PRETRIAL DISCOVERY IN CRIMINAL CASES

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INTRODUCTION

Pretrial discovery in criminal cases has been the subject of considerable comment in recent years. Although the great majority of commentators advocate expanding the range of permissible discovery, the case law throughout the United States at the present time indicates that an accused has, if any, only a very limited *right* of pretrial discovery. A definite trend toward more liberal discovery is currently reflected in the judicial decisions of a few states as well as in the enactment of statutes or rules in other jurisdictions.

Arizona must be classed among those states in which an accused is severely limited in asserting any right to pretrial discovery. In light of the present trend toward expanding pretrial discovery, and especially in view of the recent liberal modification of the Federal Rules of Criminal Procedure from whence Arizona's criminal procedure rule for pretrial discovery was taken, it would appear that the time has arrived for a re-evaluation of Arizona's position. Such re-evaluation must, of necessity, take cognizance of the history of pretrial discovery, the scope of pretrial discovery as currently practiced, and the various alternatives if a change is deemed desirable.

HISTORY

It is generally acknowledged that pretrial discovery was unknown at early common law.[1] In *Rex v. Holland*,[2] one of the earliest reported cases on the subject, an attempt by the defendant to obtain pretrial discovery and inspection of certain documents in the possession of the prosecution was rejected with the comment by Lord Chief Justice Kenyon that,

> 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]

England subsequently determined that Kenyon's view was too severe and could not be tolerated by any decent criminal procedure.[4] English practice today provides that at a preliminary hearing, antecedent to indictment, the Crown is required to make a complete disclosure of

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[1] Rex v. Holland, 4 Durn & E. 691, 100 Eng. Rep. 1248 (K.B. 1792).
[2] *Id.*
[3] *Id.* at 692, 100 Eng. Rep. at 1249.
[4] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 226 (1883).

the whole of its case.[5] In that manner the defense obtains knowledge of all evidence that it will face at trial, the Crown being precluded from offering any evidence not presented at the preliminary hearing.[6]

Notwithstanding the reformation of pretrial discovery in England, the American courts adopted and continued to adhere to the dictates of *Rex v. Holland* and not until recent years did they exhibit anything but closed minds to *any* proposals for discovery in criminal cases.[7] As recently as 1927, Mr. Justice Cardozo was able to discern only "the beginnings or at least the glimmerings" of a "power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice."[8] Since that time, however, progress has been made, and in a few instances the progress has been dramatic. California, for example, has made significant advances not only in granting discovery rights to the accused,[9] but also in exploring new areas where the state might properly compel discovery from the defendants despite their self-incrimination privilege.[10] The recent changes enacted in the Federal Rules of Criminal Procedure[11] would appear to present another significant advance in the movement toward expanded pretrial discovery. Due to the short time that the changes have been in effect, it is currently impractical to make any accurate appraisal of their benefit to the parties, but it is clear that they expand the scope of pretrial discovery for both the State and the accused considerably beyond that generally allowed under the former rules.[12] In addition, the majority of states now acknowledge that the trial courts have the discretionary power to grant or deny an accused the right to inspect evidence in the possession of the prosecutor.[13] Merely agreeing that a power exists, however, is no assurance of its utilization and, by and large, the courts remain unreceptive to the pleas of the accused for access to the prosecutor's evidence.

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[5] DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 112 (1958).

[6] In the event of after discovered evidence, notice to the defense must be given in order for the evidence to be admissible at the trial.

[7] Brennan, THE CRIMINAL PROSECUTION: SPORTING EVENT OR QUEST FOR TRUTH?, 1963 WASH. *U.L.Q.* 279-82.

[8] People *ex rel.* Lemon v. Superior Court, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927).

[9] See, *e.g.*, People v. Durazo, 52 Cal. 2d 354, 340 P.2d 594 (1959); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956).

[10] Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), discussed in Comment, 51 CALIF. L. REV. 135 (1963), and by Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965).

[11] Extensive amendments of the Criminal Rules, based upon the March 1964 Preliminary Draft, were adopted by the U.S. Supreme Court on February 28, 1966, effective July 1, 1966. See Orfield, *The Federal Rules of Criminal Procedure*, 10 ST. LOUIS U.L.J. 445 (1966); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276 (1966).

[12] For an extensive discussion of discovery under the former rules, *see generally* Annot., 5 A.L.R.3d 819 (1966).

[13] State *ex rel.* Polley v. Superior Court, 81 Ariz. 127, 302 P.2d 263 (1956); see cases collected in Annot., 7 A.L.R.3d 8 at 36-38 (1966).

CURRENT PRETRIAL DISCOVERY

Each state is free to adopt its own rules pertaining to pretrial discovery as long as those rules comply with the minimum requirements of fairness imposed upon the states by the due process clause of the fourteenth amendment to the United States Constitution.[14] Thus, it is not surprising to find a lack of uniformity in the development of pretrial discovery procedures.[15] While any attempt to reconcile the positions taken by the various jurisdictions would be doomed to failure in light of the kaleidoscope of result and reasoning contained in the courts' decisions, a few generalizations might properly be made. Most courts, for instance, are extremely reluctant to allow an accused the right to inspect statements made by other persons[16] or reports made by police or other investigating officers in connection with the case.[17] Many courts have shown some liberality as to discovery and inspection of documents and other tangible objects which were used or otherwise involved in the commission of the offense,[18] but even in these cases the courts frequently require that the defendant show a property right in the article sought[19] or at least sustain the burden of showing facts or circumstances justifying discovery and inspection.[20] It has been often held or at least recognized that documents or evidence sought to be discovered must be such as would be admissible in evidence,[21] and in nearly all jurisdictions, a defendant is required to show better cause for inspection than a mere desire to know what evidence the prosecution has obtained to use against him.[22] Furthermore, all of the cases appear to agree that the "work product" of the prosecution is not subject to

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[14] Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 229 (1964).

[15] *See generally* Annot., 7 A.L.R.3d 8 (1966).

[16] This refers to pretrial inspection. Inspection at trial and after the witness has testified is often granted for purposes of cross examination or impeachment. *See, e.g.*, State v. Cocheo, 24 Conn. Supp. 377, 190 A.2d 916 (Cir. Ct. App. Div. 1963); People v. Maranian, 359 Mich. 361, 102 N.W.2d 568 (1960); State v. St. Peter, 63 Wash. 2d 495, 387 P.2d 937 (1963).

[17] *See, e.g.*, State v. Wallace, 97 Ariz. 296, 399 P.2d 909 (1965); People v. Turner, 29 Ill. 2d 379, 194 N.E.2d 349 (1963); State v. Haddad, 221 La. 337, 59 So. 2d 411 (1952).

[18] *See, e.g.*, State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); State v. Winsett, 200 A.2d 237 (Del. 1964); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964).

[19] The former Federal Rule 16 and the current Arizona Rule 195 provide for inspection and copying by defendant of certain books, documents, and tangible objects *obtained from or belonging to* the defendant.

[20] *See, e.g.*, State v. Colvin, 81 Ariz. 388, 307 P.2d 98 (1957); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210 (1963); State *ex rel.* Keast v. District Court, 135 Mont. 545, 342 P.2d 1071 (1959).

[21] *See, e.g.*, State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962); State v. Brown, 360 Mo. 104, 227 S.W.2d 646 (1950); People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[22] *See, e.g.*, State v. Wallace, 97 Ariz. 296, 399 P.2d 909 (1965); People v. Cooper, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960); State v. Simon, 375 S.W.2d 102 (Mo. 1964).

pretrial discovery, but the cases are not always in accord as to what constitutes a "work product."[23]

In addition to formal pretrial discovery, there is also an informal type of discovery which rests upon voluntary disclosures by the prosecutor. As frequently pointed out by commentators,[24] the extent to which the usual prosecutor voluntarily divulges his evidence to the defendant is generally in direct relationship to the strength of his case. If, for example, the prosecutor's case is overwhelming, he will tend to be liberal in disclosing his evidence to the defendant and, in so doing, will often obtain a guilty plea. But when the prosecutor's case is weak and guilt is not clearly established by the available evidence, then prosecutors are tempted to cloak their case in shrouds of secrecy and fight to prevent any semblance of pretrial discovery. In addition, prosecutors tend to favor and make disclosures only to those defense attorneys whom they trust. This favored treatment is incompatible with the concept of equal treatment under the law.

In recent years, another means of compelled discovery has developed under a constitutional mandate. From the case of *Brady v. Maryland*,[25] a body of law has developed which provides that the prosecution may not actually suppress evidence which is clearly exculpatory to a defendant. Suppression of such evidence is deemed a violation of due process regardless of the good or bad intentions of the prosecutor.[26] In spite of this constitutional safeguard, the question arises as to how the accused could ever learn of such suppressed evidence in the absence of other discovery techniques. It is very unlikely that a prosecutor would ever volunteer information indicating that he had improperly suppressed evidence.

PRETRIAL DISCOVERY IN ARIZONA

The Arizona Rules of Criminal Procedure were adopted by the supreme court on June 1, 1956, and were, for the most part, derived from the Federal Rules of Criminal Procedure. Arizona Rule 195, which is the only rule directly keyed to pretrial discovery and inspection, was taken in its entirety from Rule 16 of the Federal Rules as it existed prior to the current change.[27]

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[23] *See, e.g.*, State *ex rel.* Corbin v. Superior Court, 99 Ariz. 382, 409 P.2d 547 (1966); People v. Bermijo, 2 Cal. 2d 270, 40 P.2d 823 (1935); Hooper v. People, 152 Colo. 405, 382 P.2d 540 (1963).

[24] *E.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 287 (1963); Pye, *The Defendants' Case for More Liberal Discovery*, 33 F.R.D. 47, 83 (1963); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 237 (1964).

[25] 373 U.S. 83 (1963).

[26] For an excellent discussion of the application of this doctrine, see Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHNS L. REV. 206 (1966).

[27] ARIZ. R. CRIM. P. 195 provides:

> Upon motion of a defendant at any time after the filing of the indictment

The Arizona Supreme Court has said that while Rule 195 provides only a limited right of discovery,[28] the rule itself does not express a policy prohibiting discovery and, hence, the court is free under its inherent residual powers to permit broader discovery than provided for in the rule itself.[29]

In *State ex rel. Helm v. Superior Court*,[30] the Arizona Supreme Court upheld the discretion of the trial court to grant the defendant discovery and inspection of medical reports pertaining to a blood alcohol test which had been performed upon the defendant. In deciding the issue, the court noted the trend toward expanding pretrial discovery in criminal cases and said that, "it is the trial judge who can best ascertain whether good cause for inspection has been shown or the defense is merely trying to pry into the prosecution's case or attempting to profit from the State's legal research and investigation."[31] Thus, the supreme court took the position that the determination to permit or deny pretrial discovery rests in the sound discretion of the trial court.

It is of interest to note that the supreme court laid down no guidelines for a trial court to follow in determining whether good cause for discovery and inspection exists. Instead, it would appear that an *ad hoc* approach to each case is suggested.

The most recent Arizona case on pretrial discovery by an accused is *State v. Wallace*[32] in which the defendant had asked for and was denied discovery rights to the contents of the police file concerning him. The court ruled that only upon a showing of good cause and relevancy must a police file or record be disclosed and that in the absence of such showing, it would actually be an abuse of discretion for a trial court to grant the requested inspection.[33] In short, the court determined it would permit no "fishing expeditions" into the prosecution's case.

The Need for Change

Most commentators appear in agreement that criminal discovery

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or information, the court may order the county attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

[28] State *ex rel.* Polley v. Superior Court, 81 Ariz. 127, 302 P.2d 263 (1956).
[29] *Id.* at 130, 302 P.2d at 265.
[30] 90 Ariz. 133, 367 P.2d 6 (1961).
[31] *Id.* at 137, 367 P.2d at 9.
[32] 97 Ariz. 296, 399 P.2d 909 (1965).
[33] *Id.* at 300, 399 P.2d at 912.

procedures are generally in need of revamping.[34] The extent and direction of any change, however, is subject to conflicting views.[35]

The prosecutors, for example, argue that the defendant is already too heavily favored in our judicial system and that any further advantage given him by way of pretrial discovery would only tend to compound the imbalance.[36] They contend that allowing pretrial discovery of the prosecution's case would inevitably result in perjury by defendants, subornation or intimidation of the prosecution's witnesses, and tampering with or destruction of evidence essential to the prosecution's case.[37] Finally, the prosecutor is quick to point out that the accused is protected from being compelled to disclose his case in advance due to his privilege against self-incrimination, and, therefore, any pretrial discovery forced upon the state would be unfair and inconsistent with the adversary system.[38]

These arguments, while emotionally appealing, ignore the fact that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, but rather to establish the guilt or innocence of the accused upon a public trial which is fair to accused and state alike.[39] The prosecutor's arguments assume that all defendants are *de facto* guilty and hence eager to suborn or threaten the state's witnesses, and that the accused's primary purpose for learning what evidence the prosecution may have is to perjure himself to meet such evidence. There is very little evidence, however, to support the prosecutor's position and even if such dangers were found to exist in a few cases, it would hardly justify the current denial of discovery in the great majority of cases.

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[34] See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; 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, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957); *Discovery in Federal Criminal Cases, A Symposium at the Judicial Conference of the District of Columbia Circuit*, 33 F.R.D. 47 (1963).

[35] *E.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, *supra* note 34 (advocating expanding discovery along lines of civil discovery but with appropriate safeguards); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, *supra* note 34 (advocating full discovery for the accused but no reciprocal discovery for the prosecution); Traynor, *Ground Lost and Found in Criminal Discovery*, *supra* note 24 (advocating expanding discovery for both the accused and the prosecution).

[36] Flannery, *Prosecutor's Position: Arguments and Illustrations Against Liberalization of Defense Discovery Rules; Need for Prosecutor's Discovery of Specific Defenses (Alibi, Insanity, etc.)* 33 F.R.D. 47, 74 (1963).

[37] *Id.* at 74. *But see* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[38] *Id.* at 80. *But see* Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 93 (1961).

[39] People v. Riser, 48 Cal. 2d 704, 707, 312 P.2d 698, 699-700 (1957).

The experience gained from the use of full and complete discovery in civil cases would tend not to support the fears of perjury and witness tampering. Rather, it has been dramatically illustrated that discovery is basically a tool for truth and the most effective device yet found for removing surprise as an element of the trial.[40] Pretrial discovery permits, and in fact fosters, better preparation by the parties, more effective cross examination of witnesses, and more complete and effective examination of the demonstrative evidence. It is not a valid answer to state that a criminal case is different from a civil case and that therefore the two cannot be governed by similar rules. Truth is the basic objective in either case, and the ultimate safeguard against perjury and witness tampering is not a cloak of secrecy that will frustrate the true as well as the false. A better solution is to examine all aspects of the case in the light of full discovery and thereby separate and distinguish the true from the false.[41]

ALTERNATIVES FOR CHANGE

Once a determination is made that expanded pretrial discovery is desirable in criminal cases, the difficult question arises as to how such a policy might best be implemented.

The English practice of full disclosure at the preliminary hearing could be adopted, but this would require extensive changes in most state laws.[42] In addition, it would of necessity require the demise of the grand jury which is deeply entrenched in most state judicial systems.[43]

Another possibility is to grant full or nearly full discovery to an accused, but, to condition this grant upon the accused's waiver of his right to remain silent regarding his own case. This concept is manifested in the newly amended Rule 16 of the Federal Rules of Criminal Procedure.[44] When a defendant seeks and is granted discovery under this rule, he in turn subjects himself to a demand for discovery by

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[40] Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279 (1963).

[41] *Id.*

[42] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 67-68 (1947). The American preliminary hearing generally requires only so much disclosure as is necessary to make out "probable cause" or a "prima facie" case. Statutes stating the quanta of proof necessary to "bind over" are collected in ALI CODE OF CRIMINAL PROCEDURE 308-11 (1930).

[43] In most instances the grand jury and the preliminary hearing are utilized for the same purpose (binding an accused over for trial) and the exclusive use of one would eliminate any need for the other.

[44] FED. R. CRIM. P. 16(c) provides in part:

> . . . If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which

the prosecution as to certain evidence which the defendant intends to introduce at trial. If the defendant does not first seek discovery from the prosecution, the prosecution, under the rule, is precluded from seeking it from the defendant. The principal vice in this approach is that it provides for a double system of trials.[45] The accused is forced to make a determination as to whether he desires a trial with no discovery,[46] or a trial with relatively full and reciprocal discovery. Aside from a possible question as to the constitutionality of forcing this decision upon an accused,[47] the rule as adopted would also appear to be inconsistent with its very purpose. If the assumption is made that expanded discovery is necessary or desirable for the purpose of conducting a fairer trial, then what justification can be offered for permitting either party to have the power to frustrate this purpose and to prevent pretrial discovery?

California has achieved nearly the same result as sought by the federal rule and at the same time has avoided the situation leading to a double system of trials. And even more startling is the fact that California's progress has been entirely by case law rather than by legislation. For a number of years, California has been very liberal in granting pretrial discovery to an accused *as a matter of right.*[48] More recently, the California Supreme Court determined that the prosecution is also entitled to discovery of portions of the defendant's case.[49] Neither party's right of discovery, however, is conditioned upon the granting of discovery rights to the other party. Under both the federal rule and the California case law, the accused may only be required to disclose that evidence which *he intends to present at the trial.* As an accused would hardly desire to introduce inculpatory evidence at his trial, he would never be required to make such evidence discoverable to the prosecution under either procedure. As to the exculpatory evidence in the defendant's hands, discovery would be granted in California in all cases when warranted and under the Federal Rule 16 when the defendant had sought and been granted discovery of prosecution evidence.

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are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable.

[45] 8 MOORE, FEDERAL PRACTICE ¶ 16.02 (Supp. 1965) terms this a "two-tier" system of criminal discovery and says that it "may prove a sad disappointment."

[46] Under the former discovery rule the defendant could seek discovery without waiving his right to remain silent regarding his own case. Under the current rule this is not true and a defendant may decide not to seek any discovery and thus prevent the prosecution from obtaining any.

[47] 383 U.S. 1089 (1965), statement by Mr. Justice Douglas, dissenting in part to the adoption of the new rules, and especially Rule 16.

[48] See cases collected in Jones v. Superior Court, 58 Cal. 2d 56-58, 372 P.2d 919-20, 22 Cal. Rptr. 879-80 (1962).

[49] Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

The superiority of the California policy rests on the premise that discovery by the accused need not necessarily lead to discovery by the prosecution or vice versa. Instead, discovery is available to each independently, and upon its own merits.

Designing a set of rules to govern discovery in criminal cases is not an easy task. Criminal discovery can never be as broad as its civil counterpart since the former must be workable within the confines of the self-incrimination privilege. The privilege, however, does not preclude all discovery by the prosecution. Alibi and insanity statutes, for example, have been adopted by many jurisdictions,[50] and discovery of other evidence which the defendant intends to introduce at the trial should be viewed in the same light.[51]

Instead of simply adopting the current federal rule on discovery, or codifying the California case law of liberal discovery to both parties, a more lasting and satisfying result might be achieved by setting aside all of the antiquated concepts regarding discovery in criminal cases. Then, by utilizing the experience gained from the use of liberal discovery in civil cases, a new and more effective discovery system for criminal trials could be developed. Rather than approaching the problem from the standpoint of, "What minimum discovery rights should the accused have to guarantee him a fair trial?" the approach should be, "What is the least amount of evidence that should be precluded from discovery?" With this basic premise in mind, we should then look to the devices of implementation.

Five basic devices are generally used for discovery in civil cases, and there seems to be no reason why they could not be adapted for use in criminal actions. These devices are depositions, interrogatories to adverse parties, demands for admissions, motions to produce, and motions for physical and mental examinations.[52]

In applying any of these discovery devices to a criminal action, care must be taken not to impinge upon the self-incrimination privilege and thereby make an accused his own accuser. The discovery sought from an accused would be limited to that evidence which the defendant would utilize at trial. Protective orders should be available to prevent any abuse of the expanded discovery and, as in civil cases, the burden

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[50] WEIHOFEN, MENTAL DISORDERS AS A CRIMINAL DEFENSE 357-59 (1954); Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435 (1934). *See also* ARIZ. R. CRIM. P. 192.

[51] Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965).

[52] These are merely the more commonly used discovery devices and are not intended to constitute an exclusive list.

of showing good cause for a protective order should generally be upon the party seeking to prevent discovery.

It is only by an intelligent and liberal application of the various discovery techniques that we can rid our criminal trials of the anachronistic hide-and-seek tactics so prevalent today. Truth is the prize sought in all trials, and truth will best be determined by both sides seeking to attack each other with evidence and reason rather than with surprise.