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DEFENDANT'S RIGHT TO INSPECT INVESTIGATIVE FILES OF LAW ENFORCEMENT AGENCIES

*"It has long been a truism, possibly at times more honored in the breach than in the observance, that it is as much the duty of the State to acquit the innocent as to convict the guilty. To put it another way the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' ... Justice can only be done when the truth is made known."**

The right of a criminal defendant to inspect the investigative files of law enforcement agencies is not a well-settled principle of American law. The English common law did not recognize any right of inspection in criminal proceedings.[1] The Supreme Court of the United States has held that a denial of pre-trial inspection of matter in the possession of the state is not a violation of any rights guaranteed under the Constitution.[2] Any right of inspection, therefore, must be predicated upon statute, court rule, or court decision.

In *State v. White*[3] the Supreme Court of Iowa did not allow the defendant an unlimited right to inspect police files but did remand the case with direction to the trial court to hold an *in camera* hearing of police radio tapes, in the presence of the prosecuting attorney and the defendant's counsel, in order to determine if the tapes contained information germane to the defense of entrapment. The police radio had been used to effect a rendezvous of officers in an area where an informant had advised that a burglary was to occur. The officers observed three men arrive in a car and get out. Two of the men entered a nearby building and the third returned to the car and drove away. The officers searched the building and found the defendant and another man hiding there. The driver of the car was not apprehended. At the trial defendant claimed entrapment by the informant and the police acting in concert. Although the trial court did not require the State to reveal the name of the informant,[4] it was apparent that defendant was pointing to the driver of the car as the informant.

Prior to the trial the defendant had made a written request to

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*State v. Lavallee, 122 Vt. 75, 163 A.2d 856, 858 (1960).

[1]Rex v. Holland, 4 Durn. & East. 691 (K.B. 1792).

[2]Leland v. Oregon, 343 U.S. 790 (1952).

[3]151 N.W.2d 552 (Iowa 1967).

[4]The Supreme Court has held that the decision to withhold or to disclose an informant's identity rests in the discretion of the trial court. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967); Roviario v. United States, 353 U.S. 53 (1957); Scher v. United States, 305 U.S. 251 (1938).

inspect the radio tapes, in the presence of officials, to determine if they contained information which would support his defense of entrapment. The request was denied, as was a similar request made at the beginning of the trial. The supreme court stated that the unusual circumstances of the case—reliance on an informant by the State and failure to apprehend the driver of the car—demanded that the trial court hear the tapes in order to determine if inspection would be allowed.

The right of the criminal defendant to inspect the files of law enforcement agencies is important in two stages of criminal proceedings: (1) prior to trial as a means of discovery, and (2) during trial as a means of possible impeachment of the state's witnesses.

Inspection as a Means of Discovery

Although the common law rule of no discovery has been extensively modified,[5] there are some jurisdictions which adhere to this rule.[6] In these jurisdictions, of course, the defendant has no right to inspect any material in the files of law enforcement agencies.

Several jurisdictions have enacted statutes[7] or promulgated court rules[8] which allow limited discovery in criminal proceedings. These statutes and rules vary from allowing pre-trial inspection of only the defendant's written confession[9] to the inspection of "the evidence of the state."[10] In *State v. Shouse*,[11] the Supreme Court of Florida in-

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[5]2 F. WHARTON, CRIMINAL EVIDENCE § 671 (12th ed. 1955).

[6]*See, e.g.*, Idaho Galena Min. Co. v. Judge of Dist. Ct., 47 Idaho 195, 273 P. 952 (1929); Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939); State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1967).

[7]*See, e.g.*, FLA. STAT. ANN. § 925.04 (Supp. 1965); LA. REV. STAT. § 44:3 (1950); TENN. CODE ANN. § 40-2441 (Supp. 1966); UTAH CODE ANN. § 77-21-9 (1953).

[8]*See, e.g.*, COLO. R. CRIM. P. 16; DEL. SUPER. CT. (CRIM.) R. 16; MD. R. (CRIM.) P. 728.

[9]LA. REV. STAT. § 44:3 (1950). Title 44 of the Louisiana Revised Statutes allows for the inspection of public records and documents. Section 3 of Title 44 reads as follows:

> Records held by investigating officer or agency.
>
> A. This Chapter shall not apply to public records when they are held by any sheriff, district attorney, police officer, investigator or investigating agency of the state as evidence in the investigation or prosecution of a criminal charge, until after the public records have been used in open court or the criminal charge has been finally disposed of....

This section has been held to deny inspection of all items in possession of the state with the exception of the defendant's confession. *See* State v. Johnson, 249 La. 950, 192 So. 2d 135 (1966).

[10]FLA. STAT. ANN. § 925.04 (Supp. 1965).

[11]177 So. 2d 724 (Fla. 1965).

terpreted the latter language as being applicable only to those documents and objects which are themselves admissible in evidence. This necessarily precludes inspection of such hearsay items as police reports and pre-trial statements of witnesses.[12]

Pre-trial discovery in federal criminal prosecutions is provided for by the Federal Rules of Criminal Procedure.[13] Under Rule 16 certain enumerated items are to be produced for inspection upon the defendant's request; but reports, memoranda, or other internal documents made by government agents in connection with the investigative process are specifically exempted from pre-trial inspection. The Jencks Act,[14] while concerned primarily with production of material for purposes of impeachment, specifically provides that statements or reports will not be made available for inspection until the appropriate witness has testified on direct examination in open court.

Even in jurisdictions which allow pre-trial criminal discovery, a defendant has not been allowed an unlimited right of inspection of material contained in police files. The courts in *State ex rel. Sadler v. Lackey*[15] and *Cash v. Superior Court*[16] adopted a rule which invests the the trial court with discretion as to whether the defendant will be allowed to inspect law enforcement files.

In *Sadler,* the defendant was charged with manslaughter. A small child was struck and killed by an automobile. There were no clues from which the police could ascertain the identity of the responsible person. When he arrived at the scene of the accident, the defendant, who was unaware that he had struck the child, advised the investigating officer that he had passed the area at approximately the time the child was struck. Scrapings were taken from the defendant's car and sent to the FBI laboratory for scientific analysis. On the basis of the examination results, the defendant was charged with manslaughter. Prior to the trial the defendant requested that he be allowed to examine the examination report. The trial court granted the request, and the State sought a writ of prohibition against the trial court's ordering the report produced for the defendant. The appellate court denied the writ of prohibition, stating that it was within the discretion of the

[12]Police reports and pre-trial statements of witnesses are inadmissible for proof of the truth of the matter stated therein. *See, e.g.,* Gordon v. State, 34 Ala. App. 278, 41 So. 2d 608 (1949) (unsigned stenographic transcript); Fite v. State, 158 Tex. Crim. 611, 259 S.W.2d 198 (1953) (police reports). *See also* 2 F. WHARTON, CRIMINAL EVIDENCE § 561 (12th ed. 1955).

[13]FED. R. CRIM. P. 16.

[14]18 U.S.C. § 3500 (1964).

[15]319 P.2d 610 (Okla. Crim. App. 1957).

[16]53 Cal. 2d 72, 346 P.2d 407 (1959).

trial court as to when pre-trial inspection of such items was to be allowed. It was the opinion of the appellate court that since the information was gained only because of the defendant's cooperation, justice demanded that he be allowed to see the report.

In *Cash,* the defendant was charged with attempted burglary and solicitation to commit burglary. The man he allegedly solicited was a police officer. The officer tape-recorded his conversations with the defendant. Prior to trial the defendant requested that he be allowed to inspect the tapes on the ground that he was unable to recall the content of the conversations. The trial court denied the request. The appellate court reversed the ruling of the trial court, stating that the decision as to whether to allow pre-trial inspection was at the discretion of the trial court, and that the trial court's decision would be reversed only if its discretion was abused. The court found that the ground stated by the defendant was sufficient to warrant inspection and pointed out that the fact that entrapment was a possible defense was an even more compelling reason.

Other jurisdictions have adopted rules similar to that adopted by *Sadler* and *Cash,* investing the trial court with a power of discretion as to pre-trial inspection.[17] Under this discretionary rule, a defendant must show that circumstances are such that "substantial justice requires" that he be allowed to inspect police files.[18] His request also must be narrow in scope, aimed only at those items which are material, for he will not be allowed to go on "a tour of investigation"[19] or a "fishing expedition."[20]

There are jurisdictions which completely deny a defendant the right to inspect material within police files on the ground that such material is the work product of the prosecuting attorney.[21] This work-product doctrine is derived[22] from the civil litigation work-product doctrine announced in *Hickman v. Taylor.*[23]

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[17]*See, e.g.,* Kinder v. Commonwealth, 279 S.W.2d 782 (Ky. 1955); Commonwealth v. Galvin, 323 Mass. 205, 80 N.E.2d 825 (1948); People v. Maranian, 359 Mich. 361, 102 N.W.2d 568 (1960); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960); People v. Marshall, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (1958); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).

[18]State v. Hill, 23 Ohio Op. 2d 255, 191 N.E.2d 235 (C.P. 1963).

[19]State v. District Court, 135 Mont. 545, 342 P.2d 1071 (1959).

[20]People v. Wilkins, 135 Cal. App. 2d 371, 287 P.2d 555 (1955).

[21]*See, e.g.,* State v. Superior Court, 99 Ariz. 382, 409 P.2d 547 (1966); Peel v. State, 154 So. 2d 910 (Fla. Dist. Ct. App. 1963), *cert. denied,* 308 U.S. 986 (1965); State v. Superior Court, 106 N.H. 228, 208 A.2d 832 (1965).

[22]People v. Valdez, 203 Cal. App. 2d 559, 21 Cal. Rptr. 764 (1962). *See generally* Note, 1966 Wash. U.L.Q. 321.

[23]329 U.S. 495 (1947).

In *State v. Tune*[24] the court alluded to the work-product doctrine in not allowing the defendant to inspect police files and presented an extended discussion of why the liberal rules of civil discovery should not be applied in criminal prosecutions. The court pointed out that the stakes were much higher in criminal prosecutions than in civil litigations, for a criminal defendant stands to lose his personal freedom, and even his life in extreme cases. It was the opinion of the court that such high stakes provided the criminal defendant with a great incentive to commit perjury and intimidate witnesses and that to allow discovery of police records would completely undermine the effectiveness of law enforcement agencies and would be contrary to public policy.

The courts which have transposed the civil-litigation work-product doctrine to criminal prosecutions appear to have overlooked, or failed to consider fully, one of the fundamental differences between civil litigations and criminal prosecutions. Civil litigations are actions between private parties who are on a relatively equal footing in regard to their access to investigative facilities. Criminal prosecutions are actions by the state against one or more of its citizens. The state has a veritable storehouse of investigative means and personnel at its disposal, while the criminal defendant's ability to retain investigative services is dependent entirely upon his financial status.

Nothwithstanding *State v. Tune*,[25] it is submitted that the fact that the stakes are higher in criminal prosecutions is the single most compelling reason to adopt a more liberal and flexible attitude concerning insepection of police files by a defendant. Because the stakes are so high, all reasonable methods of ascertaining the truth should be allowed, including the defendant's inspection of police files when the circumstances of the case warrant it. The mere possibility that some defendants or their counsel will yield to the temptation to misuse the information gained is not sufficient reason to deny arbitrarily all defendants inspection of law enforcement files.

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[24]13 N.J. 203, 98 A.2d 881 (1953). The court denied inspection of *any* material in the possession of the State, including the defendant's confession, but indicated that if the defendant could show *unusual and exceptional* circumstances he might be allowed to inspect matter in police files. New Jersey has relaxed its earlier rule against discovery of *any* materials in the possession of the State. *See* State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965) (medical reports); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958) (defendant's confession). However, inspection of police reports and statements of other witnesses is still not allowed.

[25]13 N.J. 203, 98 A.2d 881 (1953).

Inspection As A Source of Possible Impeachment

As a general rule of evidence, one may use the prior inconsistent statement of an adverse witness to impeach that witness.[26] The problem which arises in this respect in criminal prosecutions is that the statement of a witness against the defendant is in the possession and control of the state. The criminal defendant does not know if a prior inconsistent statement does in fact exist.

In *Jencks v. United States*[27] the Supreme Court held that an FBI report prepared by a witness who testified for the government had to be produced for the defendant's inspection. The defendant was not required to show that the report was material to the testimony of the witness or that it was in any way inconsistent with the witness' sworn testimony. The only showing that the defendant was required to make was that the report did in fact exist; and, in this case, the witness had admitted such in his testimony. It is to be noted that the *Jencks* case was not applicable to state criminal proceedings.[28]

After the ruling in *Jencks,* Congress enacted the Jencks Act[29] for the purpose of controlling the production of statements and reports for impeachment purposes in federal criminal prosecutions. Under the Act, a statement or report shall be produced only after the witness has testified on direct examination, and then only if it is material to the substance of the witness' sworn testimony. If the government objects to the production of the report on the grounds that it contains nothing material to the witness' testimony, the requested document must be submitted to the trial judge for his inspection and decision as to its materiality. The judge is also to delete any portions of a document which are not material and to deliver any material portions to the defendant for his inspection and use. The procedure prescribed by the Act has been held to be constitutional and not in violation of any of the rights guaranteed to an accused.[30]

Several states have adopted a rule which, while within the general rule of allowing impeachment by prior inconsistent statements, in fact deprives a defendant of any right of inspection of reports or

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[26]3 F. WHARTON, CRIMINAL EVIDENCE § 916 (12th ed. 1955).

[27]353 U.S. 657 (1957), *noted in* 15 WASH & LEE. L. REV. 88 (1958).

[28]*See, e.g.,* Palermo v. United States, 360 U.S. 343 (1959); Sanders v. State, 278 Ala. 453, 179 So. 2d 35 (1965); McKenzie v. State, 236 Md. 597, 204 A.2d 678 (1964).

[29]18 U.S.C. § 3500 (1964). For rulings as to what constitutes a "statement" see Mims v. United States, 332 F.2d 944 (10th Cir.), *cert. denied,* 379 U.S. 888 (1964); United States v. Papworth, 256 F.2d 125 (5th Cir.), *cert. denied,* 358 U.S. 854 (1958).

[30]West v. United States, 274 F.2d 885 (6th Cir. 1960), *cert. denied,* 365 U.S. 819 (1961).

statements held by the state.[31] Before he will be allowed to inspect such reports or statements, the defendant must show that they contain material statements which are contradictory to the sworn testimony of the witness. As early as 1807, Chief Justice Marshall, in *United States v. Burr*,[32] recognized the absurdity of such a rule when he said: "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? . . . He cannot be expected to make such a statement."[33]

In denying inspection for purposes of impeachment, courts have given the same reasons as those given for denying inspection for purposes of discovery.[34] In *State v. Oswald*[35] a police officer admitted on the stand that he used a report that he had prepared to refresh his memory the day before the trial. The court denied the defendant the right to inspect the report saying: "To permit its use by the defendant would divulge information concerning other crimes in the processes of investigation, and destroy the effectiveness of the investigative and enforcement process of the state."[36] However, other courts have adopted procedures to meet the objection raised in *Oswald*.[37] In *State v. Tranchell*[38] the defendant requested to see the notebook of a police officer who testified in court. The officer advised the court that the notebook contained notes not related to the defendant's case. The trial court ordered production of those portions of the notebook dealing with the defendant's case. The appellate court upheld the trial court's ruling. The procedure adopted by the court in *Tranchell* is consistent with that perscribed for federal courts by the Jencks Act.[39]

There is merit in the contention that a defendant should not be allowed to inspect reports which will disclose information about crimes other than the one with which he is charged. Yet a complete denial of inspection is not consistent with the general rule regarding the use

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[31]*See, e.g.*, Anderson v. State, 239 Ind. 372, 156 N.E.2d 384 (1959); State v. Martin, 250 La. 705, 198 So. 2d 897 (1967); State v. Hale, 371 S.W.2d 249 (Mo. 1963).

[32]25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).

[33]*Id.* at 191.

[34]*See, e.g.*, People v. Santora, 51 Cal. App. 2d 707, 125 P.2d 606 (1942) (confidential, inadmissible in evidence); State v. Zimnaruk, 128 Conn. 124, 20 A.2d 613 (1941) (privileged, public policy); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964) (adverse effect on law enforcement, confidential material).

[35]197 Kan. 251, 417 P.2d 261 (1966).

[36]*Id.* at 270.

[37]*See, e.g.*, Campbell v. United States, 373 U.S. 487 (1963); State v. Tranchell, 412 P.2d 520 (Ore. 1966); State v. Richards, 21 Wis. 2d 622, 124 N.W.2d 684 (1963).

[38]412 P.2d 520 (Ore. 1966).

[39]18 U.S.C. § 3500 (1964).

of a prior inconsistent statement for impeachment. The procedure adopted by the court in *Tranchell*[40] and set forth in the Jencks Act adequately protects the state's interest in the investigative process and allows a court to proceed in accordance with the rule allowing impeachment by inconsistent statements.

Conclusion

In discussing whether a state has to reveal the name of an informant,[41] the Supreme Court set forth the most reasonable solution of the problem involved in the right of a criminal defendant to inspect the files of law enforcement agencies. "No fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."[42]

In any criminal proceeding there is but one method of balancing two equally valid, opposing interests, and that is to invest the trial court with a broad power of discretion—reversing its decision only when that power is abused. The court in *State v. White* invested the trial court with such discretion, with the added requirement that it hold a hearing on material prior to exercising that discretion. If, after holding such a hearing, the court decides that justice demands inspection, it may order the material produced. This rule works to protect the integrity of the investigative and enforcement processes and at the same time works to protect the rights of the criminal defendant. It is equally applicable whether inspection is sought as a means of discovery or as a means of possible impeachment.

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[40]State v. Tranchell, 412 P.2d 520 (Ore. 1966).
[41]Roviario v. United States, 353 U.S. 53 (1957).
[42]*Id.* at 62.