discovery practices in the landmark case *State v. Dorsey*, 207 La. 928, 22 So.2d 273 (1945), and the absence of unfavorable reports probably had an effect on the decision to permit discovery of the defendant's written confession.

As an authority for criminal discovery in America, *United States v. Burr*[7] has had no effect. The question of criminal discovery did not reappear in reported cases for more than a century. When it next surfaced, it received a different reception.[8] Although it would be incorrect to suggest that our courts were unanimously opposed to discovery,[9] the clear weight of authority was to the effect that it had no place in the administration of criminal justice.[10]

Arguments Pro and Con

A 1953 opinion[11] of the New Jersey supreme court expressed many of the objections to criminal discovery that are raised today. On review of an order granting the defendant the right to inspect his confession, and in response to an argument based on the satisfactory experience with civil discovery, Justice Vanderbilt wrote:

> "In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. Another result of full discovery

7. 25 F. Cas. 30 (C.C.D. Va. 1807).

8. Murphy, *Criminal Discovery: What Progress Since U.S. v. Aaron Burr*, 2 CRIM. L. BULL. 3 (1966). The thought of criminal discovery sent Judge Learned Hand into such a rage that he wrote: "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

9. *E.g.*, State v. Tippett, 317 Mo. 319, 296 S.W. 132 (1927). The Missouri supreme court, unable to find precedent in any criminal cases, cited a civil case as authority. Although *Tippett* was only in effect for three years before being overruled, the reasoning exhibited by the court is strikingly similar to that of modern writers arguing for criminal discovery.

10. United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953); Lemon v Supreme Court of N.Y., 245 N.Y. 24, 156 N.E. 84 (1927).

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

would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings."[12]

Justice Vanderbilt was obviously concerned over the opportunity criminal discovery would afford perjurers. It is interesting to observe, however, that in civil proceedings discovery is relied upon to curb the possibility of perjury.[13] Aside from that passing observation, there are two considerations that strip such an argument of its force. The more obvious is that any system of discovery rules will provide for some form of protective order.[14] While the vast majority of criminal proceedings do not involve organized crime or other special circumstances that would make the threat of perjury or intimidation of witnesses any greater with or without discovery, protective orders should be liberally given when there is legitimate reason to fear these things.

Following the decision of *California v. Green*[15] in 1970, there is even less merit to an argument against criminal discovery based on fear of perjury and witness intimidation. Under that decision prior inconsistent statements of a witness may be used as substantive evidence against the accused. Admittedly, the procedural safeguards that are necessary to avoid violation of the defendant's right to confrontation are not normally incident

12. *Id.* at 210, 98 A.2d at 884. (Citations omitted.)

13. An obvious example of a way discovery can be used to reduce the possibility of perjury is that a deposition taken early in a proceeding can prevent a witness or party from making up a story to conform with the developing evidence. Similarly, knowledge of the evidence that an opponent plans to introduce gives a party an opportunity to find new facts that may rebut or explain the other's evidence. *See* Freedman, *Discovery as an Instrument of Justice*, 22 TEMPLE L.Q. 174 (1948).

14. *E.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY & PROCEDURE BEFORE TRIAL § 4.4 (approved draft 1970) [hereinafter cited as ABA STANDARDS, DISCOVERY].

15. 399 U.S. 149 (1970).

to a Louisiana criminal proceeding.[16] This could, however, be provided for concomitant with the adoption of a system of discovery provisions.

More modern arguments against full discovery by the defense sound more sophisticated.

> "[I]f adversariness is still to be retained as the model for fairness in our criminal system, full prosecutorial disclosure would appear to weight the balance of advantage in favor of the accused. This would diminish the capacity of the system to perform equitably, since two generally equal adversaries are necessary for such performance."[17]

A defendant, however, particularly an indigent defendant, is seldom if ever an equal adversary to the state. This was dramatically demonstrated by Professor Goldstein in 1960.[18] Although the procedural reforms of the 1960's require that the question be re-examined, many of his observations should be valid today, particularly those concerning the prosecutor's burden of proof and the presumption of innocence.[19] Likewise, Goldstein's observations as to the availability of discovery in favor of the state appear to further reflect the state's overall superior position. Devices such as the grand jury to gather information and enforce the cooperation of witnesses, interrogation of the accused prior to trial, and the massive resources of the state to carry on investigations are splendid means of discovery.[20] When

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16. Preliminary examinations are not frequently used in Louisiana. While Louisiana Code of Criminal Procedure article 292 appears to make a preliminary examination mandatory if requested prior to indictment or information, this right can be defeated by the subsequent finding of indictment or filing of information. *See* State v. Hudson, 253 La. 992, 221 So.2d 484 (1969), *cert. denied*, 403 U.S. 949 (1971).

17. Liles & Patterson, *Prosecutorial Disclosure: In Camera and Beyond*, 22 FLA. L. REV. 491, 508-09 (1970).

18. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

19. *See* Williams, *The Trial of a Criminal Case*, 29 N.Y.S.B. BULL. 36, 42 (1957): "[T]he statistics kept by the Administrative Office of the United States Courts last year show that in 99 per cent . . . of all the criminal cases tried in the eighty-six judicial districts at the federal level, defendants who did not take the stand were convicted by juries . . . . The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence."

20. These are discussed at somewhat greater lengths in Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972).

notice-of-alibi[21] and insanity[22] statutes are added to these devices, it is apparent that the state occupies a favorable position.

Removal of the argument to the vague, conceptual plane of adversariness adds nothing to its merit; rather it tends to obscure the real problem. The only important question is whether more liberal discovery will lead to a better, more efficient system of justice and aid the court in its search for truth, or will it hinder the prosecution of crime to such an extent that society will suffer?

The focus should not be on the relative strengths and weaknesses of the sides of a criminal proceeding, but rather on more fundamental interests of the defendant and society. Criminal defendants are either innocent or guilty. Both have the same interest with reference to the criminal proceeding, to be able to present their best possible defense. This can be achieved only with full knowledge of the facts surrounding the case. If the defendant were actually presumed innocent, then he would also have to be presumed ignorant of the facts concerning the crime with which he is charged.

Society's most fundamental interest in a criminal proceeding is dual. The more obvious is the conviction and punishment, or perhaps rehabilitation of those who have committed crime. Equally as important, however, is the acquittal of the innocent, for their conviction undermines the judicial process upon which society depends. It is therefore in the interest of society to give the defendant an opportunity to present his best defense, at least to the extent that the other interest is not defeated.

Justice Vanderbilt referred to the teaching of long experience that discovery will lead to perjury and the suppression of evidence.[23] If this were true, it would end the discussion of discovery immediately, but as Justice Brennan observed, the courts have had no such experience.[24] Even today with criminal discovery having progressed rather dramatically in some jurisdictions over the last twenty years, there has been relatively little experience with the subject. The indications are, however, that this experience is teaching a different lesson.

21. *See* Williams v. Florida, 399 U.S. 78 (1970).
22. *See* LA. CODE CRIM. P. art. 651.
23. State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953)
24. *Id.* (dissenting opinion).

In Vermont there arose what has been described as an open-file practice of criminal discovery following the enactment in 1961 of a statute allowing the defendant to take the deposition of a state witness before trial.[25] One of the few evaluations of discovery in practice has been made on the Vermont experience.[26] The study made three significant revelations:

1. Not a single judge, prosecutor or defense counsel had called for a return to the prior restrictive law.
2. There was a significant decrease in the likelihood of trial.
3. After reviewing the arguments against discovery including "possible intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on the prosecution officer, increased costs of the administration of criminal law, etc.," the author concluded that these fears had been proved imaginary.[27]

Perhaps more important is the fact that discovery is rapidly gaining ground throughout the nation.[28] As Professor Wright has observed, "[t]he trend toward free disclosure is unmistakable."[29]

Criminal Discovery in Louisiana

A thorough discussion of criminal discovery has not been presented in Louisiana jurisprudence. Strangely, the decision as to whether the defendant is entitled to evidence before trial has turned on a consideration of the Public Records Act.[30] The act gives an almost all-encompassing definition of public rec-

25. 13 VT. STAT. ANN. § 6721 (1961).

26. Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

27. *Id.* at 737.

28. *See* Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557 (1971), which includes a textual review of the discovery laws of some of the more progressive states, and rather comprehensive appendices dealing with all the states; and Annot., 7 A.L.R.3d 8 (1966).

29. C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 252 (1969).

30. LA. R.S. 44:1-39 (1950). The specific provision is that part of 44:3A which follows the broad definition of public records and makes an exception to it: "This Chapter shall not apply to public records when they are held by any sheriff, district attorney, police officer, investigator or investigating agency of the state as evidence in the investigation or prosecution of a criminal charge, until after the public records have been used in open court or the criminal charge has been finally disposed of."

ords[31] and, with certain exceptions, grants any elector or taxpayer the right to examine or copy the records.[32] The function and scope of the Act have never been entirely clear, particularly in relation to criminal discovery. In 1964, however, the Louisiana supreme court in *State v. Pailet*[33] referred to "[t]he well-established rule that all evidence relating to a pending criminal case which is in the possession of the State is privileged and not subject to inspection by the accused unless and until it is offered in evidence at the trial."[34] Presumably, the court was referring to the fact that such evidence is excluded from the operation of the Public Records Act. This, so far as has been determined, is the first case to use the term "privileged," and it was the only case cited in a later case[35] asserting the same proposition.

There was some discussion of the Public Records Act in *State v. Dorsey*,[36] but in granting an accused the right to pretrial inspection of his written confession, the court concluded that a confession is not a public record. Although there is some language that suggests that the court might have thought evidence in the hands of the state should be privileged, there is just as much reason to believe that the court viewed R.S. 44:3[37] as merely an exception not bearing on the question of discovery. After a discussion of the development of liberal criminal discovery practices in England and notice of the fact that the defendant had no such right at common law, the court said: "[W]e see no necessity for following the old common-law rule in this State, in the *absence of any prohibiting statute* or decisions of this court on the point, solely and only for the reason that several states in the Union continue to do so."[38] (Emphasis added.)

Two years later the court again had occasion to consider the effect of the Public Records Act as it relates to criminal discovery.[39] It was urged by the accused that he should have access to the police report on his alleged crime because it should

31. LA. R.S. 44:1 (1950).
32. *Id.* 44:31.
33. 246 La. 483, 165 So.2d 294 (1964).
34. *Id.* at 497, 164 So.2d at 299.
35. State v. Hunter, 250 La. 295, 195 So.2d 273 (1967).
36. 207 La. 928, 22 So.2d 273 (1945).
37. *See* note 30 *supra*.
38. State v. Dorsey, 207 La. 928, 963-64, 22 So.2d 273, 284 (1945).
39. State v. Mattio, 212 La. 284, 31 So.2d 801 (1947).

be considered a public record. Unlike other cases,[40] it was the defendant rather than the state seeking support from the Act. During the course of the opinion, the court expressed doubt as to whether a police report is a public record, but determined that if it were a public record, it would be within the exception in section 3 of the Act.[41]

Even after the court first expressed the opinion that evidence in the possession of the state relating to a pending criminal case was "privileged,"[42] there was good reason to believe that it was within the trial court's discretion to allow discovery. The supreme court had touched upon this issue in *State v. Dowdy*.[43] These defendants excepted to the refusal of the trial judge to permit them to subpoena for inspection a fuse, dynamite caps and clothing of the man they were charged with having murdered. In upholding the trial judge, the court said, "their application therefore was a matter which addressed itself to the discretion of the trial judge, 'whose ruling will be set aside only upon a showing of gross abuse of discretion.' "[44] Two years before *Dowdy* the court had spoken of the plenary power of the trial judge, to be exercised within his sound discretion, to order the production of evidence in the hands of third persons which is sought on behalf of the prosecution or the defense.[45] It is interesting to note that the court cited Article VII of the Louisiana Constitution, sections 28 and 83, as authority for its position.[46] That was at a time before the concept of "privilege" had been developed, so there should have been no difference had a defendant requested evidence from the state. Likewise, if the source of the plenary power of the trial judge is the constitution, the legislature was without power to create a privilege in favor of the state.

Despite these considerations, the supreme court in *State v. Hunter*[47] reversed a trial judge who ordered the state to furnish

40. *E.g.*, State v. Vallery, 214 La. 495, 38 So.2d 148 (1948).
41. La. Acts 1940, No. 195 § 3, which is now LA. R.S. 44:3 (1950). *See* note 30 *supra*.
42. State v. Pailet, 246 La. 483, 165 So.2d 294 (1964).
43. 217 La. 773, 47 So.2d 496 (1950).
44. *Id.* at 786, 47 So.2d at 501.
45. State v. Wilde, 214 La. 453, 38 So.2d 72 (1948).
46. The court was obviously thinking in constitutional terms, but there must have been a misprint because those provisions are not authority for the statements made by the court.
47. 250 La. 295, 195 So.2d 273 (1967).

more evidence than was common. In earlier cases the question had been whether the trial judge had abused discretion in denying discovery, whereas in *Hunter*, the question of discretion was raised by the state. The conclusion became inescapable that the trial judge was without power to order discovery. It is obvious from the evidence ordered furnished to the defendant in *Hunter*, that the test was not to be "gross abuse of discretion."[48]

The practical effect of *Pailet*[49] and *Hunter*[50] was to provide the court with the label "privilege" when upholding a challenged refusal to order discovery. It was applied without question or comment in *State v. Clack*,[51] a case that was to become better known under the name *Clack v. Reid*,[52] in which the Fifth Circuit reversed the case in part on the question of discovery.

The authority of the decision is diminished by the circumstances by which it came before the court and its unimpressive disposition. For some reason, apparently unknown to the court, the state was not notified of the appeal, and it did not appear for oral argument or file a brief. The issue of pretrial examination was remanded in order to give the state an opportunity to be heard. Nevertheless, the court made it clear that the question of criminal discovery could no longer be ignored or silenced with a label of privilege. Referring to the defendant's motion for pretrial examination of the marijuana gleanings he was charged with possessing, the court said, "To deny a defendant a fair opportunity to present competent proof in his defense is the denial of a fair trial and of due process."[53] Although the statement was dictum, as will be seen, it was not

48. The judge had ordered pretrial inspection of the weapon used in the crime, the written confessions and statements of the accused, the gist of oral confessions and statements, all photographs held by the state, clothing and physical evidence, correct information concerning the police station where the defendant was booked and the names and addresses of the arresting officers. Nothing in the order could have possibly prejudiced the state in its case.

49. State v. Pailet, 246 La. 483, 165 So.2d 294 (1964).

50. State v. Hunter, 250 La. 295, 195 So.2d 273 (1967).

51. 254 La. 61, 222 So.2d 857 (1969).

52. 441 F.2d 801 (5th Cir. 1971).

53. *Id.* at 804.

without support, and may well be the logical outgrowth of *Brady v. Maryland*[54] and its progeny.

Louisiana responded with *State v. Migliore*.[55] Like *Clack*, that case involved a request for pretrial inspection of the drugs that the defendant was charged with having illegally possessed. Surprisingly, the trial judge relied on the state court decision in *Clack* and denied the request. Using very guarded language, the Louisiana supreme court reversed the decision. The court apparently did not intend to say anything that could be construed as a broad approval of criminal discovery or an extension of discovery beyond the facts of *Clack*.

The decision does, however, make two things clear. The defendant has a right to pretrial inspection of a substance, if there is a sufficient amount, in cases where his guilt or innocence turns upon analysis of that substance. It is also clear that *State v. Hunter*[56] has been overruled in as far as it stripped the trial judge of discretion to order pretrial inspection of evidence other than the defendant's written confession.

> "Even though as stated supra the Louisiana Code of Criminal Procedure does not allow formal pre-trial discovery in criminal cases, much discretion is vested in the trial judge with respect to bills of particulars and the furnishing of evidence requested by the defendant."[57]

Beyond these two things it is unknown whether *Migliore* will have any appreciable effect.[58] The case should not be hailed as a great advance toward a more liberal attitude concerning criminal discovery; in fact, it adds nothing really new to the jurisprudence.[59]

There is a constitutional dimension to criminal discovery

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54. 373 U.S. 83 (1963).
55. 261 La. 722, 260 So.2d 682 (1972).
56. 250 La. 295, 195 So.2d 273 (1967).
57. State v. Migliore, 261 La. 722, 742, 260 So.2d 682, 689 (1972).
58. It may well be that *State v. Jones*, 263 La. 164, 267 So.2d 559 (1972), will have the effect of limiting *Migliore* to its facts. In distinguishing the cases, the court in *Jones* said that the case before it did not involve the possession of a substance which is criminal merely by virtue of its chemical composition.
59. It was not at all unusual during prohibition to get the same kind of discovery order. *See, e.g.*, State v. McCrary, 164 La. 1057, 115 So. 268 (1927); State v. Lowery, 160 La. 811, 107 So. 583 (1926); State v. Bramhall, 134 La. 1, 63 So. 603 (1913).

which has not yet been touched upon. The United States Supreme Court announced in *Brady v. Maryland*[60] the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment irrespective of the good or bad faith of the prosecution."[61]

Strictly speaking, the *Brady* line of cases is said to relate to prosecutorial "disclosure," as distinguished from "discovery" by the defense.[62] It is difficult, however, to conceive of a duty to disclose without a corresponding right to discover. Likewise, the distinction between the terms is de-emphasized by the fact that there must be a request by the defense before the defendant's due process rights are violated by the refusal of the prosecution to disclose material, favorable evidence. Despite these problems, the distinction can serve a useful purpose. The reader is alerted that when the term disclosure is used, it is intended to have a more limited meaning than discovery.

It has been asserted by respectable authority that "*Brady v. Maryland* did not deal in any way with pre-trial discovery by defendant . . . ."[63] Other authorities have taken a more flexible, and what is believed to be a more reasonable approach. The Fifth Circuit has expressed its opinion that:

> "It is now clear that *Brady* imposes an affirmative duty on the prosecution to produce *at the appropriate time* requested evidence which is materially favorable to the accused either as direct or impeaching evidence."[64] (Emphasis added.)

Another federal appellate court has expressed a similar view:

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60. 373 U.S. 83 (1963).

61. *Id.* at 87.

62. Note, 34 GEO. WASH. L. REV. 92, 93 (1965): "On the one hand, discovery emphasizes the right of the defense to obtain access to evidence necessary to prepare its own case; on the other, disclosure stresses the duty of the prosecution to make available to the accused the evidence and testimony without which an adequate defense would be virtually impossible."

63. United States v. Armantrout, 278 F. Supp. 517, 518 (S.D.N.Y. 1968). Other cases asserting the same position are United States v. Wolfson, 289 F. Supp. 903 (S.D.N.Y. 1968); United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968); United States v. Manhatten Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965); State v. Gillespie, 227 So.2d 550 (Fla. App. 1969); State v. Drayton, 226 So.2d 469 (Fla. App. 1969).

64. Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

> "The importance of *Brady*, then, is its holding that the concept out of which the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon the defendant's preparation for trial, rather than its effect upon the jury's verdict."[65]

The thrust of these decisions and others that have adopted similar views[66] is that *Brady* sought to assure that the defendant would be treated with fundamental fairness and not hindered by the state in the presentation of his defense. Furthermore, in cases where disclosure is required, it must be made at a time when it would not be useless to the defense. Obviously, this means that in some cases there is a constitutional duty to disclose evidence to the accused before trial.

One such case in Louisiana would be presented by the facts of *Ashley v. Texas*.[67] The defendant, charged with murder, was examined by two psychiatrists who reported to the district attorney that, in their opinion, the defendant was legally incompetent to stand trial. The defense counsel, without knowledge of the reports, advised his client to plead not guilty. In reversing the conviction the court, without citing *Brady*, held that the failure of the district attorney to inform defense counsel of the results of the examinations was so fundamentally unfair that it amounted to a denial of due process. It would be necessary in Louisiana that the defense receive this information before trial because evidence of insanity could not be introduced after a plea of not guilty.[68]

From this discussion, therefore, it is evident that there is some support for the dictum in *Clack v. Reid*.[69] While it is still true that the state need not open its files to the defendant prior

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65. United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969).

66. *E.g.*, United States v. Cullen, 305 F. Supp. 695 (E.D. Wis. 1969); United States v. Curry, 278 F. Supp. 508 (N.D. Ill. 1967); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967).

67. 319 F.2d 80 (5th Cir. 1963).

68. LA. CODE CRIM. P. art. 651: "When a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible.

"The defenses available under a combined plea of 'not guilty and not guilty by reason of insanity' shall be tried together."

69. 441 F.2d 801 (5th Cir. 1971).

to trial,[70] there is a growing realization that there is a constitutional dimension to criminal discovery.[71]

The present state of the law on discovery in Louisiana is unsatisfactory. It is impossible to foresee the direction the trial courts will take armed with the discretion approved by *Migliore*, and there is at least a possibility that the federal courts will impose more scattered requirements. Illinois was in a similar position in 1969 when an intermediate appellate court held that the trial judge had unlimited discretion to order discovery in criminal cases.[72] Even though Illinois had had considerable experience with much more liberal discovery practices than those of Louisiana, the state, realizing the uncertainty and inconsistencies that would inevitably result under such circumstances, argued not that the decision was wrong, but that the Illinois supreme court should exercise the power that had been delegated to it and establish a uniform system of discovery rules.[73] In response to the state's argument, the court appointed a committee to draft a system of discovery rules and remanded the case with directions to proceed according to the rules.

The course taken by Illinois is to be commended. The state recognized that criminal discovery was inevitable. Louisiana should adopt a similar approach. With the detailed guidelines provided by the American Bar Association, the task of enacting a comprehensive plan for discovery should be a relatively easy one.[74] The enactment of such a plan would not only lend predictability to trial court dispositions of discovery questions, but would also eliminate many of the useless appeals that are now wasting judicial time. Likewise, the flexibility of a good framework of discovery rules is better suited to the problems of the area than would be scattered constitutional or judicially created rules. If discovery should be raised to a constitutional issue as it appears that it may be, and as some have suggested that it

70. Moore v. Illinois, 408 U.S. 786 (1972).

71. *See* Nakell, *Criminal Discovery for the Defense and the Prosecution —The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972); Thode, *Criminal Discovery: Constitutional Minimums and Statutory Grants in Texas*, 1 TEX. TECH. L. REV. 183 (1970); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

72. People v. Crawford, 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969).

73. Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 573-76 (1971).

74. ABA STANDARDS, DISCOVERY.

should be,[75] protective orders[76] will become difficult, if not impossible, to obtain. It is to be observed that the decisions that tend to push back the frontiers of the constitutional dimension invariably originate in restrictive or oppressive state or lower court decisions.[77]

The reason most often given in support of criminal discovery is fairness to the accused.[78] As has been previously observed, it may well be that the accused is at a disadvantage in a criminal proceeding. Fairness, it will be recalled, was the reason given in *United States v. Burr* in 1807,[79] and it was obviously the reason behind *Brady*.[80] It is often unfair to the defense attorney, as well as the defendant, to expect him to represent an individual without some information from the state. The defendant, particularly an indigent defendant, may be unwilling or unable to cooperate with his attorney. Under these circumstances the attorney cannot plan an intelligent defense, nor can he give his client proper advice on such matters as the advisability of a plea bargain.

The ABA Standards, however, were not shaped by arguments such as that above. The editorial remarks stress such reasons as the need to lend more finality to criminal dispositions, to speed up and simplify the criminal process, and to use our resources more economically.[81] One of the more important objectives is to bring potential constitutional problems to the surface and dispose of them at an early date. It is also believed that a defendant with greater knowledge of the state's evidence will be more likely to plead guilty. A tentative evaluation of expanded discovery under the Standards indicated that discovery appeared to be

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75. *See* note 71 *supra*.

76. ABA STANDARDS DISCOVERY § 4.4: "Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof."

77. *See, e.g.*, Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Clack v. Reid, 441 F.2d 801 (5th Cir. 1971); State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945). *Cf.* Moore v. Illinois, 408 U.S. 786 (1972); Williams v. Florida, 399 U.S. 78 (1970).

78. *E.g.*, State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) (Brennan, dissenting).

79. 25 F. Cas. 30 (C.C.D. Va. 1807).

80. Brady v. Maryland, 373 U.S. 83 (1963).

81. ABA STANDARDS, DISCOVERY.

> "increasing the efficiency of judges and lawyers, speeding up the process, improving the performance of defense counsel, eliminating a substantial amount of paperwork, making trials shorter and more to the point, and increasing the number of guilty pleas—all apparently without any sacrifice to the interests of the government or the defendant."[82]

Criminal discovery could also work more directly to the advantage of the state. It is quite probable that the United States Supreme Court's decision in *Williams v. Florida*[83] upholding Florida's notice-of-alibi statute, another state discovery device, would have been different had it not been for the substantial discovery concessions to the defendant under Florida law. That decision made it clear that the time had come for the tired argument against criminal discovery, that it is a one-way street in view of the defendant's privilege against self-incrimination, to be put to rest.

The Williams decision was foreshadowed by an earlier decision of the California supreme court, *Jones v. Superior Court.*[84] The defendant, charged with rape, sought a continuance alleging that he was impotent and needed time to gather medical evidence. The court considered the liberal discovery that was available to a defendant[85] and, reasoning that it should not be a one-way street, allowed state discovery of X-rays and reports that the defendant intended to introduce and the names and addresses of intended defense witnesses. It was explained that to allow state discovery of evidence that the defendant intended to produce at trial would not violate his privilege against self-incrimination since it was merely requiring him to decide at an earlier time whether he would remain silent or disclose the information. In any event such information should be exculpatory rather than incriminating. In *Williams* and *Jones*, the respective courts observed that all the defendant was losing was a chance to surprise the state. The right of the state to discovery of defense evidence was subsequently affirmed and expanded

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82. *Id.* at 9.
83. 399 U.S. 78 (1970).
84. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
85. *See,* Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 228 (1964).

in other cases,[86] and other states such as Illinois have gone even further in this direction than California.[87]

It is an elementary observation that surprise has no legitimate place in a criminal proceeding, whether resorted to by the defense or the state. The promulgation of a comprehensive, systematic set of discovery rules will do much to take the gamesmanship out of the criminal process. Louisiana should take the step that will lead to a fairer trial for an accused and at the same time improve the overall efficiency and effectiveness of the courts. Nothing can possibly be gained by ignoring the question while further random requirements are imposed by the courts.

James A. Rountree

86. People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Shabo, *Prosecution Discovery in Criminal Cases: The California Supreme Court Confronts the Problem of Self-Incrimination Anew*, 46 L.A.B. BULL. 61 (1970).

87. Illinois Supreme Court Rules of Criminal Discovery, Rule 41360, ILL. ANN. STAT. 110A § 413 (1971). This rule requires the defense on motion of the state to inform the state of any defense intended to be made at a hearing or trial subject, of course, to constitutional limitations.