

Summer 1966

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Recommended Citation

Earl E. Boyd, *Inadequacy of Pretrial Discovery in Missouri Criminal Cases, The*, 31 MO. L. REV. (1966)
Available at: <https://scholarship.law.missouri.edu/mlr/vol31/iss3/6>

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THE INADEQUACY OF PRETRIAL DISCOVERY IN MISSOURI CRIMINAL CASES

Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.

—Justice Rutledge¹

A deluge of protest has been heard concerning courts and court philosophies. The protestors have had many topics from which to choose, but criminal justice is high in priority of attack. Many persons feel criminal rules and procedures have relaxed to the point that society is suffering. But even these critics should hesitate to campaign against liberalization of criminal discovery procedures for this proposal is not intended to give criminal defendants an advantage, nor is it urged to lessen any discovery advantage the state may have. Its purpose is that of the more liberal rules of civil discovery—exposure of the truth.

I. PRESENT APPLICABLE LAW—GENERALLY

By statute and rule, criminal defendants in Missouri have very limited pre-trial discovery available to them. The names of all material witnesses must be endorsed on indictments and informations.² Cross-examination of the state's witnesses is allowed at the preliminary hearing.³

At common law defendants in criminal cases were denied discovery because of the fear that it would subvert justice.⁴ What remains of the common law still

1. Address to the American Bar Association, 1941, in Allison & Seymour, *The Supreme Court and the Doctrine of the Right to Counsel*, 46 J. AM. JUD. Soc'y 259, 265 (1963).

2. § 545.070, RSMo 1959 provides: "When an indictment is found by the grand jury, the names of all the material witnesses must be indorsed upon the indictment"

§ 545.240, RSMo 1959 states *inter alia*: "The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Mo. R. CRIM. P. 24.17 incorporates nearly the identical wording of § 545.070, RSMo 1959 into one provision for both informations and indictments.

§ 545.320, RSMo 1959 denies the issuance of a subpoena in favor of the state for a state's witness unless his name appeared on the indictment or information. This requirement, however, may be circumvented by the provision that the prosecutor can file an affidavit that other witnesses are "positively necessary for a complete adjudication of the case"

In addition, Mo. CONST. art. I, § 18(a) provides that "the accused shall have the right . . . to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf" This article would not seem to grant the defendant any right of pretrial discovery; only that he is to be assured of these rights upon trial.

3. § 544.250, RSMo 1959 guarantees the right of preliminary examination before a magistrate. Mo. R. CRIM. P. 23.02 is in accord. §§ 544.270, .280, .380 also deal with the preliminary hearing.

Mo. R. CRIM. P. 23.03 allows the accused to cross-examine the prosecution's witnesses at the preliminary hearing.

4. Comment, 60 YALE L.J. 626 (1951).

speaks of injustice for defendants. Blair, J., in *Ex Parte Welborn*⁵ attacks a remaining element—the secrecy of grand jury proceedings:

That was a part of a system which denied the defendant counsel, kept him in close confinement until the hour of trial, refused him the right to call witnesses, sent juries to jail for returning verdicts of acquittal and which, in short, was devised to convict the accused rather than to try the truth charged against him. In many respects, including the feature now pressed upon our attention, the rule in England has been changed by statutes . . . under which a criminal trial bears greater resemblance to a legal proceeding.⁶

Admittedly, modern day procedures grant today's defendant many more rights than his ancestor, but still the criminal trial does not resemble the ideal "legal proceeding" as closely as it could.

*State v. Aubuchon*⁷ enunciates the rule which Missouri courts follow. As stated in that case: "There is no general *right* of discovery by statute or rule in Missouri criminal cases."⁸ (Emphasis added.) Disclosure may be obtained only by the exercise of the court's discretion. In determining whether or not to exercise discretion, courts look mainly to the factors of materiality, admissibility and necessity.⁹

II. PRESENT APPLICABLE LAW—SPECIFICALLY

The five categories where discovery is the most important for the defendant are: copies of grand jury minutes; evidence, documents and scientific reports in the possession of the state; lists of potential witnesses; depositions; and, finally, confessions and statements of the defendant.

A. Grand Jury Testimony

The general rule regarding disclosure of grand jury minutes is: "In the absence of a statute otherwise providing, the accused is not entitled to inspect the grand jury minutes as of right, but such inspection may in the court's discretion be granted."¹⁰

In *State ex rel. Clagett v. James*¹¹ it was stated:

[I]nspection of a grand jury transcript should not be permitted for purposes of discovery or as a substitute for taking depositions of witnesses endorsed on an indictment but only when and to the extent that it is shown to be necessary to meet the ends of justice.¹²

5. 237 Mo. 297, 141 S.W. 31 (1911).

6. *Id.* at 304, 141 S.W. at 34.

7. 381 S.W.2d 807 (Mo. 1964).

8. *Id.* at 813.

9. *Id.*, at 813 contains a collection of the cases supporting the widely accepted rule of discretionary discovery. The criteria referred to will be discussed more fully in the text; they are also commonplace requirements.

10. 23 C.J.S. *Criminal Law* § 956 (1961).

11. 327 S.W.2d 278 (Mo. En Banc 1959).

12. *Id.* at 290.

Following this case, the Missouri Supreme Court adopted the rule that inspection of grand jury testimony would be permitted

upon a finding of necessity to meet the ends of justice, preliminary to or in connection with a judicial proceeding either civil or criminal or when permitted by the court upon a particularized showing by the defendant that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury.¹³

The supreme court should have stopped at this point, but it continued in a wholesale adoption of the *Clagett* rule.¹⁴ The supreme court rule is therefore not effective as a discovery device. The *Clagett* case points out that inspection, if allowed, should be of only that part of the transcript which would be admissible in evidence.¹⁵ A motion to examine a transcript was denied in *State v. McDonald*,¹⁶ when it was shown that the only use the defendant could make of it was the possible impeachment of witnesses by showing inconsistent statements.¹⁷ However, once the grand jury's indictment is made public, witnesses who previously appeared before the grand jury may be required to testify about their former testimony.¹⁸ The theory of requiring secrecy of grand jury proceedings has been severely criticized.¹⁹

B. Evidence, Documents and Scientific Reports

Disclosure in the pretrial stage of scientific reports, documents (including witnesses' statements) and other evidentiary material in the possession of the state is of primary importance to the defendant. Discovery is permissible only at the discretion of the court, and the defendant is afforded no general right either by

13. Mo. R. CRIM. P. 24.24.

14. Mo. R. CRIM. P. 24.24 continues by saying that "Disclosure shall not be permitted by inspection of transcripts of testimony for purposes of discovery or as a substitute for taking depositions of witnesses indorsed on an indictment and no inspection of clerk's minutes shall be permitted. If inspection of a stenographer's transcript, or any part thereof of the testimony of any witness indorsed on an indictment is permitted . . . it shall not include disclosure of facts or testimony that would not be admissible in evidence in a trial upon the indictment involved."

Note that discovery of grand jury minutes may not be valuable to the accused except in the cities of St. Louis and Kansas City. The reason is that those are the only areas where a grand jury is continually sitting. Expense is a primary factor in discouraging the use of the grand jury plus the fact that prosecutors may use informations as readily as grand jury indictments. The number of crimes committed in those two areas may justify the discovery of grand jury minutes.

15. *State ex rel. Clagett v. James*, *supra* note 11, at 290.

16. 342 Mo. 998, 119 S.W.2d 286 (1938).

17. *Id.* at 1003, 119 S.W.2d at 288: "Impeachment of witnesses for variations in testimony before a grand jury at the trial is usually accomplished through some member of the grand jury or other person lawfully in attendance thereon, and not from the minutes kept by said body."

18. *State ex rel. Clagett v. James*, *supra* note 11, at 290.

19. *E.g.*, Blair's comment in *Ex Parte Welborn* cited in the text following note 5, *supra*. The secrecy theory is based upon the premise of assuring that witnesses will come forth and testify. The argument is that disclosure would result in bribery and intimidation of witnesses.

statute or rule.²⁰ In *State ex rel. Page v. Terte*²¹ the defendant applied for discovery of documents and certain evidence from the state which "may be material."²² The court denied the motion on the basis that there was no showing of the evidence's materiality to the defense. The allegation of materiality was merely a conclusion.²³ The court quoted the general rule that motions for "fishing examinations" will not be permitted.²⁴ In the *Page* case there was also a motion for production of witnesses' written statements under a civil discovery statute.²⁵ This motion was also denied for failure to show they were material or admissible in evidence. Admissibility for impeachment purposes was considered insufficient.²⁶

The *Aubuchon* case provides a different criterion:

[I]f there is a satisfactory showing that a report or statement of a witness in the hands of the state is of such nature that *without it*, the defendant's trial would be fundamentally unfair, then it should be produced; otherwise not.²⁷

Obviously, it is impossible for the defense to bear the burden of proof imposed by *Aubuchon* in a situation where the state has evidence of benefit to the defendant, but the accused is ignorant of its existence or is otherwise unable to prove its benefit because he is unaware of its exact content.

In *Brady v. Maryland*²⁸ the United States Supreme Court stated:

[T]he 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.²⁹

20. *State v. Aubuchon*, *supra* note 7. The rule in regard to defendants' rights is quoted in the text at note 8, *supra*. The *Aubuchon* case has this to say about discretion: "The propriety of requiring the production for the defendant of documents such as prior reports and written statements of a witness in the hands of the state, is in the first instance, a matter resting largely in the discretion of the trial court." 381 S.W.2d at 814.

21. 324 Mo. 925, 25 S.W.2d 459 (En Banc 1930).

22. *Id.* at 932, 25 S.W.2d at 462.

23. *Ibid.* In *State v. Brown*, 360 Mo. 104, 115, 227 S.W.2d 646, 649-50 (1950), the defendant moved for inspection alleging it was "necessary to defendant to prepare his case for trial." Defendant argued it would show contradictory statements. The court refused to allow inspection saying: "The application for the inspection . . . [is] based wholly upon supposition, conjecture and surmise unsupported by any facts . . ."

24. 10 R.C.L. p. 1062 § 292 (1915), the rule which the case quotes, reads as follows: "[A] party to a pending action has no right to call for the books, papers, and documents of his adversary merely for the purpose of entering into a 'fishing examination' of them. To authorize their production, there must be a substantial showing that the book, paper or document sought for contains material evidence in support of the cause of action or defense of the party asking for it. A mere suspicion that it contains such evidence does not warrant an order for its production."

25. MO. LAWS 1917, at 203, § 1948, § 510.030, RSMo 1959, providing for production of documents, papers and tangible objects, is its successor.

26. *State ex rel. Page v. Terte*, *supra* note 21, at 931, 25 S.W.2d at 461.

27. *State v. Aubuchon*, *supra* note 7, at 814.

28. 373 U.S. 83 (1963).

29. *Id.* at 87.

Notwithstanding the implications of the *Brady* case, the case of *State v. Spica*³⁰ indicates all too clearly that Missouri courts have no intention of aiding defendants in this predicament. In refusing to allow discovery of a witness' statement made to the police and in the state's possession, the court said: "We cannot say that this statement is favorable to appellant, and we cannot go outside the record to make that determination."³¹ (Latter emphasis added.) If the demands of due process are to be followed in a criminal trial, a defendant must be permitted to make use of favorable material. Constitutional guaranties should not be thwarted under the guise of procedural refusals to consider evidence. The legal profession has been trying to rid the judicial system of the "sporting theory of justice" since the era of trial by combat and compurgation.

*State v. Hinojosa*³² makes it even more difficult for the criminally accused to obtain a fair and speedy trial. The court in that case stated:

The court would have had no authority to order the production of irrelevant and immaterial matter not admissible in evidence, and this is true even though such matters might aid in the preparation for trial.³³ (Emphasis added.)

If the material is not admissible in evidence, it is difficult to visualize damage to the state. It appears the court is endorsing the promotion of needless delay and expense on the accused's attempt to prepare for trial by causing the defendant to expend time and money finding evidence.

In *State v. Kelton*³⁴ the court avoided the question of whether the civil discovery statute³⁵ applied in criminal cases, but held that assuming it did, there must be a showing of materiality of the documents requested and the application must be in writing.³⁶

*State ex rel. Phelps v. McQueen*³⁷ reduced further the defendant's chances of obtaining discovery:

Rule 25.19 is not intended as a rule of discovery. Rather, its purpose is to enforce the production of documents or objects at the trial that contain evidence material and relevant to the issues and to require prior production and inspection of such records or objects if prior production and inspection will expedite the trial.³⁸

30. 389 S.W.2d 35 (Mo. 1965).

31. *Id.* at 51.

32. 242 S.W.2d 1 (Mo. 1951).

33. *Id.* at 6-7.

34. 299 S.W.2d 493 (Mo. 1957).

35. § 510.030, *supra* note 25.

36. *State v. Kelton*, *supra* note 34, at 497.

37. 296 S.W.2d 85 (Mo. En Banc 1956).

38. *Id.* at 89. Mo. R. CRIM. P. 25.19, upon which the court comments, provides: "A subpoena duces tecum may be issued by the court or the clerk thereof, upon application of either party, commanding the person to whom it is directed to produce the books, papers, documents or other objects designated therein . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the

Inspection of documents or papers used to refresh a witness' recollection has been required.³⁹ However, such an inspection has been refused where the documents or papers were not used at trial, notwithstanding examination by the witness before trial.⁴⁰ Examination at the pretrial stage should be allowed.

Jencks v. United States,⁴¹ which allowed liberal pretrial discovery in the federal courts, has been held inapplicable in Missouri.⁴²

C. Witnesses

Criminal defendants in Missouri have limited discovery procedures available whereby they are able to ascertain the names of the witnesses the state will call.⁴³ However, these statutory provisions are valueless to provide the defendant with the discovery really needed, and judicial interpretation has seriously limited the effectiveness of these provisions. The statutory requirement does not include rebuttal witnesses.⁴⁴ Indorsement of additional witnesses upon the information or indictment is largely discretionary and has been allowed even during trial.⁴⁵ *State v. Farris* recommends that the state give the names of the additional witnesses to the defendant before indorsement.⁴⁶ To obtain a continuance on the ground of surprise, the defendant should file an affidavit setting out the specific reasons why he is prejudiced and needs more time.⁴⁷ The *Farris* case points out that "An important factor is whether the state is acting in good faith and has not purposely withheld the names of witnesses."⁴⁸ Actually, there is no effective sanction for the state's refusal to indorse all witnesses' names on the indictment.⁴⁹

time when they are to be offered in evidence and may upon their production permit the books, papers, documents or portions thereof to be inspected by the parties and their attorneys."

39. *State v. Crayton*, 354 S.W.2d 834 (Mo. 1962).

40. *State v. Miller*, 368 S.W.2d 353 (Mo. 1963).

41. 353 U.S. 657 (1957). In the *Jencks* case the defendant was allowed production of reports of undercover F.B.I. agents which had been made to the F.B.I. Their use was for impeachment purposes and they had not been introduced in evidence.

42. The effect of the liberal decision in the *Jencks* case was subsequently restricted by enactment of 18 U.S.C. § 3500. Neither the case nor the statute is important in light of Missouri holdings. See *State v. Aubuchon*, *supra* note 7, at 815; *State v. Mobley*, 369 S.W.2d 576, 583 (Mo. 1963).

43. See statutes and rules quoted notes 2 & 3 *supra*.

44. *State v. Jennings*, 326 Mo. 1085, 34 S.W.2d 50 (1930); *State v. Cook*, 318 Mo. 1233, 3 S.W.2d 365 (1928).

45. *State v. Farris*, 243 S.W.2d 983 (Mo. 1951); *State v. Hefflin*, 338 Mo. 236, 89 S.W.2d 938 (1936); *State v. Short*, 337 Mo. 1061, 87 S.W.2d 1031 (1935); *State v. Lowry*, 321 Mo. 870, 12 S.W.2d 469 (1929).

46. *State v. Farris*, *supra* note 45, at 987.

47. *Ibid.* *State v. Boone*, 355 Mo. 550, 196 S.W.2d 794 (1946); *State v. Derington*, 137 S.W.2d 468 (Mo. 1940); *State v. Wilson*, 321 Mo. 564, 12 S.W.2d 445 (1928).

48. *State v. Farris*, *supra* note 45, at 986-7.

49. The only consequence may be that the state will not be granted a continuance when a witness whose name is not indorsed is absent. See § 545.070, RSMo 1959. Indorsing additional witnesses' names on the indictment or the information at trial has been permitted, and it is not considered as surprise sufficient to set aside the verdict. Cases cited note 45 *supra*; *State v. Nugent*, 71 Mo. 136 (1879).

Present statutes, court rules and case law make no mention of discovery of names of potential witnesses which the state may have. These witnesses may provide the most important information for the defendant. The state may not need to call all of its witnesses before the grand jury in order to indict the defendant. While the defendant remains ignorant of their existence, the state could subpoena these witnesses at trial⁵⁰ to the defendant's disadvantage.

State v. Hawkins finds nothing in any statute requiring furnishing the defendant with the addresses of state witnesses.⁵¹ Quite obviously there are many imaginable situations where knowledge of the addresses would be extremely important to the defendant. Furthermore, there seems to be no overwhelming public policy for denying the accused this information. It would save a great deal of time and expense in the defendant's preparation for trial.

The defendant may use his statutory right of the preliminary hearing to discover what he can about the state's case.⁵² At the preliminary hearing an exposure to the evidence and witnesses the state calls, plus his right of cross-examination, will greatly aid the defendant; but the defendant may be handicapped if the state does not call all of its witnesses and introduce all of its evidence.

D. Depositions

The court in *State v. Cox* flatly states that "A defendant is entitled to take the depositions of witnesses in a criminal case. . . ."⁵³ The *Welborn* case held that the extent to which an examination may go is the same as in civil cases.⁵⁴ A commission to take depositions will be issued as a matter of right even where re-

50. § 545.070, RSMo 1959, states that "other witnesses may be subpoenaed or sworn by the state . . ."

51. 362 Mo. 152, 156, 240 S.W.2d 688, 690 (1951). Specific reference was made in the case to §§ 545.070, 240, RSMo 1959; see note 2 *supra*. 23 C.J.S. *Criminal Law* § 951 (1961) states the general rule: "In the absence of statute, accused cannot require the state to inform him as to the residences of witnesses whose names appear on the indictment, even though he may desire such knowledge to ascertain their standing and credibility."

52. § 544.250, RSMo 1959.

53. 352 S.W.2d 665, 673 (Mo. 1961). The court admitted the privilege of the defendant to take depositions on the basis of Mo. R. CRIM. P. 25.10 which reads: "A defendant in any criminal case pending in any court may obtain the deposition of any witness to be used in such case conditionally."

The court in the *Cox* case also recognized Mo. R. CRIM. P. 25.11 as being applicable. It provides: "[T]he method of taking such depositions shall be governed by the statutes or rules applicable to civil actions, except as otherwise provided herein . . ."

Mo. R. CRIM. P. 25.12 sets out the situations under which depositions are admissible in evidence. See §§ 545.380-400, RSMo 1959.

54. § 492.080, RSMo 1959 is substantially the same as Rule 25.10. Under § 492.080, "conditionally" refers to the use of the deposition and not to the taking of it. See *Noell v. Bender*, 317 Mo. 392, 295 S.W. 532 (En Banc 1927); *Ex Parte Welborn*, 237 Mo. 297, 141 S.W. 31 (1911).

54. *Ex Parte Welborn*, *supra* note 53, at 308, 141 S.W. at 35; *State v. Aubuchon*, 381 S.W.2d 807, 812 (Mo. 1964). The court in the *Welborn* case was construing Mo. LAWS 1872, at 1096, § 13, which has been superseded by § 545.400, RSMo 1959.

quested by oral application.⁵⁵ Furthermore, a grand juror possessing facts beneficial to the defendant may have his deposition taken notwithstanding his oath of secrecy.⁵⁶

In light of the *Aubuchon* ruling,⁵⁷ the defendant has no right to demand depositions for discovery. Evidently, they may be used for discovery only at the discretion of the court. Admissibility in evidence is a prerequisite for taking depositions. Since they are admissible only in limited circumstances, they are valueless, particularly from the standpoint of impeachment purposes.⁵⁸ There are few elaborative decisions in this area.

E. Confessions and Statements of the Defendant

Prior to December 1, 1965, criminal defendants could not inspect or copy their own confessions in the possession of the state as a matter of right.⁵⁹ Criminal Rule 25.195 which took effect on that date reads:

Upon motion of a defendant the court may order the attorney for the state to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the attorney for the state to be within its possession, custody or control, and (2) results or reports of physical or mental examinations, which are known by the attorney for the state to be within the possession, custody or control of the state.

The interpretation which this rule will be given remains to be seen, but it is a definite improvement. Criticism of the rule is discussed *infra*.

III. ARGUMENTS REGARDING MORE LIBERAL DISCOVERY⁶⁰

A. Opposing More Liberal Discovery⁶¹

The argument most frequently advanced against increased discovery is that the prosecution is at a disadvantage; therefore, it would be unfair to increase

55. *Ex Parte Welborn*, *supra* note 53, at 302, 141 S.W. at 33.

56. *Id.* at 305-06, 141 S.W. at 34.

57. *State v. Aubuchon*, *supra* note 54, at 813. The rule is stated in the text at note 8, *supra*.

58. Mo. R. CRIM. P. 25.12 sets out the limited circumstances under which depositions are admissible. In all instances set forth therein the witness is not before the court. Therefore, there could be no use of the deposition for impeachment purposes.

59. *State v. Aubuchon*, *supra* note 54, at 813. The rule is stated in the text at note 8, *supra*.

60. See *Discovery in Federal Criminal Cases*, 33 F.R.D. 47 (1963); Comment, 74 HARV. L. REV. 1051 (1961); Comment, 60 YALE L.J. 626 (1951). The latter two articles summarize the existing law of discovery. The arguments presented in all three articles have been relied on.

61. The most frequently quoted statement in support of the opposition is that of Learned Hand in *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923) wherein it was said: "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not dis-

the defendants' advantage. Defendants already have the advantage of being presumed innocent and cannot be convicted without proof beyond a reasonable doubt. They cannot be forced either to testify or make incriminating statements. Furthermore, defendants are permitted to suppress the state's evidence under the proper circumstances. Various methods of discovery are now available to the defendant and are more than adequate to provide the information he desires. Notwithstanding these discovery techniques, prosecutors are normally cooperative with defense counsels and disclose evidence willingly.

Due to the large dockets which confront most courts, pleas of guilty are encouraged in criminal cases. With liberalized discovery such pleas will be reduced in number in hope of obtaining further evidence to gain releases and decrease penalties.

Present liberal discovery in civil cases should not be extended to criminal areas because the stakes are higher. Many defendants would resort to any tactic to gain an acquittal. Civil trials provide for the mutual exchange of evidence; mutuality would be impossible in criminal cases due to the defendants' constitutional privileges.

Liberal discovery will lead to perjury and tampering with witnesses. If the defendant is aware of the identity of the witnesses who will testify against him, he will have the opportunity to bribe or intimidate them into revising their testimony. Persons with information will be reluctant to come forth and testify when they realize the defendant knows their identity. The fear of reprisal is particularly great in the case of organized crime. Society and its members are deserving of protection from criminals and their tactics of harassment, coercion and intimidation.⁶²

Not only should defendants be denied more liberal discovery, but also should be required to plead the defenses of alibi and insanity when they intend to use them at trial. This would discourage the use of fabricated alibis and reduce perjury.

B. Favoring More Liberal Discovery

Civil and criminal cases do not differ enough to justify the disparity of available discovery methods. The element of surprise is always a possibility, and a

close 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."

State v. Aubuchon, *supra* note 54, concurs: "The state is not permitted in any possible way to discover facts from a defendant; we are unwilling to open up, *carte blanche*, the files of the State to a defendant." 381 S.W.2d at 814.

62. The court in State v. Aubuchon, *supra* note 54, continued: "We have reached that point in our criminal jurisprudence where we should consider, and balance, the rights of the public against some of the recently pressed rights of the defendants." 381 S.W.2d at 814.

continuance may not rectify the harm that has been done. A criminal trial is as much a search for truth as is a civil trial. The average defendant in criminal proceedings will normally be unable to recall all pertinent and relevant facts. This is more true when the defendant is innocent, was intoxicated at the time the alleged offense occurred, or is incapable of remembering because of a physical or mental infirmity (e.g. epilepsy, insanity, amnesia, etc.). In addition, the defendant may have forgotten much of what he knew and will be unable to refresh his recollection prior to trial. Without discovery, defendant is unaware of the names of *all* witnesses who possess valuable information. He does not possess all of the evidentiary material which is relevant. He is not aware of any scientific tests which have been conducted (e.g. blood tests, ballistics tests, lie detector tests, etc.), nor statements given to the state.

Liberalizing discovery will permit the defense to make more effective use of cross-examination, because disclosure of prior statements by witnesses allows the defense to show inconsistencies and contradictions. It may also reveal bias, prejudice or a prior conviction.

It is desirable that court dockets be reduced. Pleas of guilty will aid this effort. Counsel, with full knowledge of the facts of the case, will be better able to advise clients how to plead. Without all the facts, counsel may not plead his client guilty because of undiscovered facts which may acquit his client. Discovery allows counsel to make the proper pretrial motions, effectively conduct voir dire examination and exercise pre-emptory challenges.

Presently the state has the advantage. Its investigative process is more efficient than any the defendant could hope to utilize. It has the police officers' interviews and reports.

Prosecuting attorneys may allow defendants discovery as a grace, but this is probably refused in the more important cases. If the information would prompt a plea of guilty, it would be disclosed; if it would aid the defendant in the preparation of his case, it would remain concealed.

The harm caused by the unavailability of discovery is acute in the case of the indigent defendant. Because of his financial situation, he is neither able to hire private investigators, nor an experienced, skilled criminal attorney. The indigent must resign himself to the degree of resourcefulness and proficiency of appointed counsel.

Rules of discovery should be written for the innocent and mentally responsible defendant. The exclusionary rule and the *Durham* rule are of no assistance to defendants who are legally sane and from whom no evidence has been illegally seized.⁶³ The concept of presumption of innocence and the requirement of proving guilt beyond a reasonable doubt are of only theoretical value and their benefit has been exaggerated. The effect of pleading fifth amendment privileges may create a more injurious impression in the mind of jurors than testifying and risking impeachment. Defendant's chances of acquittal are small if he has been impeached and the state's witnesses have not been impeached due to the unavailability of discovery.

63. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

Bribery and intimidation are scarcely possible for the indigent defendant, especially if he is not admitted to bail. Organized crime does not increase the danger as the defendant will discover the state's witnesses regardless of discovery rules. Risk of perjured testimony is not increased by liberalized discovery; the guilty defendant, knowing all details, will be able to fabricate a defense while the innocent defendant will not. Authorities indicate that discovery in civil cases has probably reduced perjury.⁶⁴

IV. CONCLUSION: COMMENTS AND SUGGESTIONS

Existing Missouri law is inadequate to assure that a criminal trial will be an adjudication of all relevant and material facts bearing on the accused's guilt. Surely no one would question the following:

The objectives of modern trial procedure should be to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat.⁶⁵

Without a liberalization of discovery this cannot be possible.

The Missouri Supreme Court has begun to move in the right direction with its rule authorizing inspection and copying of statements and confessions of the defendant, and results or reports of physical and mental examinations.⁶⁶ What are the difficulties which can be foreseen? First, the rule is discretionary in character ("the court *may* order" Emphasis added.). The courts have long disallowed discovery by not exercising their discretion. Whether mandatory language is necessary is only conjecture, but it would seem an improvement.

Second, inspection is permitted only of relevant material. Who is to determine whether the material is relevant? The court? The prosecution? Or must the defendant demonstrate its relevancy? Consider the intoxicated defendant who does not know what statements he has made. It would be better to require inspection upon defendant's motion and deny it only when the prosecution has shown the material irrelevant. In other words, put the burden on the party who is better able to prove its relevancy or irrelevancy.

The third problem with the rule is that it relates only to statements, confessions and physical or mental examination reports. Expand the rule to include any documents, results of scientific tests, lists of potential witnesses, grand jury minutes and tangible objects and many of the defendant's problems will be solved.

The final problem is that the rule pertains only to statements and confessions of the defendant. Discovery of all statements, whether made by witnesses or co-defendants, should be allowed if it would benefit the defense's preparation for trial.

It is conceded that the above suggestions may be the zenith of liberal discovery. Perhaps reasonable limitations and checks should be included, but what

64. 4 MOORE'S FEDERAL PRACTICE § 26.02(2) (2d ed. 1963).

65. Comment, 60 YALE L.J. 626 (1951).

66. See MO. R. CRIM. P. 25.195 quoted in text following note 59, *supra*.

these limitations and checks would be and whether they would be effective are two very difficult questions. Quite possibly none are feasible and this may be the reason discovery has been left to the discretion of the courts. However, greater damage is being done under our present system than can be contemplated under a more liberal discovery procedure.

If discovery is allowed, and it must be, it should also be permitted for use by the state as the *Spica* case intimates.⁶⁷ It is not unreasonable to require the accused to plead the defenses of alibi and insanity if he intends to rely on them at trial,⁶⁸ and it certainly is consistent with the theme of dispensing with surprise and promoting complete adjudication of all facts.

The adoption of legislation similar to the Federal Rules of Criminal Procedures with proposed amendments would be a step toward solving the dilemma which defendants now face.⁶⁹

With the cooperation of the courts, Missouri Rule 25.195 could provide the solution for many problems. Legislative action, however, is needed to deliver us from our dark age quagmire, and to provide our criminal trials with at least the cloak of a true legal proceeding.

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67. *State v. Spica*, 389 S.W.2d 35, 51 (Mo. 1965).

68. See FED. R. CRIM. P. proposed amendment 12.1, which would require the defendant's giving notice to the government prior to the trial if he plans to defend on the ground of insanity.

69. See FED. R. CRIM. P. 15, 16 & 17, along with their proposed amendments.