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The Need for Liberalized Rule of Discovery in Criminal Procedure

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COMMENTS

THE NEED FOR LIBERALIZED RULES OF DISCOVERY IN CRIMINAL PROCEDURE

Liberal discovery techniques have become an accepted part of civil procedure. Pretrial conferences, interrogatories and stipulations are commonly used in resolving civil disputes.[1] However, attempts to expand the use of discovery techniques in criminal procedure have been sharply criticized.

The primary purpose of this comment is to examine present discovery techniques available in both federal and Wisconsin practice. Following a brief explanation of the arguments for and against liberalized criminal discovery, there will be a discussion of the pertinent Feleral Rules of Criminal Procedure and the federal cases. Next, the relevant Wisconsin Statutes and holdings of the Wisconsin Supreme Court will be discussed. Finally, possible trends in Wisconsin criminal discovery will be considered.

THE ARGUMENTS FOR AND AGAINST LIBERAL DISCOVERY

Some states permit very little criminal discovery by defendants and a number of arguments have been advanced in support of this view.[2]

One of the main contentions is that if all the evidence to be offered against the defendant is made available to his prior to trial, there will be an increase in the incidents of perjury and illegal suppression of evidence. Also, witnesses, fearing reprisals, would be less willing to supply information to law enforcement officials if they knew that the defendant would learn their identity and probable testimony before the trial.

Another argument is that in view of the procedural safeguards already given to the defendant, such as the presumption of innocence and the need for proof beyond a reasonable doubt, the liberalization of discovery procedure would give the defendant an undue advantage. This would be especially true in view of the increasing crime rate.

However, the arguments against liberal criminal discovery have

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[1] It has been suggested that the adoption of pretrial methods in criminal procedure would allow speedier trials, avoid repetition and produce less confusion at trial. Kaufman, *Pre-trial In Criminal Cases,* 42 J. AM. JUD. SOC'Y 150 (1959), Kaufman, *The Apalachin Trial: Further Observations On Pretrial In Criminal Cases,* 44 J. AM. JUD. SOC'Y 53 (1960).

[2] State v. Tune, 13 N.J. 203, 98 A. 2d 881 (1950). Views opposed to the liberalization of criminal discovery are expressed in many law review articles, *eg.,* Grady, *Discovery in Criminal Cases,* 1959 U. ILL. L. F. 827 (1959); Steffes, *Discovery in Criminal Cases,* 10 PRAC. LAW. 61 (1964); *Panel on Pretrial Discovery in Criminal Cases,* 31 BROOKLYN L. REV. 320, 322 (1965); *Symposium, Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 74 (1963).

been met by equally strong arguments in favor of more liberal discovery techniques.[3]

In support of their view, the proponents point to the fact that the liberalization of discovery in civil procedure has not been accompanied by a corresponding increase of perjury and suppression of evidence cases. Also, the existing penalties for perjury, bribery, and threatening of witnesses will continue to provide an adequate safeguard. Rather than increase the incidents of perjury and the other abuses, they believe that liberal criminal discovery procedure is likely to decrease the incidents of conflicting testimony, since both parties would be aware of the evidence facing them and therefor would be less likely to risk the imposition of the penalties for perjury and the suppression of evidence.

The need for access to the scientific facilities of law enforcement agencies is the basis of another argument for liberal discovery. While the prosecution obtains scientific data, fingerprints, criminal records of witnesses, and copies of statements taken by the police as a matter of course, these important sources of information are frequently barred to defense counsel. Many feel that this advantage outweighs any procedural advantage which the defendant might have, especially where indigent defendants are involved.[4] Therefore, in order to insure a fair trial, access to information in the hands of the prosecution is a necessity.

Finally, the proponents argue that in the area of criminal discovery, the presumption of innocence attaches, *de facto*, at the trial level of criminal proceedings. Assuming that the defendant is innocent, they argue it is unlikely that he will know the details of the crime and as a result, will be unable to properly prepare his case. The prosecution on the other hand, will be better able to obtain this information due to the efforts of the law enforcement agencies.

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[3] Articles favoring liberalized discovery include Aronson, *Pre-trial Discovery In Criminal Proceedings,* 27 BROOKLYN L. REV. 318 (1961); Brennan, *The Criminal Prosecution: Sporting Event or Quest For Truth?* 1963 WASH. U. L. Q. 279 (1963); Datz, *Discovery in Criminal Procedure,* 16 U. FLA. L. REV. 163 (1963); Everett, *Discovery in Criminal Cases—In Search of a Standard,* 1964 DUKE L. J. 477; Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L. J. 1149 (1960); Kaufman, *Pre-trial In Criminal Cases,* 42 J. AM. JUD. SOC'Y 150 (1959); Kaufman,*The Apalachin Trial: Further Observations On Pre-trial In Criminal Cases,* 44 J. AM. JUD. SOC'Y 53 (1960); Krantz, *Pretrial Discovery In Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 NEB. L. REV. 127 (1962); Louisell, *Criminal Discovery Dilemma Real or Apparent?* 49 CALIF. L. REV. 56 (1961); Traynor, *Ground Lost and Found In Criminal Discovery,* 39 N. Y. U. L. REV. 228 (1964); Comment, *Developments in Discovery,* 74 HARV. L. REV. 940; *Symposium: Discovery In Federal Criminal Cases,* 33 F.R.D. 47, 56, 82 (1963); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L. J .136 (1964).

[4] Everett, *Discovery in Criminal Cases—In Search of a Standard,* 1964 DUKE L. J. 477, 480 (1964).

While those favoring liberal discovery generally concede that the possibility of bribery and other methods of suppressing evidence are matters of general concern, they feel that barring discovery is not the best solution. Rather, procedural safeguards should be established to prevent abuses. For example, it has been suggested that the concept of the "protective order" should be borrowed from the Federal Rules of Civil Procedure, which would allow the trial court, upon a proper showing, to deny information to the defendant until trial.[5] Both English criminal procedure and American court-martial procedure are examples of successful attempts to liberalize criminal procedure.[6]

THE DEFENDANT'S RIGHT TO DISCOVERY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

In order to determine what rights of discovery the accused has in criminal procedure, it will be necessary to first consider the Federal Rules of Criminal Procedure and the decisions of the federal courts. While a number of provisions for discovery can be found in the Federal Rules, these have been strictly construed. As a result, the value of these rules has been limited.

Rule 5(c) gives the defendant the opportunity to hear and to cross-examine prosecution witnesses at a preliminary examination. However, the Government may call at trial, witnesses who were not present at the preliminary examination. Since only probable cause must be shown at the preliminary examination, rather than proof beyond a reasonable doubt, the prosecution is not likely to produce all of its evidence. Moreover, there is no requirement of a preliminary examination if a grand jury returned the indictment, and in practice a preliminary examination is rarely granted.[7]

Grand jury testimony may be made available to the defense prior to trial by court order under Rule 6(e). In order to obtain copies of the testimony, the defendant must show " 'a particularized need' exists for the minutes which outweighs the policy of secrecy."[8] Defense motions to obtain witnesses' testimony or even the defendant's own testimony are usually denied, except in prosecution for perjury arising out of the testimony before a grand jury.[9]

Under Rule 7(f) the defendant may obtain additional informa-

[5] Goldstein, *The State and the Accused: Balance of Advantage In Criminal Procedure*, 69 YALE L. J. 1149, 1195 (1960).

[6] Brennan, *The Criminal Prosecution: Sporting Event or Quest For Truth?* 1963 WASH. U. L. Q. 279, 293 (1963); Datz, *Discovery In Criminal Procedure*, 16 U. FLA. L. REV. 163, 170-171, (1963); Everett, *Discovery in Criminal Cases In Search of a Standard*, 1964 DUKE L. J. 477, 493-495 (1964).

[7] Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L. J. 477, 481 (1964).

[8] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). However, a showing of contradiction between the grand jury testimony and testimony at trial is not necessary.

[9] *Symposium: Discovery In Federal Criminal Cases*, 33 F.R.D. 47, 109 (1963).

tion to clarify the indictment by moving for a bill of particulars. Attempts to use this method as a means to discover government witnesses, documents or testimony have not been successful.[10]

The district judge is authorized by Rule 16 to order an inspection of tangibles obtained by seizure or process, if the items sought are material to the preparation of the defense and the request is reasonable. This rule has been strictly construed to deny discovery of witnesses' names and addresses, defendant's statements, and scientific reports.[11]

Pretrial subpoena is the subject of Rule 17(c), which allows the judge, on motion, to direct that books, papers, documents, or objects designated in a subpoena *duces tecum* be produced and the defense be allowed to inspect them prior to trial. The materials must be sought "in a good faith effort to obtain evidence" and not as part of a "fishing expedition."[12] They must be: evidentiary and relevant, not otherwise procurable by the defendant in advance of trial, and necessary to proper preparation for trial.[13]

The Jencks Act, which will be considered in the next section of this article, is an additional factor to be considered in applying the Federal Rules of Criminal Procedure.[14]

The Decisions in Federal Cases

While under the Federal Rules motions may be made to discover documents before trial, attempts to do so are rarely successful, especially in situations involving the statements of government witnesses.[15] In the case of *Jencks v. United States,*[16] the Supreme Court held that defense counsel must be given access *at trial* to prior statements of government witnesses concerning the subject matter of their testimony. But the ensuing controversy caused the passage of the Jencks Act to insure that the rationale of that decision would not be extended to the time prior to trial.[17]

[10] *Supra* note 4, at 482; *supra* note 9, at 105 and 106.
[11] Datz, *Discovery In Criminal Procedure,* 16 U. Fla. L. Rev. 163, 172 (1963); *supra* note 9, at 106 and 107; *supra* note 4, at 482.
[12] Datz, *Discovery In Criminal Procedure,* 16 U. Fla. L. Rev. 163, 172-174; *supra* note 9, at 107-109; *supra* note 4 at 482-485.
[13] *Supra* note 9, at 108.
[14] 18 U.S. C. §3500 (1957).
[15] *Supra* note 5, at 1181.
[16] 353 U.S. 657 (1957). *Supra* note 5, at 1182.
[17] Kratz, *Pretrial Discovery In Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 Neb. L. Rev. 127, 142 (1962). Traynor, *Ground Lost and Found In Criminal Discovery,* 39 N.Y. U. L. Rev. 228, 241 (1964). Prior to the *Jencks* decision it had already been recognized that the defendant had a right to inspect government papers for impeachment purposes if the evidence is relevant, competent, and outside of any exclusionary rule. Gordon v. United States, 344 U.S. 414 (1953). Apparently the trial judge has the affirmative duty of requiring the production of all relevant evidence. Campbell v. United States, 365 U.S. 85 (1961). This rule was affirmed in Campbell v. United States, 373 U.S. 487 (1962) which held that a reasonable accurate copy of the statement of witness may be made available for impeachment purposes.

The generally accepted view seems to be that there is no constitutional right to pretrial discovery and that the granting of discovery at trial along with a continuance is sufficient to meet the requirements of the Constitution.[18] However, the Supreme Court has said that the granting of discovery and inspection is the better practice, although no violation of the fourteenth amendment is involved.[19]

A number of cases have arisen in the area of suppression of evidence and the use of perjured testimony by the prosecution. These cases seem to temper the generally accepted Constitutional rules. The duty of the prosecutor was first defined as one "not to suborn perjury, not to use evidence known to be false, and to correct state witnesses who lie."[20]

This duty was broadened by *United States ex rel Almeida v. Baldi*[21] and *United States ex rel Thompson v. Dye*.[22] These cases hold that the prosecutor's motive for suppressing evidence is no longer controlling, but rather what effect the suppression has on the defendant's case.[23] The Supreme Court accepted this rationale in the case of *Brady v. Maryland*:[24]

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of Mooney v. Holohan [that the states have a duty to prevent convictions obtained without due process of law] is not punishment of society for misdeeds of a prosecutor *but avoidance of an unfair trial to the accused.* (Emphasis added.)[25]

The Court also clarified the duty of the prosecution:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecution in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case his action is not 'the result of guile', to use the words of the Court of Appeals.[26]

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[18] Traynor, *Ground Lost and Found In Criminal Discovery*, 39 N.Y. U. L. REV. 228, N. 77 at p. 242 (1964).
[19] Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 302 (1960); Steffes, *Discovery in Criminal Cases*, 10 PRAC. LAW. 61, (1962).
[20] Comment, 74 YALE L. J. 136 at 138 (1964).
[21] 195 F. 2d 815 (3rd Cir. 1952).
[22] 221 F. 2d 763 (3rd Cir. 1955).
[23] *Supra* note 20, at 140.
[24] 373 U.S. 83 (1963).
[25] *Id.* at p. 87. It should be noted that if the statement is in any way relevant to the case, in the sense that the testimony could have affected the jury's verdict this is sufficient. Napue v. Illinois, 360 U.S. 264 (1958). However, a sharp conflict in the testimony has been held by a state court not to be sufficient, rather, actual proveable perjury is needed. Bailey v. Warden of Maryland Penitentiary, 231 Md. 626, 190 A. 2d 547 (1963).
[26] Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

The obvious intent of the Supreme Court is to focus upon the harm caused to the defendant at trial.[27] Immediately the question arises as to the possible implications which this decision might have with respect to the defendant's constitutional right to a fair trial in the area of pretrial discovery.

> The factor which differentiates the suppression cases and gives them constitutional dimension is that they grow out of a situation which makes a fair trial for many defendants nearly impossible. Suppressed evidence would not be a major problem if the defendant had facilities adequate to gather his own evidence before the trial. But the defendant's facilities are usually meager especially when compared to those of the state. . . . When the prosecutor aggravates the defendant's lack of ability to obtain evidence by not revealing to him material evidence, the Constitution has been violated. . . . The importance of *Brady* and the other suppression cases is not in any new principle they express but in their indication that the principle has constitutional dimensions and must be enforced in state proceedings.[28]

Federal cases following the *Brady* case have continued the trend and have recognized that the inability of the defendant to properly prepare for trial, coupled with the failure of the prosecution to reveal material evidence will result in the denial of a fair trial to the defendant. In *Ashley v. Texas,*[29] the failure of the district attorney to disclose the existence of opinions of the state psychiatrist and psychologist that the defendants were legally incompetent was viewed as being a fundamental unfairness, constituting a denial of due process. The defendants' counsel knew nothing of the examination until after the trial. Another case involved the refusal of a state court to allow the examination of a statement given to the police by the defendant in which the defendant related a material admission by a witness.[30] This was also held to be a denial of due process. A third case, *United States ex rel Meers v. Wilkins,*[31] held that the prosecution had a duty to make known to the defendant the existence of two disinterested witnesses who would have testified that the defendant was not a participant in the robbery. In this case, just as in the *Ashley* case, defense counsel was not aware of this material evidence until after the trial.[32]

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[27] In the case of State v. Giles, 239 Md. 458, 212 A. 2d 101 (1965) the Maryland court stated that the test derived from the Brady case is whether the evidence might be reasonably considered admissible and useful to the defense.

[28] *Supra* note 20, at 143-145.

[29] 319 F. 2d 80 (5th Cir. 1963).

[30] United States *ex rel* Butler v. Maroney, 319 F. 2d 622 (3rd Cir. 1963).

[31] 326 F. 2d 135 (2nd Cir. 1964).

[32] These cases would tend to support the position of one author that pretrial discovery should not be at the discretion of the prosecutor, since he being an advocate, is ideally situated to determine what information should, in the interests of justice, be made available to defense counsel. *Supra* note 18, at 237.

In the light of these holdings the following comment seems appropriate:

> If the courts accept the effect of the undisclosed evidence on the defendants preparation for trial as determining whether due process has been denied, and they cannot reject this standard without also rejecting the constitutional basis for the suppression cases, then the complete suppression of evidence can no longer be the court's only concern. Any failure to reveal evidence before the trial may affect preparation adversely, even if the evidence is presented at trial.[33]

In summation of this development in criminal law it has been suggested that

> Unless the courts repudiate the constitutional basis of suppression cases, and thereby reject the thirty-year development of a principle now widely accepted, the prosecutor should be required to reveal all relevant evidence to the defendant.[34]

An example of how the *Brady* rationale may be of value to the defense would be for counsel to request, before trial, to see all of the prosecutor's information.[35] This motion probably would be denied. After trial, defense counsel would be free to move for a new trial, alleging the withholding of evidence in very broad terms. By use of this method, any conviction obtained where the defendant's motion was refused would be subjected to constitutional attack on due process grounds.[36] In fact, this method could be used for a new attack on the Jencks Act based on constitutional grounds.[37] The situation would assume the refusal of inspection prior to trial where the statement of a government witness would have contained information of great potential importance for the preparation for trial, but was of little value when it was furnished at trial.

Wisconsin and the Right of the Defendant to Inspection of Prosecution Information

In order to determine what effect the gradual liberalization of criminal discovery is likely to have on Wisconsin law, it is necessary to consider the present provisions of the Wisconsin Statutes affecting criminal discovery and also the decisions of the Wisconsin Supreme Court. On this basis, it will be possible to consider the effect on Wisconsin law of the current federal trend and also the effect of the decisions of other state courts. The first area to be dealt with will be the possibilities for discovery under the Wisconsin Statutes.

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[33] *Supra* note 20, at 146-147.
[34] *Id.* at 149.
[35] *Supra* note 4, at 515-516.
[36] However, see United States v. Manhattan Brush Co., USDC SNY, 34 L. W. 2114 where this approach was unsuccessful.
[37] *Supra* note 4, at 516.

Under section 954.025 of the Wisconsin Statutes, testimony taken in a John Doe proceeding is not open to inspection unless it is used by the prosecution at either the preliminary hearing or the trial, and then only to the extent to which the prosecution uses it. Since the statutory language has been strictly construed, John Doe testimony is kept secret, subject only to the mentioned statutory exceptions. Even these statutory rights of the defendant are limited where the John Doe proceedings have not been closed.[38] In *State ex rel Johnson v. Coffey*,[39] the court quoted from *Steensland v. Hoppman*,[40] which dealt with grand jury testimony, and gave the following reason for denying John Doe testimony to the defendant:

> And there exists the very practical reason, especially applicable to the situation where the jury is continuing to sit, that an inspection of the minutes, if permitted to any defendant for the purpose of preparing his defense, would advise the public of the subject under investigation, afford an opportunity to those interested in thwarting an inquiry into their acts of secreting evidence, tampering with prospective testimony, and generally embarrassing the work to be done by the grand jury, if not entirely defeating the object for which that body is designed.
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> The same reasons are applicable to a John Doe proceeding.[41]

In every criminal action a complaint must be issued pursuant to section 954.02 of the Wisconsin Statutes and the offense charged must be stated in the complaint.[42] It is apparent that the purpose of the complaint is to do no more than to notify the defendant of the crime charged.

If there is a showing of probable cause by the district attorney before a magistrate, the magistrate may issue a warrant or a summons.[43] The warrant or the summons state the charge as it was stated in the complaint.[44]

Every defendant is entitled by statute in Wisconsin to a preliminary examination.[45] At this examination the state must produce sufficient evidence to justify the defendant being bound over for trial. The test of what is sufficient evidence for these purposes has been stated as

[38] State ex rel Niedziejko v. Coffey, 22 Wis. 2d 392, 398; 126 N.W. 2d 96, 99 (1964). See also State ex rel Distenfeld v. Neelen, 255 Wis. 214, 218; 38 N.W. 2d 703, 704 (1949).

[39] 18 Wis. 2d 529; 118 N.W. 2d 939 (1963).

[40] Steensland v. Hoppmann, 213 Wis. 593, 252 N.W. 146 (1936).

[41] *Supra* note 39, at 546; 118 N.W. 2d at 949.

[42] WIS. STATS. §960.36 (1963).

[43] State *ex rel* White v. Simpson, 28 Wis. 2d 590, 137 N.W. 2d 391 (1965), states that the district attorney or corporation counsel cannot constitutionally be empowered to authorize the issuance of a warrant, since they are not the equivalent of a neutral and detached magistrate. However, they may issue a summons pursuant to WIS. STATS. 954.02 (4) (1963).

[44] WIS. STATS. §954.02 (2) (1963).

[45] WIS. STATS. §955.18 (1963). In some instances it may be advisable to waive the preliminary examination. For example, if the preliminary examination is waived, the district attorney cannot charge a more serious crime than was charged in the information. Theis v. State, 178 Wis. 98, 189 N.W. 539 (1929).

> not whether guilt in those respects has been established beyond a reasonable doubt, but merely whether the evidence, worthy of consideration in any respect for the judicial mind to act upon, rendered the charge against the prisoner within reasonable probabilities.[46]

Under this rule, the state need not produce all the witnesses which it intends to use at trial nor its best evidence.[47] Obviously, the defendant will obtain some idea of the evidence which will be used against him from evidence which the state presents and also from his cross-examination of the witnesses. However, the extent of the knowledge he gains will depend largely on what evidence the prosecution feels it is necessary to produce.[48]

After the preliminary examination, the information can be filed. A defendant is entitled to a copy of the indictment or information, the contents of which are specified by section 955.14 of the statutes.[49] The rule for determining the sufficiency of the statement of the statutory offense is that a "statement of an offense in the language of the statute is sufficient whenever enough is stated in connection with the use of the statutory language to inform the accused of the particular act of violation claimed."[50]

Here also the defendant will receive only enough information as to the details and circumstances of the crime with which he is charged as to satisfy this requirement. Practically speaking, it is unlikely that the knowledge obtained from both the preliminary examination and the indictment or the information will provide an adequate basis for the defendant to prepare for trial, except in very simple fact situations.

Another possible help to defense counsel in the preparation for trial is the bill of particulars. Counsel may move for a bill of particulars in those cases where the indictment or information, though valid, is indefinite as to the particular charge or occurence referred to and therefore hinders the preparation of the defense. In Wisconsin the defendant has a right to have the charge made certain.[51] However, the refusal to furnish such a bill is not necessarily error if the defendant had access to information sufficient to make the charge certain.[52] The time and the manner in which the bill of particulars is to be furnished is discretion-

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[46] State v. Whatley, 210 Wis. 157, 164; 245 N.W. 93, (1932).
[47] State *ex rel.* Brill v. Spieker, 271 Wis. 237, 241; 72 N.W. 2d 906, 908 (1955).
[48] Even if the district attorney fails to introduce sufficient evidence, when it was available to him, to justify binding the defendant over for trial a second complaint charging the same crime may be issued upon the same evidence. Tell v. Wolke 21 Wis. 2d 613; 124 N.W. 2d 655 (1963).
[49] WIS. STATS. §955.05 (1963), entitles the defendant to a copy of the indictment or information.
[50] Liskowitz v. State, 229 Wis. 636, 641; 282 N.W. 103, 105 (1939). See also Unger v. State, 231 Wis. 8; 284 N.W. 18 (1939).
[51] Secor v. State, 118 Wis. 621, 632; 95 N.W. 942, 946 (1903).
[52] *Ibid.*

ary with the court, so long as the defendant will be fully able to prepare for trial.[53] Assuming this motion is granted, the defendant should be adequately informed of the charge facing him, but he has little knowledge of the evidence to be offered against him at trial. For instance, he does not know the names of witnesses for the state and therefore he cannot investigate their backgrounds for such facts as convictions for crimes, even if he could obtain knowledge of these facts from police records.

Some other statutes may be of possible help to defense counsel in the preparation for trial. It has been suggested that Wisconsin Statute section 269.65, which authorizes pretrial procedure in civil actions, might be applied in criminal procedure as well.[54] However, in view of its recent amendment, this is probably no longer possible.[55] At one time it was also suggested that section 269.57 which authorizes inspection of books and documents in the possession or under the control of the other party might be applicable to criminal procedure. However, this is unlikely in view of the section's placement within Title XXV of the statutes, which is entitled "Procedure in Civil Actions." In addition, the scope of this title is limited to civil actions by secton 260.01 of the Wisconsin statutes.[56]

One statute that may be of possible help is Wisconsin Statute section 887.06(1)[57] which authorizes the taking of depositions in criminal actions. This statute provides:

> If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at anytime after the filing of an indictment or information may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time or place.

One possible construction of this statute that could be urged is that a showing of necessity for a fair trial and also of materiality would be sufficient to allow the defendant to take depositions of witnesses as to what actually happened. This interpretation would give the defendant an opportunity to obtain knowledge of the testimony to be offered against him, without a showing that the witness would not be able to attend.

[53] State *ex rel.* Drew v. Shaughnessy, 212 Wis. 322, 336; 249 Wis. 522, 527; 90 A.L.R. 368 (1933).
[54] Tibbs, *Criminal Procedure Under Proposed Federal Rules Compared With Wisconsin Statutes*, 28 MARQ. L. REV. 75, 85 (1944).
[55] WIS. STATS. 269.65 was amended by Wisconsin Supreme Court order of November 10, 1960 (25 Wis. 2d vi), to read: "In all contested civil actions."
[56] 1955 WIS. L. REV. 672, 675 and 676.
[57] This section was formerly §326.06 (1).

However, the decision of *State ex rel. Drew v. Shaughnessy*,[58] which was concerned with the right of the defendant to confront the witness under a former version of tht statute, tends to indicate that this construction would not be accepted. Instead, the fact that the witness would be unable to attend or prevented from attending the criminal trial or hearing would also have to be shown. In this event, discovery by deposition would be available only where all of the conditions set forth in the statute are met.

Finally, the use of the subpoena *duces tecum* has been suggested as a method for obtaining a particular instrument of evidence, such as a confession. The question of whether the subpoena *duces tecum* can be used in this manner has remained unsettled.[59]

Wisconsin Supreme Court Holdings

Wisconsin has consistently held to the common law doctrine that the defendant is not entitled to inspect the evidence and other information which the prosecution has gathered.[60] The statement of the supreme court whenever the issue was raised has been, "One accused of crime enjoys no right to an inspection of evidence relied upon by the public authorities for his conviction."[61]

A request prior to trial for a list of prosecution witnesses was denied in *Cornell v. State*,[62] since there was neither a common law right nor a statutory right to a list of witnesses.

In *Havenor v. State*,[63] where the defendant was denied a copy of grand jury testimony prior to trial, the court said that there is no distinction between this situation and that of a request for a list of witnesses. It then stated:

> We do not see how the defendant can be prejudiced by withholding such information until the evidence is offered upon the trial, nor is it suggested in what respect this practice prevents him from procuring and adducing all the evidence at hand to establish the facts of his defense. The charge preferred in the indictment, information, or complaint fully informs him as to what facts the prosecution expects to establish by the evidence upon the trial, and this meets all the necessary requirements of the right which the accused has in criminal cases to be informed of the nature and cause of the accusations against him.[64]

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[58] 212 Wis. 322; 249 N.W. 522, 524 (1933).
[59] *Supra* note 56, 676 and 677.
[60] Steffes, *Discovery in Criminal Cases*, 10 Prac. Law. 61, 66 (1964).
[61] State *ex rel.* Spencer v. Freedy, 198 Wis. 388, 392; 223 N.W. 861, 862 (1929). This same statement is repeated in State *ex rel.* Schroeder v. Page, 206 Wis. 611, 240 N.W. 173 (1932); Steensland v. Hoppmann, 213 Wis. 593, 252 N.W. 146 (1934); State v. Herman, 219 Wis. 267, 262 N.W. 718 (1935). A similar statement is found in Santry v. State, 67 Wis. 65, 30 N.W. 226 (1886).
[62] 104 Wis. 527, 539; 80 N.W. 745, 749 (1899).
[63] 125 Wis. 444; 104 N.W. 116; 4 Ann. Cas. 1052 (1905).
[64] *Id.* at 450; 104 N.W. at 118. Inspection of grand jury testimony was also denied in Steensland v. Hoppmann, 213 Wis. 593, 252 N.W. 146 (1934).

From this statement one of the court's underlying reasons for refusing to grant pretrial discovery appears. The Wisconsin Supreme Court has taken the position that defendants will not be prejudiced by the withholding of evidence until the actual trial. In other words, it feels that defendants can adequately prepare for trial by being informed in the indictment or information as to the nature and cause of the accusations against them.

Another reason for denying discovery was explained in *State ex rel Spencer v. Freedy*,[65] which involved an action to secure a preemptory writ of *mandamus* to compel the state fire marshall to permit the inspection of the results of his investigation of a fire. The plaintiff, who was suing to recover her claim against the insurer of her property, claimed the right to inspect the records under a statute providing that the state fire marshall keep records and statistics regarding fires. It also provided that "such statistics shall be at all times open to the public inspection." Since the law was intended to further the purposes of apprehending and punishing those guilty of arson, and the releasing of the testimony of all persons taken in investigations could hurt the enforcement of the law, the court held that the legislature intended only that general statistics of educational value were to be released to the public. The court said in arriving at this conclusion that:

> . . . if such testimony as well as other information coming to the knowledge of the state fire marshall is subject to public inspection, it is subject to the inspection of the person who may be accused of the crime of arson as the result of such investigation. One accused of crime enjoys no right to an inspection of evidence relied upon by the public authorities for his conviction.[66]

This decision denies to the public information gathered by state agencies in order to insure that defendants will not be able to inspect them. While the court states that the defendant has no *right* to the information, the reason for denying public access to the information appears to be that doing so might hinder the apprehending and punishing of those guilty of arson. If inspection might be of benefit to those guilty of a crime, might not the denial of it hinder the accused's preparation for trial?

Defendants have been similarly denied inspection in the cases of *State ex rel Schroeder v. Page*[67] and *State v. Herman*,[68] which dealt with John Doe testimony.

Whether prior statements made by prosecution witnesses are discoverable has been the issue of several appeals to the Wisconsin Su-

[65] 198 Wis. 388, 223 N.W. 861 (1929).
[66] *Id.* at 392.
[67] 206 Wis. 611, 240 N.W. 173 (1932).
[68] 219 Wis. 267, 262 N.W. 718 (1935).

preme Court. It has been held to be improper for a district attorney to deny a prior statement to defense counsel when requested at trial for impeachment purposes after a witness admitted that he had made prior statements.[69] But since the witness admitted that there were inconsistencies between his testimony at the trial and his earlier statements, the error was not prejudical.

Even though the prosecuting witness makes contradictory statements before trial and defense counsel learns of this fact, he cannot inspect these statements until the trial.[70] At the trial, these statements are available, if requested, for impeachment purposes. Prior statements of witnesses will be available for impeachment purposes, if they are requested. In order to have the right to inspect prior statements, it must be shown that prior statements were made, usually by asking the witness if he did make prior statements. Defense counsel need not show any inconsistency between the statements, but must make clear his purpose of impeaching the witness, to justify his asking questions about prior statements and also his requests for inspection of the prior statements.[71]

Possible Trends in Wisconsin Criminal Discovery Procedure

In view of these past decisions dealing with the defendant's right to inspection of prosecution information, several conclusions can be drawn. The cases dealing with discovery prior to trial have established in Wisconsin the English common law rule that the defendant enjoys no right to inspection of prosecution evidence. Apparently any statute modifying the common law rule will be strictly construed. This harsh view has been tempered somewhat by allowing inspection at trial of prior statements of state witnesses, where defense counsel can establish that the statements were made, and he requests them for impeachment purposes. The allowance of inspection at trial together with the granting of continuance, if necessary, would be in accordance with the generally accepted view of what is necessary for a fair trial under the United States Constitution.[72]

However, the Wisconsin Supreme Court decision which clarified the right of the defendant to have access at trial to prior statements of witnesses without showing a contradiction, quoted from a California decision. The California case, *People v. Chapman*[73] dealt with the same issue as the Wisconsin case. The quotation is as follows:

> Ordinarily a defendant cannot show that a statement contains contradictory matters until he has seen it, and, if such a showing

[69] State *ex rel.* Byre v. Circuit Court for Dane County, 16 Wis. 2d 197; 114 N.W. 2d 114 (1962).
[70] State v. Richards, 21 Wis. 2d 622; 124 N.W. 2d 684 (1963).
[71] *Ibid.*
[72] *Supra* note 18. See also 353 U.S. 657, 666-668.
[73] 52 Cal. 2d 95, 338 P. 2d 428 (1959).

> were a condition precedent to production, his rights would be dependent upon the highly fortuitous circumstances of his detailed knowledge as to the contents of the statement.[74]

Use of this quotation is intriguing for two reasons. First of all, it shows that the accused cannot be presumed to have sufficient, detailed knowledge to adequately present his case in all situations. This idea also embodies the principle that the defendant is presumed to be innocent at trial. The question remains as to whether this concept should be extended to pretrial stages. If it is, then the same argument, namely that it would be highly unlikely that the defendant would have sufficient knowledge of the circumstances surrounding the offense to adequately prepare for trial would apply to requests for pretrial inspection.

Secondly, the California Court is considered to be liberal in regard to discovery, whereas the Wisconsin Court is considered to be one of the conservative courts in this respect.[75] While the Wisconsin Supreme Court has held that the defendant has no right to discovery prior to trial, California has held that the defendant will be allowed not only to obtain inspection at trial but also to obtain pretrial inspection of unprivileged evidence or information that might lead to discovery of such evidence, if it reasonably appears that such knowledge will help him in preparing his defense.[76] The California Court allows the prosecution to make a countervailing showing that the information may be used for an improper purpose, but in the absence of such showing, discovery is a matter of right.[77]

This investigation of Wisconsin law naturally leads to the question of whether or not Wisconsin criminal discovery procedure should be liberalized.

Any decision on this question would have to consider the policy arguments which were stated at the beginning of this article. However, the controversy seems to center on the question of whether the right of the defendant to a fair trial entitles him to inspect the evidence and information gathered by the prosecution.

There are two bases for arguing that the defendant should be allowed, in certain circumstances, to inspection prior to trial.

Normally we view the accused as being innocent until judgment is rendered to the contrary. This presumption has played an important part in the recognition of the right of the defendant to inspect evidence introduced at trial. The reason for allowing inspection at trial is simply that if the accused is innocent it is unlikely that he will be able to know what evidence will be presented against him and therefore it will be un-

[74] State v. Richards, 21 Wis. 2d 622, 633; 124 N.W. 2d 684, 689 and 690 (1963).
[75] *Supra* note 18, 243 and 244, discussing the California decisions in this area.
[76] Cash v. Superior Court, 53 Cal. 2d 72, 346 P. 2d 407 (1959).
[77] *Ibid.*

duly difficult for defense counsel to counteract the prosecution presentation of evidence. Since pretrial inspection would lead to better preparation for trial and fewer convictions, in this sense law enforcement would suffer.

However this idea is closely tied to the right of the defendant to a fair trial, which demands that the accused have adequate procedural means to defend himself at trial against the incriminating evidence presented by the prosecution. The *Brady* case establishes the rule that suppression of evidence favorable to the accused, where it was requested, violates due process. Many feel that if the defendant is to have an adequate oportunity to prepare for trial, he must have the opportunity to discover evidence and information before trial.

Allowing discovery prior to trial is likely to lead to quicker trials and also less confusion at trial. Requests for inspection of prosecution testimony, when made at trial cause an interruption of the trial. There may also be a request for a continuance which will lead to a delay in the completion of the trial. In addition, if evidence has been withheld from the defendant prior to trial which could have been of value to him, the rule of the *Brady* case may be applied.[78]

However, the warnings that liberal discovery could be used by criminals to suppress evidence and possibly avoid criminal prosecution, should be heeded. If this abuse was likely in a particular case, this would certainly appear to be a justifiable grounds for denying discovery. But in the majority of cases, and especially those involving indigent defendants, liberal discovery would appear to be the better general rule.

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[78] *Supra* note 20, at 147.