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Florida's Proposed Rules of Criminal Discovery--A New Chapter in Criminal Procedure

Charles P. Pillans

Gregory A. Presnell

FLORIDA'S PROPOSED RULES OF CRIMINAL DISCOVERY — A NEW CHAPTER IN CRIMINAL PROCEDURE

Section 3, article V, of the Florida Constitution provides: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." In 1954, the Florida Rules of Civil Procedure were adopted by the supreme court, and in 1962 the supreme court approved the Florida Appellate Rules as revised. The subsequent success of these rules and their beneficial effect on the practice of law in the courts of Florida are generally conceded. Presently, however, only two rules exist concerning criminal procedure,[1] and the Florida Bar, at the request of the supreme court, has recently undertaken to fill this gap. A subcommittee was appointed to draft proposed criminal rules for submission to the supreme court and after more than a year of diligent work the committee has adopted a final draft that has been approved by the Board of Governors of the Florida Bar. This draft, which has been submitted to the supreme court for its consideration, represents a significant effort toward the eventual obtainment of complete justice and fairness in criminal proceedings.

The proposed rules contain a number of substantial innovations. One such innovation — criminal discovery — is the subject of this note. The proposed rules pertaining to criminal discovery are comprehensive and far-reaching and are in line with the recent trend toward more liberalized discovery in criminal cases. They not only fill the gaps of existing statutory and case law, but give both the defendant and the state discovery devices previously unknown. They are an attempt to alleviate, if not eliminate, the existing inequities of criminal procedure.

But, like all innovations of substantial significance, these proposed discovery rules are highly controversial. It is, of course, to be expected that defense attorneys will strive toward the obtainment of more discovery rights for criminal defendants. It is equally obvious that prosecuting attorneys will resist most such attempts and will ask in return for more discovery rights in their own favor. This apparent conflict in respective interests has resulted in a compromise approach toward criminal discovery in the proposed rules. This willingness to compromise indicates the objectivity with which the subcommittee approached this controversial subject.

The traditional reasons for denying criminal discovery: (1) that it would subvert the system of criminal law;[2] (2) that it would increase

1. FLA. R. CRIM. P. 1, 2 (1965).
2. United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923).

perjured testimony;[3] and (3) that it is inconsistent with the adversary method[4] have all been ably refuted by numerous commentators.[5] The crucial question today is not whether there should be any criminal discovery at all; that there is a place for some discovery is generally conceded. Rather, the question is: How much discovery should there be?[6] The purpose of this note is to evaluate objectively the proposed Florida rules; to ascertain whether they go far enough or too far; and to consider their effect on criminal justice in light of the above arguments.

DISCOVERY RULES[7]

The major procedural devices for discovery by both the prosecution and the accused are embodied in Rule 22 of Florida's proposed rules of criminal procedure. Paragraph (a) provides for discovery of statements or confessions, results or reports of physical or mental examinations, and the defendant's recorded testimony before the grand jury. Rule 22 (b) provides for production of other documents and tangible items and paragraph (c) gives the state a reciprocal right of discovery. Paragraphs (d) and (e) concern the exchange of lists of witnesses and Rule 22 (f) provides for discovery depositions. In addition, Rules 20 and 21 provide for notice of the defenses of alibi and insanity.[8]

3. State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953).

4. State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186, 192 (1910).

5. See, *e.g.*, Datz, *Discovery in Criminal Procedure*, 16 U. FLA. L. REV. 163 (1963); 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, 1172-98 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961).

6. Grady, *Discovery in Criminal Cases*, 1959 U. ILL. L.F. 827.

7. For discussion purposes, these rules will not be considered in their proper numerical sequence.

8. As an adjunct to these discovery rules indictments and informations are also simplified and made more meaningful by Rule 14. Section 14 (b) requires "a plain, concise, and definite written statement of the essential facts constituting the offense," including the official or customary citation of the statute or other provision violated. In addition, the time and place of the commission of the offense must be given as definitely as possible. Rule 14 (d) (1) (3). Rule 14 (n) limits the discretion of the trial judge in granting bills of particulars, requiring that the court *shall* order the prosecutor to furnish a bill of particulars when the indictment or information fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Any reasonable doubt concerning the construction of this rule is to be resolved in favor of the defendant. Within the context of the discovery rules, a more precise accusatorial writ and more liberal use of bills of particulars will make the defense counsel's initial task of utilizing the discovery rules an easier one.

Confessions: Rule 22 (a) (1)

A party preparing his defense to a criminal prosecution is often confronted with the necessity of overcoming the incriminating effects of a statement that he has voluntarily given the government.[9] But in accord with the common law view, it has generally been held that an accused is not entitled, as a matter of right, to inspect his own statements, memoranda, or confessions.[10] Although Florida is one of a minority of states that allows, by statute, the pretrial discovery of certain tangible objects[11] the Florida Supreme Court held, in *Williams v. State*,[12] that the defendant's confession was not among the enumerated documents.

In 1963, the legislature rectified the situation by enacting Florida Statutes, section 925.05, which was not only an innovation in the law of Florida, but was one of the first formal legislative expressions in the country giving an accused the right to inspect and copy or photograph his own written or recorded statements or confessions whether signed or unsigned.[13] The statements covered by this statute are those only of a substantially verbatim nature taken contemporaneously with their verbal utterance; and not incomplete notes or impressions of what defendant had said.[14] The first section of Florida's proposed Rule 22 (a) is substantially the same as Florida Statutes, section 925.05.

Although the proposed Florida rule is in line with the decided trend toward liberalization of discovery procedures in criminal cases, many states still adhere to the common law view and do not allow the defendant the right to inspect his own statements or confessions.[15] The case most often cited for this position is the New Jersey case of *State v. Tune*[16] in which Justice Vanderbilt expressly denounced the practice on the ground that discovery would often lead to perjury and the suppression of evidence. Justice Brennan, however, now on the Supreme Court of the United States, strongly dissented. He refuted the perjury rationale at great length, calling it an anchronistic ap-

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9. Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957).

10. 23 C.J.S. *Criminal Law* §955 (2) (c) (1961).

11. FLA. STAT. §925.04 (1965).

12. 143 Fla. 826, 197 So. 562 (1940).

13. 1963-1964 FLA. ATT'Y GEN. BIENNIAL REP. 269. For other state statutes giving the defendant the right to discover his own statements or confessions see DEL. SUPER. CT. (CRIM.) R. 16 (1953); M4. R.P. 728 (1963); PA. R. CRIM P. 310 (1965); TENN. CODE ANN. §40-2441 (Supp. 1965).

14. 1963-1964 FLA. ATT'Y GEN. BIENNIAL REP. 269.

15. See, *e.g.*, Kinder v. Commonwealth, 279 S.W.2d 782 (Ky. 1955); State v. Leland, 190 Ore. 598, 227 P.2d 785 (Ore. 1951), *aff'd*, 343 U.S. 790 (1952).

16. 13 N.J. 203, 98 A.2d 881 (1953).

prehension.[17] It shocked his sense of justice that in these circumstances an accused facing a possible death sentence should be denied inspection of his own confession.[18] Several years later, in *State v. Johnson*,[19] the New Jersey court seemed to accept Justice Brennan's position. Although the court adopted an intermediate view that inspection lies within the trial court's discretion, it noted that simple justice requires that a defendant be prepared to meet what looms as the critical element of the case against him.[20]

Other states have followed this view and have allowed discovery when the circumstances are such that the interests of justice will be best served by allowing the defendant before trial to have a copy of his confession.[21] In California the absolute right of the defendant to inspect any statement that he has made to the police now seems settled.[22] Louisiana, in a noted case, held that discovery of the defendant's confession is a constitutional right.[23] The court saw no necessity for following the common law rule merely because other states in the Union continue to do so and held that the refusal to produce the confession was tantamount to depriving the defendant of a fair and impartial trial.[24]

The federal courts, however, have generally refused to follow this trend. Before the adoption in 1965 of the amendment to Rule 16, the right of a defendant to discover his pretrial statements under the federal rules of criminal procedure was confusing and uncertain.[25]

17. *Id.* at 894.

18. *Id.* at 896.

19. 28 N.J. 133, 145 A.2d 313 (1958).

20. *Id.* at 316. Since the *Johnson* decision the ordinary procedure in New Jersey has been to give defendants copies of their own statements as a matter of course and the New Jersey court has recently noted that nothing has been brought to their attention to suggest that this has impaired any prosecutions or has failed to promote justice. State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965).

21. See, *e.g.*, People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Superior Court, 106 N.H. 228, 208 A.2d 832 (1965).

22. Louisell, *Criminal Discovery, Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 74 (1961). See, *e.g.*, Cash v. Superior Court, 53 Cal. App. 2d 72, 346 P.2d 407 (1959).

23. State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945).

24. *Id.* at 285. Subsequent cases, however, have severely restricted the application of this right in Louisiana to written confessions only. See, *e.g.*, State v. Pailet, 246 La. 483, 165 So. 2d 294 (1964).

25. Discovery of defendant's statements has been sought under both Rules 16 and 17(c) of the Federal Rules of Criminal Procedure. The great weight of authority treated confessions as outside the ambit of former Rule 16, which permitted the defendant only to inspect books, papers, documents, or other tangible objects obtained from the defendant or other by seizure or process. Kaufman, *supra* note 9, at 1114. See, *e.g.*, Shores v. United States, 174 F.2d 838 (8th Cir. 1949). *But cf.* United States v. Peace, 16 F.R.D. 423, 424 (S.D.N.Y. 1954). Although some courts have allowed inspection under Rule 17(c), which provides that a subpoena may

Although a majority of the federal courts held that confessions did not fall within the scope of the federal rules, the federal courts were not precluded from allowing inspection of a defendant's confession. In *Shores v. United States*,[26] the court held that under its inherent power to administer justice in the federal courts it could permit discovery. It noted that perhaps as a matter of fundamental fairness, a defendant ought, in enlightened criminal administration, to be granted the right to have a copy of his confession in any case.[27]

This belief has been embodied in the 1965 amendments to the Federal Rules of Criminal Procedure. Under the advisory committee's revision of Rule 16, the defendant is apparently automatically entitled to inspect and copy his own pretrial statements in whatever form.[28] This rule as amended is substantially the same as that proposed by Florida Rule 22 (a) (1), and both are a realization that a fair and impartial trial includes the right of an accused to examine one of the strongest forms of evidence that may be used against him. Effective representation by counsel may be almost impossible in many instances without knowledge before trial of the details of statements made by the defendant to police officers after he was first taken into custody. The argument that such a practice will increase perjured testimony is not well founded. Any such fear should be alleviated in light of the great success of the Civil Rules.[29] The possibility of perjury would seem to exist whether or not the defendant knew beforehand the specific contents of the pretrial statement. In any event the harm that might result from allowing discovery of pretrial statements seems small indeed in comparison with the good to be achieved therefrom in preventing an unjust conviction.[30]

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command the production of documents, et cetera, *e.g.*, Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953), the weight of authority is to the contrary, and the commentators hold the view that Rule 17 (c) was not intended as a discovery device. Kaufman, note 9 *supra*; Note, *The Scope of Criminal Discovery Against the Government*, 67 HARV. L. REV. 492 (1954); Note, *The Right of an Accused to Obtain Pre-Trial Inspection of His Confession*, 48 J. CRIM. L., C. & P.S. 305 (1957). See United States v. Bowman Dairy Co., 341 U.S. 214 (1951) in which the Supreme Court held that Rule 17 (c) is not a discovery device.

26. 174 F.2d 838 (8th Cir. 1949); Annot., 11 A.L.R.2d 635 (1950).

27. *Id.* at 844-45. The United States Supreme Court has also noted that such may be the better practice. LeLand v. Oregon 343 U.S. 790 (1952). The broad implications of a recent Supreme Court decision, moreover, reveal that denial of discovery of evidence favorable to the defendant will be a violation of due process. Brady v. Maryland, 373 U.S. 83 (1963).

28. FED. R. CRIM. P. 16 (a) (1).

29. There is no reason or proof to substantiate the belief that the hazard of perjury is so much greater in criminal cases than in civil ones. State v. Tune, 13 N.J. 203, 98 A.2d 881, 894 (1953) (Brennan, J. dissenting).

30. See Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477, 507.

Grand Jury Testimony: Rule 22 (a) (3)

Traditionally, the proceedings before a grand jury have been cloaked in a veil of secrecy;[31] and a person charged with a crime has not been entitled, either before or at the time of trial, to the minutes of evidence before the grand jury.[32] In Florida, this policy of grand jury secrecy has been preserved by statute. Florida Statutes, section 905.27, prohibits persons appearing before the grand jury from disclosing the testimony of a witness examined before the grand jury or other evidence received by it, but notes three exceptions: (1) except when required to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether his testimony is consistent with that given before the court;[33] (2) except to disclose the testimony of a witness charged with perjury in giving his testimony; and (3) except when permitted by the court in the furtherance of justice. The Florida Supreme Court has found only the second exception applicable to pretrial discovery of grand jury minutes and in a recent case stated: "[E]xcept as to grand jury testimony upon which a charge of perjury or subornation of perjury is based — an accused in a criminal case has no right to inspect, in advance of trial,

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31. The reasons for the policy of secrecy were stated by the Florida Supreme Court in Minton v. State, 113 So. 2d 361, 365 (Fla. 1959): to protect the jurors themselves; to promote a complete freedom of disclosure; to prevent the escape of a person indicted; to prevent the subornation of perjury; and to protect the reputations of persons against whom no indictment is found.

32. United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923); State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910). See 6 WIGMORE, EVIDENCE §1850 (3d ed. 1940).

33. Although this exception has been interpreted as a constitutional right, State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936), its use has been curtailed by the existence of difficult procedural requirements. Before defense counsel may obtain the grand jury testimony, he must first establish a proper predicate or show a "particularized need" for the grand jury minutes, and this showing must not be based on mere surmise or speculation that the witness's testimony is inconsistent. See Minton v. State, 113 So. 2d 361, 365 (Fla. 1959). Only when this predicate has been properly established does the trial judge have the duty of examining the grand jury testimony with a view to making a determination of its materiality before turning it over to defense counsel for his use in cross-examination. Jackman v. State, 140 So. 2d 627 (3d D.C.A. Fla. 1962). Since defense counsel does not have access to the grand jury testimony, it will be difficult, if not impossible, to establish a predicate that is not based on mere speculation that the witness's testimony is inconsistent. The requirement is therefore logically difficult to support and has come under recent attack in other courts. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 408 (1959) (Brennan, J. dissenting); State v. DiModica, 40 N.J. 404, 192 A.2d 825, 829 (1963). For an excellent discussion of the Florida cases see Note, *Discovery in Criminal Proceedings*, 13 U. FLA. L. REV. 242, 245 (1960).

the grand jury testimony of the witness who will be called by the state to testify against him for the purpose of preparing his defense."[34]

It is obvious, therefore, that in Florida the defendant's right to inspect the grand jury testimony before trial is quite limited. Despite a recent trend toward relaxation of the secrecy rule prior to trial in a few state courts,[35] and the existence of several state statutes that permit pretrial disclosure of grand jury minutes,[36] the proposed Florida rule lifts the veil of secrecy in only one instance. Rule 22 (a) (3) merely permits the defendant to inspect and copy or photograph his own recorded testimony before the grand jury.[37] Since Florida Statutes, section 905.27, prohibits the disclosure of the witness's own testimony before a grand jury, except in perjury cases,[38] this provision is a slight enlargement upon the present practice. From a practical standpoint, however, it is merely an extension of Florida Statutes, section 925.05, and its parallel proposed rule,[39] which allows the defendant to inspect his own statements or confessions.[40] Obviously, the policy that favors pretrial disclosure to a defendant of his statements to government agents also supports pretrial disclosure of his testimony before a grand jury.[41]

Although this proposal may be of some benefit to the defendant by enabling his counsel to properly prepare to meet any disclosure that he made before the grand jury, it will not significantly expand his present discovery rights. The testimony of state witnesses before the grand jury will still be kept secret under the proposed Florida rules and will not be available to defense counsel for use in preparing his defense. While it may be argued that the traditional reasons for secrecy are no longer applicable after the indictment is returned and the accused is in custody,[42] the failure of the proposed rules to permit

34. Minton v. State, 113 So. 2d 361, 364 (Fla. 1959); *accord,* Gordon v. State, 104 So. 2d 524 (Fla. 1958). Note, however, FLA. STAT. §902.11 (1965) allows the defendant to secure a copy of the transcript of all testimony taken at the preliminary hearing, but only if it is reduced to writing at the prosecutor's request. Baugus v. State, 141 So. 2d 264 (Fla. 1962). This provision has been incorporated in the proposed rules. See Rule 12 (K).

35. *E.g.,* State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959); State v. Clement, 40 N.J. 139, 190 A.2d 867 (1963); State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959).

36. CAL. PEN. CODE §938.1; IOWA CODE ANN. §772.4 (1950); KY. R. CRIM. P. 5.16; MINN. STAT. ANN. §628.04 (1947).

37. This is the same as the 1965 amendment to Rule 16 of the Federal Rules of Criminal Procedure, Rule 16 (a) (3).

38. 1957-1958 FLA. ATT'Y GEN. BIENNIAL REP. 523.

39. FLA. R. CRIM. P. 22 (a) (1) (final draft 1966).

40. See Committee Note, FLA. R. CRIM. P. 22 (a) (3) (final draft 1966).

41. See Advisory Committee's note, 1964 proposed amendments, FED. R. CRIM. P. 16 (a) (3). 34 F.R.D. 411 (1964).

42. See Seltzer, *Pre-Trial Discovery of Grand Jury Testimony in Criminal*

pretrial discovery of grand jury testimony probably will not result in hardship or injustice to the defendant because the rules provide other means by which the accused can learn of the substance of the testimony that will be presented at trial.[43] Thus, within the total context of the discovery rules, the necessity of securing the grand jury testimony for the purpose of preparing a defense will be greatly reduced.

Tangible and Documentary Evidence: Rules 22 (a) (2) and (b)

In many cases, the most damaging evidence against a defendant may be the fingerprints, ballistics tests, FBI reports, and other tangible documentary or scientific evidence in possession of the state. Even if these reports may not be admissible at trial, their results often prove innocence as well as guilt and for that reason may be quite vital to the defendant in preparing his defense.[44]

At common law, the accused was conceded no right to inspect chattels or documents in the control of the prosecution.[45] Although several states still adhere to the common law view,[46] there has been a growing tendency for courts to allow discovery of scientific reports and other documentary evidence.[47] Some courts have held that the trial court has a residuum of inherent power to order production and inspection of such evidence, despite the absence of any statutory authority.[48] Some states have provided by statute for the discovery of tangible evidence;[49] and two of the states, which formerly adhered

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Cases, 66 DICK. L. REV. 379 (1962); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

43. See discussion of Rule 22 (f) in text following subheading *Depositions: Rule 22 (f)*.

44. Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 131 (1962).

45. See 6 WIGMORE, EVIDENCE §§1859 (g), 1863 (3d ed. 1940).

46. *E.g.*, Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952); Parker v. State 164 Neb. 614, 83 N.W.2d 347 (1957).

47. In several cases courts have pointed out the inapplicability of the perjury argument in regard to discovery of tangible objects, since such evidence is not subject to tampering or to refutation by perjury. *E.g.*, State v. Cook, 43 N.J. 500, 206 A.2d 359 (1964); People v. Stokes, 24 Misc. 2d 255, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960).

48. See, *e.g.*, State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (4th D.C.A. 1959); State v. Winsett, 200 A.2d 237 (Super. Ct. Del. 1964); State v. Superior Court, 106 N.H. 228, 208 A.2d 832 (1965); State v. Cook, 43 N.J. 560, 206 A.2d 359 (1964); People v. Stokes, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960); *In re* Di Joseph's Petition, 394 Pa. 19, 145 A.2d 187 (1958); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).

49. ARIZ. R. CRIM. P. 195 (1956); DEL. SUPER. CT. (CRIM.) R. 16 (1953);

to the strict common law view,[50] have recently enacted legislation granting the defendant a limited right of discovery.[51]

In the federal courts, criminal discovery is generally governed by Rule 16 of the Federal Rules of Criminal Procedure. Prior to 1965, the federal courts imposed severe restrictions on the application of this rule[52] and discovery under the rule was allowed only in isolated cases.[53] Although Rule 16 was substantially amended in 1965, the limited effectiveness of the former rule as a discovery device is significant in state practice since most of the state statutes permitting discovery are based on it.[54] The inadequacy inherent in the former federal rule is thus present in the state statutes as well.

Under the 1965 amendment to federal Rule 16, discovery is no longer limited to items obtained from or belonging to the defendant or obtained from others by seizure or process.[55] This will remedy the restrictive influence of the former rule in the federal courts and will expand the defendant's right to discover books, papers, documents, or tangible objects in possession of the Government. The amendment is significant because the federal courts have had extensive experience with discovery in criminal cases; therefore, a recommendation of expansion can only be taken as an expression of confidence in the practical utility and soundness of the procedure.[56] Evidence of this view may be found on the state level as well. In a recent Dela-

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IDAHO CODE ANN. §R 19-1530 (Supp. 1961); MD. R.P. 728 (1963); VT. STAT. ANN. tit. 13, §6727 (Supp. 1965).

50. Kinder v. Commonwealth, 279 S.W.2d 782 (Ky. 1955); Freeman v. State, 166 Tex. Crim. 626, 317 S.W.2d 726 (Crim. App. 1958).

51. KY. R. CRIM. P. 7.22 (1963); TEX. CODE CRIM. P. art 39.14, Vernon's Tex. Session Law Service pamphlet No. 7 (1966).

52. Prior to 1965, Rule 16 provided that the court may order the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents, or other tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

53. The restrictive interpretation of Rule 16 generally stemmed from the phrase, "obtained from or belonging to the defendant or obtained from others by seizure or process." Under this interpretation it has been held that confessions, F.B.I. reports, grand jury proceedings, et cetera were not discoverable under this rule. See, *e.g.*, United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946). Use of Rule 16 as a discovery device was therefore limited; and it has even been suggested that the rule was not designed to facilitate discovery of documents crucial to the preparation of a defense, but rather to protect the property right of the defendant in objects belonging to him. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 234 (1964).

54. See statutes cited note 49 *supra*.

55. See FED. R. CRIM. P. 16 (b).

56. Bradshaw, *Discovery in Criminal Cases: the Problem in Texas*, 1 HOUS. L. REV. 158, 165 (1963).

ware case[57] the court refused to follow the restrictive interpretation of its rule, which is similar to the former federal Rule 16. The court instead adopted, as a better procedure, the substance of the amended rule as then proposed by the federal advisory committee.

Florida has a unique statute that permits more liberal discovery of tangible evidence than the former federal rule and similar state statutes. Florida Statutes, section 925.04,[58] provides that the court *may* order the state to permit the defendant to inspect designated papers, books, accounts, letters, photographs, objects, or other tangible things. It also provides that the defendant shall be permitted to be present or have present an expert of his own selection during the course of any examination conducted by representatives of the state as to ballistics, fingerprints, blood, semen, and other stains.

At first blush, this statute seems to be very comprehensive, but judicial interpretation has been to the contrary.[59] In the first case to arise under the statute the court denied the defendant the right to inspect his own confession.[60] Subsequent cases have reinforced this restrictive interpretation and have limited the items discoverable thereunder.[61] Thus, although obtaining the statements of prospective state witnesses before trial may be essential to preparation of the defendant's case, the Florida courts have denied such discovery under the statute on the ground that it would be an invasion of the prosecuting attorney's "work-product."[62] Similarly, secret tape recordings taken by the prosecutor have been deemed not discoverable on the same rationale.[63]

57. State v. Winsett, 200 A.2d 237 (Super. Ct. Del. 1964).

58. Formerly FLA. STAT. §909.18 (1961).

59. For excellent discussions of this statute, see Datz, *Discovery in Criminal Procedure*, 16 U. FLA. L. REV. 163 (1963); Note, *Discovery in Criminal Proceedings*, 13 U. FLA. L. REV. 242 (1960).

60. Williams v. State, 143 Fla. 826, 197 So. 562 (1940).

61. *But see* State v. Shouse, 177 So. 2d 724 (2d D.C.A. Fla. 1965) in which the court upheld the trial court's order requiring the state to submit for inspection and copying by the defendant all documents and legal papers that the state intended to use at trial.

62. Raulerson v. State, 102 So. 2d 281 (Fla. 1958); McAden v. State, 155 Fla. 523, 21 So. 2d 33 (1945); Jackman v. State, 140 So. 2d 627 (3d D.C.A. Fla. 1962); Bedami v. State, 112 So. 2d 284 (2d D.C.A. Fla. 1959). *But cf.* Smith v. State, 95 So. 2d 525 (Fla. 1957). See also State v. Shouse, 177 So. 2d 724 (2d D.C.A. Fla. 1957). For a good discussion of this problem in Florida, see Note, *Defendant's Right To Inspect Written Statements of Prosecution Witnesses*, 11 U. FLA. L. REV. 107 (1958). Very few states authorize a defendant to inspect the statements of prosecution witnesses. California, however, has abrogated the rule. See, *e.g.*, Funk v. Superior Court, 52 Cal. App. 2d 423, 340 P.2d 593 (1959). The federal position in this regard is governed by 28 U.S.C. §3500 (1957), which provides that no statement shall be the subject of discovery until the witness has testified on direct examination.

63. Peel v. State, 154 So. 2d 910 (2d D.C.A. Fla. 1963).

Although the defendant or an expert of his choice are permitted to be present during the course of any examination conducted by the state, this right to be present may be meaningless since these experiments or examinations are often conducted before the defendant is represented by counsel. Furthermore, it has been held under the statute that reports of such examinations may not be inspected by the defendant in advance of trial.[64] Thus, defendant will in effect often be denied any right to ascertain the nature of such evidence before trial.

The proposed Florida rules would significantly expand the scope of pretrial discovery of tangible evidence and would eliminate the inadequacies of the present statute and the restrictive interpretation placed upon it by the courts. Proposed Rule 22 (a) (2) would permit the defendant to inspect and copy or photograph results and reports of physical or mental examinations and of scientific tests or experiments made in connection with the case.[65] Under this rule, the defendant would no longer be precluded from ascertaining the nature of experiments and examinations conducted by the state merely because he or an expert of his choice was not present at the time. The FBI ballistics report held nondiscoverable in a recent case,[66] and the drunkometer report, which the attorney general held to be without the scope of the present statute,[67] would now be produced for defendant's inspection. Fingerprints and handwriting comparisons would also be subject to discovery under this proposal.[68] Since such items often loom large in the determination of guilt or innocence, and are generally beyond the investigative resources of the defendant, adoption of this proposal would help remedy a present injustice in Florida law.

Proposed Rule 22 (b) is essentially a restatement of Florida Statutes, section 925.04, but two changes have been effected that may broaden defendant's present discovery rights:

> (1) the phrase "the court *may* order" production has been changed to, "the court *shall* order" production. (Emphasis added.) Since the Florida court had previously held that the allowance of discovery was a matter of trial court discretion,[69] this will clarify

64. Ezzell v. State, 88 So. 2d 280 (Fla. 1956). The attorney general has also held that a drunkometer report is not discoverable under the statute. 1957-1958 FLA. ATT'Y GEN. BIENNIAL REP. 83.

65. This provision is substantially the same as FED. R. CRIM. P. 16 (a) (2) (as amended 1965).

66. Ezzell v. State, 88 So. 2d 280 (Fla. 1956).

67. 1957-1958 FLA. ATT'Y GEN. BIENNIAL REP. 83.

68. See Advisory Committee's Note, 1964 proposed amendments, FED. R. CRIM. P. 16 (a) (2). 34 F.R.D. 411 (1964).

69. Padgett v. State, 16 Fla. 389, 59 So. 946 (1912).

the fact that discovery of such documentary items and tangible objects is an absolute right.

(2) To the phrase "other tangible things" in the existing statute has been added the words, "of whatsoever kind or nature." Although this addition may expand the defendant's right to discover such evidence, the extent of such expansion is a matter of speculation.

If the courts continue to adhere to the "work-product" rationale, statements of prosecution witnesses, tape recordings, et cetera, would probably still be excluded from discovery under the proposed rule. Possibly the grand jury transcript could be reached under this provision for inspection before trial, but this is unlikely because the rules notably exclude such a right. Although these items may be important to proper preparation of the defendant's case, their exclusion from discovery in the proposed rules would probably not work a grave injustice in light of the other discovery devices available. The defendant's need for such items, for example, is greatly reduced by his ability to take the deposition of prosecution witnesses as provided in Rule 22 (f). Thus, although Rule 22 (b) falls short of providing complete discovery, it seems quite adequate to meet the needs of the defendant and the ends of justice.

Reciprocal Discovery: Rule 22 (c)

Proposed Rule 22 (c) provides that if the court grants relief sought by the defendant under Rules 22 (a) (2) or (b), it may condition its order by requiring that the defendant permit the state to inspect scientific or medical reports, books, papers, documents, or tangible objects that the defendant intends to produce at trial and which are within his possession, custody, or control.[70] This provision, which gives the prosecution a limited right of reciprocal discovery, affords the state an area of discovery that it previously did not have.

The right of a defendant to discovery procedures in a criminal case has been the subject of much scholarly debate and judicial concern. Only until recently, however, has the debate extended to the reciprocal right of the prosecutor to obtain discovery. Until a landmark California case in 1962, it had generally been taken for granted that reciprocal rights for the prosecutor would be precluded by the defendant's privilege against self-incrimination.[71] But in *Jones v. Superior Court*,[72] the California Supreme Court rejected this reason-

70. This rule is substantially the same as FED. R. CRIM. P. 16 (c) (as adopted 1965).

71. See, *e.g.*, State v. Tune, 13 N.J. 203, 211, 98 A.2d 881, 884-85 (1953) (dictum).

72. 372 P.2d 919 (1962), 58 Cal. Rptr. 2d 56.

ing and opened the door to discovery by the prosecutor. The court held, through Justice Traynor, that the prosecution was entitled to discover the names and addresses of the witnesses whom petitioner intended to call in support of his "affirmative defense" of impotency and any reports and X-ray photographs the latter intended to introduce as evidence at trial.

The decision seemed to be based upon the premise that absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on the issues in the case,[73] and that discovery procedure should not be a one-way street. Accepting this premise as valid, the crucial question becomes: Did the discovery order violate the privilege against self-incrimination? The court was satisfied to answer this contention on the basis of the analogous alibi statutes. This procedure, said the court, merely sets up a wholly reasonable rule of pleading that in no manner compels a defendant to give any evidence other than that he will voluntarily and without compulsion give at trial. Thus, the court held that the order did not violate the privilege against self-incrimination, as it simply required him to disclose information he would shortly reveal in any event.[74]

Although initially this rationale appears sound, there has been much criticism of the *Jones* decision.[75] While the abili statutes would seem to justify the discovery of the names and addresses of the witnesses, they cannot justify production of the medical reports and X-ray photographs because these statutes do not involve the production of documentary evidence. They are more of a pleading device than a method of discovery,[76] and the holding in *Jones* appears to be a repudiation of the well-established rule that the self-incrimination privilege protects all evidence, including the preexisting documents, produced through testimonial compulsion.[77] No longer will all chattels and documents produced in this manner be protected, but only those the accused does not intend to introduce at the trial.[78]

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73. *Id.* at 920, 58 Cal. Rptr. 2d at 59.

74. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 247 (1964).

75. See, *e.g.*, Comment, 15 STAN. L. REV. 700 (1963); Comment, 20 WASH. & LEE L. REV. 159 (1963). *But cf.* Comment, 76 HARV. L. REV. 838 (1963); Comment, 8 VILL. L. REV. 110 (1962).

76. It is interesting to note that the California Legislature recently rejected a proposed alibi statute. Thus, it may be argued that pretrial disclosure should not be required in other instances. See Comment, 76 HARV. L. REV. 838, 842 (1963).

77. See 8 WIGMORE, EVIDENCE §2263, at 379 (3d ed. 1940).

78. See Comment, 51 CAL. L. REV. 135 (1963).

The *Jones* decision has been justified by some on an analysis of the term "affirmative defense." The argument is that an affirmative defense does not directly relate to any part of the state's case and consequently the discovered material cannot be used by the prosecution in establishing its prima facie case. The dissenting judges in *Jones* were concerned with the implications of such a position.[79] In this case, for example, the prosecution was made aware of the defendant's intended defense because of defendant's motion for a continuance. It is unlikely, however, that the California court will allow mere chance to define the prosecutor's right to discovery. Thus, it can be inferred that this discovery process will be augmented by a general interrogatory requiring the defandant to answer whether he intends to rely upon an "affirmative defense."[80] Since any defense other than an attempt to refute the prosecution's witnesses is an affirmative defense,[81] this could mean that nearly all the information a defendant may have accumulated before the time of trial in respect to any "intended" defense would have to be disclosed lest it later be ruled inadmissible when offered by the defendant as evidence.[82] To the dissenting judges, this was opening the door to a general inquiry by the prosecution, which they felt would deprive the accused of his constitutional rights.

It remains to be seen what effect the *Jones* decision will have on the development of criminal discovery. Only the Washington court has followed its lead. In *State v. Grove*,[83] the court upheld an order requiring the defendant to produce a letter written by the defendant, while in jail, to his wife explaining the circumstances of the incident in question. The court held that the inherent power of the trial court to grant discovery was not limited to that which benefits the defendant and seemed to accept the fact that, on the basis of *Jones*, it was not in violation of the defendant's privilege against self-incrimination.

Other courts, however, may be unwilling to follow the *Jones* decision in light of its considerable constitutional objections. An alternative solution to the problem, which may be more acceptable to other courts, would be to base reciprocal discovery on a waiver theory. It has been suggested, for example, that a defendant be required as a condition of a discovery order in his favor to waive his privilege against self-incrimination as to evidence in his hands, which is of approximate equal probative value to that sought.[84] Since dis-

79. Jones v. Superior Court, *supra* note 72, at 925, 58 Cal. Rptr. 2d at 65 (Peters, J. dissenting).

80. *Id.*

81. *Id.*

82. Comment, 15 STAN. L. REV. 700, 707 (1963).

83. 398 P.2d 170 (Wash. 1965).

84. Goldstein, *The State and the Accused—Balance of Advantage in Criminal*

covery has generally been held not to be required by due process,[85] a conditional grant of discovery would seem constitutionally proper. This is the view apparently taken by the committee in proposing Florida Rule 22 (c).

Assuming that constitutional objections may be set aside upon a theory of waiver, the question becomes whether it is desirable to condition the defendant's access to material that will be used against him on his willingness to surrender his constitutional rights.[86] Rule 22 (c) is essentially an attempt at compromise, which rests upon the assumption that recognition of formal discovery rights in a defendant, without a corresponding right in the prosecution, would create an undue procedural imbalance in the defendant's favor.[87] Thus, such a proposal is only justifiable if, in the context of the total fact ascertainment process, the state would otherwise be unduly handicapped.

In determining whether such an imbalance exists between the state and the accused, all the weights on the scales must be taken into account, informal circumstances as well as formal rules.[88] It must be remembered that in the usual case, the state normally has resources, through its investigative process, adequate to secure the information necessary for trial. The defendant on the other hand, often represented by appointed counsel, is usually quite limited in his discovery resources. Although the state's need for discovery procedures is therefore generally less than defendant's, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the state to study the opinions of experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of state's witnesses.[89] In such a case, a conditional grant of discovery as provided

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Procedure, 69 YALE L.J. 1149, 1198 (1960). Judicial support for this position may be found in McCain v. Superior Court, 184 Cal. App. 2d 813, 7 Cal. Rptr. 841 (2d D.C.A. 1960), in which the court held the defendant had waived any right he might have had to prohibit the prosecution from making pretrial discovery against him.

85. See, *e.g.*, Palermo v. United States, 360 U.S. 343, 349 (1959); Cicenia v. Lagay, 357 U.S. 504, 510-11 (1958). *But cf.* Brady v. Maryland, 373 U.S. 83 (1963).

86. See Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317, 325 (1964).

87. See Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 925 (1961).

88. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 86 (1961).

89. Advisory Committee's Note, 1964 proposed amendments, FED. R. CRIM. P. 16 (c). 34 F.R.D. 411, 424 (1964).

in the proposed rule would be advisable in order to prevent either side from securing a procedural advantage.[90]

Rule 22 (c) may therefore be a valuable discovery device in the hands of the prosecution. Unfortunately, however, inherent in the rule is a potential for abuse. If, for example, the rule is invoked as a matter of course, this conditional right of discovery could be used as a weapon against the defendant's own right to discovery under the rules. A defendant seeking discovery, but faced with the necessity of reciprocating, would often be confronted with a dilemma. In order to secure the state's tangible evidence, the defendant would have to permit the state to inspect any of his tangible evidence that he intends to produce at trial. Thus, if the state's evidence is obtained under a conditional grant of discovery, the defendant, on the one hand, would be facing the risk of providing the government with evidence that may cure a deficiency in its case. On the other hand, if this evidence is not provided the state, he would be precluded from presenting this same evidence at trial even though it became important in connection with his own defense.[91] Faced with this dilemma, in those instances when the defendant would not choose to request discovery, the policy of facilitating fact ascertainment through pretrial disclosure of information pertinent to the resolution of factual issues would be frustrated.[92] In effect, this could result in the defendant having less right to discovery under this proposed rule than the unconditional, although more limited, right that he presently has under Florida Statutes, section 925.04.

In the final analysis, the effect of this proposed rule would depend upon the use made of it. If a conditional grant of discovery is made only in those cases in which the state would be unduly handicapped if denied reciprocal discovery, such a rule would be beneficial and advisable. If, however, the rule is used indiscriminately the very purpose of the rule would be thwarted. But, such a potential for abuse should not condemn an otherwise valuable rule. Rather, the burden will be on the courts to exercise sound discretion in making conditional grants of discovery under proposed Rule 22 (c).

Notice of Defense of Alibi: Rule 20

Another reciprocal discovery device, under which the prosecutor is the principal beneficiary, is the requirement that upon written demand by the prosecuting attorney a defendant who intends to offer

90. See State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965).

91. See Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477, 504.

92. Comment, 61 MICH. L. REV. 987 n.22 (1963).

evidence of an alibi shall serve a written notice specifying the place where he claims to have been at the time of the alleged offense and the names and addresses of the witnesses by whom he proposes to establish such alibi.[93] Fourteen states enacted alibi statutes between the years 1927 and 1941.[94] During their early years some doubt was cast on the value of such statutes,[95] but a recent survey of prosecutors in the states that have alibi statutes indicates their operation has been highly successful.[96]

The purpose of requiring notice of the defense of alibi is primarily "to prevent the sudden 'popping-up' of witnesses to prove that the defendant was not at the scene of the crime."[97] Such witnesses are offered after the state has put on its case-in-chief and at a time when the prosecutor has little or no opportunity to check either the credibility of the witnesses or the accuracy of their statements.[98] Since defendants will know that their defense of alibi will be investigated prior to trial, a secondary effect of such a rule would be to deter the use of false alibis. An alibi rule would also save time and money. After the prosecutor has investigated an alibi, he will be prepared either to meet the defense at trial and thus avoid the necessity of seeking a continuance, or will dismiss the case because the alibi has been substantiated. Moreover, an alibi rule should ultimately work to

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93. FLA. R. CRIM. P. 20 (a) (final draft 1966).

94. ARIZ. R. CRIM. P. 192 (1956); IND. ANN. STAT. §§9-1631-33 (1956); IOWA CODE ANN. §777.18 (1958); KAN. GEN. STAT. ANN. §62-1341 (1949); MICH. STAT. ANN. §28.1043-44 (1954); MINN. STAT. ANN. §630.14 (1947); N.J. SUPER. & COUNTY CT. CRIM. PRACTICE R. 3:5-9 (1948); N.Y. CODE CRIM. PROC. 295-L (1935); OHIO REV. CODE ANN. §2945.58 (Page 1953); OKLA. STAT. ANN. tit. 22, §585 (1937); S.D. CODE §34.2801 (1939); UTAH CODE ANN. §77-22-17 (1953); VT. STAT. ANN. §§13-6561-62 (1958); WIS. STAT. ANN. §955.07 (1958). These statutes were enacted in response to several law review articles by Professor Millar: Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L., C. & P.S. 344, 350 (1920); Millar, *The Function of Criminal Pleading*, 12 J. CRIM. L., C. & P.S. 500 (1922), and a recommendation of the American Bar Association, *A.B.A. Proceedings of the Fifty-Seventh Annual Meeting*, 20 A.B.A.J. 647, 651 (1934), as well as the recommendation of several national committees and commissions, see Epstein, *Advance Notice of Alibi*, 66 J. CRIM. L., C. & P.S. 29, 30 nn.17, 18, 19 (1964).

95. Stayton, *Is Specific Notice of the Defense of Alibi Desirable?*, 18 TEXAS L. REV. 151 (1940).

96. Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L., C. & P.S. 29 (1964).

97. People v. Schade, 161 Misc. 212, 216, 292 N.Y. Supp. 612, 617 (Queens County Ct. 1936).

98. In some states, an alibi is considered an affirmative defense that the defendant must establish by a preponderance of evidence, e.g., State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963); Commonwealth v. Johnson, 372 Pa. 266, 93 A.2d 691, *cert. denied*, 345 U.S. 959 (1953), but Florida requires that the evidence need only raise a reasonable doubt in the minds of the jury, Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465 (1920); Knight v. State, 60 Fla. 19, 53 So. 541 (1910).

the advantage of an innocent defendant because the defense will be more credible to the jury after a previous investigation has failed to refute it.[99] If the defendant is guilty, he should not be permitted to go free because of perjured testimony; but if the defendant is innocent, he should not be convicted because of the jury's skepticism of the defense of alibi.

The principal challenge to the alibi statutes has been on the ground that they violate the constitutional protection against self-incrimination, but no state faced with the issue has held an alibi statute unconstitutional.[100] The most thorough opinion on the question[101] met the self-incrimination argument by reasoning that the requirement does not compel the defendant to give any information that will incriminate himself. Rather, the requirement is a reasonable rule of pleading under which the defendant voluntarily gives information that he plans to offer at trial.

In interpreting the statutes, the courts have been careful to preserve the rights of the defendant. If the defendant chooses not to introduce evidence of an alibi, it should be considered reversible error for the prosecutor to read the notice of intention to rely on an alibi or to comment on the failure of the defendant to call alibi witnesses.[102] Moreover, the requirement does not operate to shift the burden of proof, and the prosecutor still must offer evidence placing the defendant at the scene of the crime.[103] If the defendant fails to give the proper notice under the proposed rule, the court may exclude evidence offered to prove the defense.[104] This should not raise an issue of due process because within the constitutional framework criminal procedure is not limited to that which was known at common law.[105] New procedure may be developed and, provided it is not arbitrary,[106] the exclusion of the defendant's evidence for failure

99. See State v. Waid, 92 Utah 297, 67 P.2d 647 (1937). *But see* People v. Wudarski, 253 Mich. 83, 234 N.W. 157 (1931) which permitted the trial judge to disparage alibi testimony despite notice of the defense.

100. People v. Marcus, 253 Mich. 410, 235 N.W. 202 (1931) (constitutionality implied); People v. Wudarski, 253 Mich. 83, 234 N.W. 157 (1931) (constitutionality implied); People v. Shulenburg, 279 App. Div. 1115, 112 N.Y.S.2d 374 (Sup. Ct. 1952); People v. Schade, 161 Misc. 212, 292 N.Y. Supp. 612 (Queen's County Ct. 1936); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495, 30 A.L.R. 2d 476 (1952).

101. People v. Schade, 161 Misc. 212, 292 N.Y. Supp. 612 (Queen's County Ct. 1936).

102. People v. Mancini, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (Ohio Ct. App. 1943).

103. State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963).

104. FLA. R. CRIM. P. 20 (a) (final draft 1966).

105. *E.g.*, Hurtado v. California 110 U.S. 516 (1884).

106. *E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908).

to follow the procedure is not a denial of due process.[107] One other question, which has a bearing on the constitutionality of the rule, is whether the defendant himself may be denied the opportunity to give alibi testimony. The proposed rule assures this right to the defendant by specifically providing that the defendant's own testimony cannot be excluded for failure to give notice of an alibi defense. New York has reached the same result by judicial decision,[108] while Ohio has decided otherwise on the grounds that the defendant has no constitutional right to testify and it is a matter of discretion with the legislature.[109]

Under the proposed rule the prosecuting attorney must initiate the process by making a written demand for notice of the defense.[110] This requirement is based upon the assumption that in most instances the prosecutor can anticipate an alibi defense,[111] and the rule can be justified as a reasonable means of calling the notice requirement to the attention of the defendant. Opponents suggest that by making the demand, the state is inviting the defense,[112] but such an argument is misplaced when it is considered that one of the primary effects of the rule is to eliminate false alibi defenses.

One of the more controversial aspects of the proposed rule is the requirement that the defendant provide names and addresses of the witnesses by whom he proposes to establish the alibi.[113] Such a requirement facilitates the investigation of the prosecuting attorney and, from his point of view is highly desirable. On the other hand,

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107. See People v. La Crosse, 5 Cal. App. 2d 696, 43 P.2d 596 (1st D.C.A. 1935) in which this reasoning was applied to reject a due process challenge to a notice of defense of insanity statute. The requirements of the statute might be considered a rule for the introduction of evidence, Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954), or that the issue was of relevancy on the grounds that if there is no notice, alibi is not an issue in the case, State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).

108. People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (Sup. Ct.), *aff'd*, 289 N.Y. 306, 45 N.E.2d 812 (1942).

109. Smetana v. State, 22 Ohio L. Abs. 165 (Ohio Ct. App.), *appeal dismissed*, 131 Ohio St. 329, 2 N.E.2d 778 (1936).

110. Minnesota, New Jersey, and New York also require a demand by the prosecutor. See statutes cited note 94 *supra*.

111. In State v. Wiedenmayer, 128 N.J.L. 239, 25 A.2d 210 (N.J. Sup. Ct. 1942), New Jersey held the failure of the prosecutor to make the demand relieves the defendant of the obligation of providing notice.

112. For a discussion of the competing arguments, see Epstein, *supra* note 96, at 34.

113. Seven of the fourteen states have the requirement: Arizona, Iowa, Kansas, Michigan, New Jersey, New York, and Wisconsin. Iowa requires the defendant to list not only names and addresses of the witnesses but also their occupation and a statement of what the defendant expects to prove by the testimony of each witness. See statutes cited note 94 *supra*.

the absence of such a provision has not seriously impaired the effectiveness of the alibi statutes.[114] This provision was the primary reason the Advisory Committee of the Federal Rules of Criminal Procedure[115] and the California Bar Association[116] have refused to support an alibi rule. Their fear is that such notice would operate to discourage and intimidate prospective alibi witnesses and thereby injure the defendant's legitimate alibi defense.[117] To ameliorate the possible unfairness of requiring the defendant to provide a list of his alibi witnesses, the proposed rules permit the defendant to demand a list of witnesses by whom the prosecutor intends to place the defendant at the scene of the crime.[118] In its practical effect, however, this provision offers little more to the defendant than that which he could obtain under Proposed Rule 22(e): Exchange of Witness Lists.

The sanction by which the proposed rule is enforced is the discretionary power of the trial judge to exclude the defendant's evidence, other than the testimony of the defendant himself.[119] This sanction, however, may cut both ways as there is authority to the effect that if the prosecutor fails to provide the defendant with a list of his witnesses the trial judge has authority to exclude the state's evidence placing the defendant at the scene of the crime.[120] All other states with an alibi statute utilize this type of sanction with the exception of Oklahoma and Iowa, which merely require that a continuance be granted when proper notice is not given. The proposed rule also provides that for good cause shown, the court may waive the requirements of the rule. This makes the rule sufficiently flexible in the event of an exceptional case; although, to date there has been no reported case in which a trial judge has been reversed for improperly excluding alibi testimony. In fact, the courts have been strict in interpreting the statutes. The requirement of notice has been characterized as "mandatory" in Ohio,[121] and oral notice has in

114. Epstein, *supra* note 96, at 34.

115. See Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477, 498.

116. 36 CAL. STATE B.J. 480, 487 (1961).

117. Everett, *supra* note 115, at 498.

118. This is patterned after N.J. SUPER. & COUNTY CT. CRIM. PRACTICE R. 3:5-9 (1948).

119. See, *e.g.*, Lamar v. State, 195 N.E.2d 98 (Ind. 1964); People v. McFadden, 347 Mich. 357, 79 N.W.2d 869 (1956); People v. Wright, 172 Miss. 860, 16 N.Y.S.2d (Columbia County Ct. 1940); State v. Payne, 104 Ohio App. 410, 5 Ohio Op. 2d 87, 149 N.E.2d 583 (1957).

120. Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954). This ruling was based on the express language of the Indiana statute, but the sanction should be read into the Florida rule.

121. State v. Payne, 104 Ohio App. 410, 5 Ohio Op. 2d 87, 149 N.E.2d 583 (1957).

no case been considered sufficient.[122] Once a defendant has given the notice, he may be bound by the facts recited in the notice,[123] and he cannot evade the rule by labeling "alibi" testimony as testimony to contradict or impeach the state's witnesses.[124]

The proposed rule requires that in his written demand, the prosecutor must "specify as particularly as is known . . . the place, date, and time of the commission of the crime."[125] The information contained in the written notice would probably in most instances, obviate the need for a bill of particulars. However, if the notice is insufficient, there should be no question but that the defendant is entitled to one if a question arises as to the exact time and place of the offense.[126]

The alibi rule can be an effective device to reduce use of false alibis. The rule is primarily for benefit of the prosecutor, but in light of the other liberal discovery procedures given the defendant under the proposed rules, this rule is a reasonable means of assuring that both sides will be fully prepared at trial.

Notice of Defense of Insanity: Rule 21

Rule 21 of the proposed rules incorporates almost verbatim the present Florida law requiring the defendant or his counsel to give notice that he has reasonable grounds to believe that the defendant is insane or that he intends to rely upon the defense of insanity.[127] If the defendant claims he is incapable of standing trial, the court must order a hearing at which experts, who have been appointed by the court to examine the defendant, can be called to testify as to the defendant's mental condition.[128] If the defendant intends to claim insanity as a defense, he must submit a bill of particulars showing as nearly as possible the nature of the insanity he expects to prove and the names of witnesses by whom he expects to prove such insanity.[129] Following the notice, the court may appoint disinterested qualified experts to examine the defendant and these examining experts must be summoned to testify at the trial.[130] The rule does not preclude the

122. Balzliser v. State, 10 Ohio L. Abs. 666 (Ct. App. 1931); State v. Selbach, 268 Wis. 538, 68 N.W.2d 37 (1955).

123. State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495, 30 A.L.R. 2d 476 (1952).

124. State v. Nooks, 123 Ohio St. 190, 174 N.E. 743 (1930).

125. FLA. R. CRIM. P. 20 (final draft 1966).

126. Proposed Rule 14 gives the trial judge little discretion in granting bills of particulars. See discussion note 8 *supra*.

127. FLA. STAT. §§909.17, 917.01, .02 (1965).

128. FLA. R. CRIM. P. 21 (a) (final draft 1966).

129. FLA. R. CRIM. P. 21 (b) (final draft 1966).

130. FLA. R. CRIM. P. 21 (c) (final draft 1966).

state or the defense from calling other expert witnesses to testify and, for good cause shown, the court has the discretion to permit introduction of such testimony despite failure of the defendant to comply with the notice and procedure.[131]

The proposed rule makes no specific provision for enforcement when the defendant fails to give notice or refuses to submit to a psychiatric examination. However, in light of the provision that allows the judge to waive the requirements and permits introduction of evidence, the proposal apparently contemplates that the judge should exclude proffered psychiatric testimony when the defendant has, without good cause, failed to comply with the rule.[132]

This discovery device has found wide acceptance; at least thirty states and the District of Columbia require the defendant to submit to a mental examination when the issue of his mental condition is raised.[133] These insanity statutes have been enacted to balance the interest of the state and the accused.[134] The value of the procedure to the state is obvious. While lay witness's testimony as to the defendant's mental condition is admissible in Florida,[135] expert testimony, based upon examination of the accused, is the normal procedure and is the most persuasive in the minds of the jury.[136] In the absence of a rule or statute requiring notice and an examination, the defendant could create a reasonable doubt of his sanity[137] by calling his own expert witnesses and could then make this plea invulnerable by preventing all inquiry into his mental condition on the part of the state.[138]

These statutes also work to the advantage of a defendant by assuring him a hearing on his mental capacity to stand trial. They also insure that expert testimony will be available to an indigent defendant who would otherwise be unable to afford the testimony of a psychiatrist or psychologist.[139]

Constitutional attacks on the insanity statutes have generally been unsuccessful. The principal challenge has been on the ground that the statutes violate the defendant's privilege against self-incrimination,

131. *Ibid.*

132. There is no Florida case that has considered this issue under FLA. STAT. §909.17 (1965).

133. For an excellent discussion of the state statutes, see State v. Whitlow, 45 N.J. 3, 11, 210 A.2d 763, 767 n.1 (1965).

134. State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965).

135. Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892).

136. See generally Note, *Why Not Bury M'Naghten's Moldy Ghost?*, 12 U. FLA. L. REV. 184, 186 (1959).

137. Johnson v. State, 57 Fla. 18, 49 So. 40 (1909).

138. See State v. Cerar, 60 Utah 208, 207 Pac. 597 (1922).

139. See Gentilli v. Wainwright, 157 So. 2d 419 (Fla. 1963); Hobbs v. Cochran, 143 So. 2d 481 (Fla. 1962).

but this argument is usually rejected on the rationale that the requirement is not compulsory, that the defendant has waived his privilege against self-incrimination, or that the evidence is not in itself incriminating.[140] Yet, the issue is not entirely free from doubt as several recent cases have held that the right against self-incrimination prohibits a compulsory psychiatric interview with the defendant.[141] The courts faced with the issue, however, recognize the value of the insanity statutes[142] and, within the reciprocal discovery philosophy of the proposed rules, the notice of insanity rule should be sustained.[143] Proposed Rule 21 adds nothing new to the Florida law, but it does carry forward an essential discovery device, which can operate to the benefit of the defendant as well as to the state.

List of Witnesses: Rules 22 (d) and (e)

An additional form of reciprocal discovery, set forth in Rules 22 (d) and (e), gives the defendant optional procedures for obtaining a list list of the prosecution witnesses. Although at common law an accused had no right to obtain a list of the state's witnesses prior to trial,[144] nearly every jurisdiction provides by statute for such discovery.[145] The general purpose of these statutes is to safeguard the accused against surprise and unfair advantage by the prosecuting attorney.[146] Traditional notions of a fair trial include the right of a defendant to demand the nature and cause of the accusation and to confront the

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140. See generally Annot. 32 A.L.R.2d 434 (1953) and McVeigh v. State, 73 So. 2d 694 (Fla.), *appeal dismissed*, 348 U.S. 885 (1954).

141. French v. District Ct., 384 P.2d 268 (Colo. 1963); *cf.* People v. English, 31 Ill. 2d 301, 201 N.E.2d 455 (1964). For a full discussion of the question see Danforth, *Death Knell for Pre-Trial Mental Examinations? Privilege Against Self Incrimination*, 19 RUTGERS L. REV. 489 (1965).

142. See State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965).

143. See People v. La Crosse, 5 Cal. App. 2d 696, 43 P.2d 596 (1935); Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884).

144. Rex v. Holland, 100 Eng. Rep. 1248 (1792); Baker v. State, 51 Fla. 1, 40 So. 673 (1906).

145. These statutes fall into three general classes: (1) those that require a list of the witnesses examined before the grand jury, *e.g.*, OKLA. STAT. ANN. tit. 22, §384 (1937); PA. R. CRIM. P. 216 (1965); (2) those that require a list of the witnesses known to the prosecuting attorney, *e.g.*, MICH. STAT. ANN. §28.980 (Supp. 1965), MONT. REV. CODES ANN. §94-6208 (1947), (these statutes are especially appropriate to a prosecution upon information when there is no grand jury indictment and often coexist with (1) above, *e.g.*, KY. R. CRIM. P. 608 (1963)); and (3) those that require a list of all witnesses intended to be produced by the state, *e.g.*, IOWA CODE ANN. §769.4 (1950), MD. ANN. CODE, Rules of Procedure 728 (1963).

146. See, *e.g.*, State v. Williford, 64 Wash. 2d 787, 394 P.2d 371 (1964); People v. Weisberg, 396 Ill. 412, 71 N.E.2d 671 (1947).

witness against him.[147] Since these rights could be made ineffective if the state can conceal the names of its witnesses until the day of the trial,[148] an accused is entitled not only to be confronted with the witnesses in court, but he is entitled to some opportunity to know who is to testify against him.[149] The Florida statute,[150] enacted in 1939 was a recognition of this fact.

Although the law in Florida was inconsistent on this point before adoption of Florida Statutes, section 906.29,[151] it had been recognized that the prosecuting attorney was required as a matter of duty to place upon the back of the indictment the names of the witnesses who testified before the grand jury and upon whose testimony the indictment was found.[152] The Florida statute was a codification of this view. It provides that upon motion of the defendant, the court shall order the prosecuting attorney to furnish the names of witnesses on whose evidence the indictment or information was based. This does not, however, require a trial judge to order the state to furnish a full and complete list of witnesses to be used by the state.[153]

Proposed Rule 22 (d) is simply a restatement of Florida Statutes, section 906.29, except for addition of the requirement that the addresses of the witnesses be given. The defendant is allowed this procedure in any event.[154] Rule 22 (e), however, affords the defendant the additional practice of obtaining a list of all the state's witnesses, as distinguished from merely those on whose evidence the information or indictment is based. But this right is conditioned upon the defendant's willingness to give the state a list of all his witnesses, which therefore makes this provision a form of reciprocal discovery. The defendant initiates the process by filing a written offer to furnish the prosecution a list of all witnesses he expects to call at trial. After the defendant's offer, the prosecutor must furnish the defendant with a list of all witnesses known to him to have information that may be relevant to the offense charged. The defendant must then reciprocate by furnishing his list of witnesses. There should be no constitu-

147. FLA. CONST., Decl. of Rights §11. In Pointer v. Texas, 380 U.S. 400 (1964) the United States Supreme Court held that the sixth amendment guarantee of the rights of an accused to confront the witnesses against him was a fundamental right obligatory on the states by the fourteenth amendment.

148. State v. District Court of First Judicial Dist., 124 Mont. 249, 220 P.2d 1035, 1042 (1950).

149. 8 ALI PROCEEDINGS 134 (1930).

150. FLA. STAT. §906.29 (1965).

151. *Compare* Murray v. State, 25 Fla. 528 (1889), *with* Padgett v. State, 64 Fla. 389, 59 So. 946 (1912). See Comment, 7 U. FLA. L. REV. 113 (1954).

152. Lee v. State, 115 Fla. 30, 37, 155 So. 123, 126 (1934).

153. Ezzell v. State, 88 So. 2d 280 (Fla. 1956); Shields v. State, 64 So. 2d 271 (Fla. 1953). *Cf.* State v. Shouse, 177 So. 2d 724 (2d D.C.A. Fla. 1965).

154. Committee Note, FLA. R. CRIM. P. 22 (d), (e) (final draft 1966).

tional objection to this procedure since the defendant by starting the process may be deemed to have waived his privilege against self-incrimination.

Only one jurisdiction has a statute similar to the proposed Florida rule. Under the Washington Code, each of the parties to a criminal action is required to provide his adversary with a list of witnesses who will be called at trial, regardless of the character of the defense.[155] This statute thus provides for a reciprocal exchange, but production of the prosecutor's list is not conditioned upon the defendant first offering to produce his list, as provided by the Florida rule. Although its constitutionality has been upheld,[156] the statute has been of questionable value. The cases interpreting the statute indicate that the Washington courts have been very liberal in sustaining the action of trial courts in permitting the state to use witnesses whose names have not been furnished to a defendant.[157]

In light of the Washington experience, it is obvious that in order to be effective this procedure must be coupled with a sufficient sanction against noncompliance. Proposed Rule 22(g) provides such a sanction. If a party fails to comply with the rules, or with an order issued pursuant to the rules, the court may order the defaulting party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing into evidence the material not disclosed, or enter such other order as it deems just under the circumstances. This apparently gives the court wide discretion in dealing with noncompliance. Such discretion will permit the court to consider the reasons disclosure was not made, the extent of the prejudice, if any to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.[158]

Proposed Rule 22(g) also requires that if a party discovers additional material, which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly notify the other party or his attorney of existence of the additional material. This requirement of a continuing duty to disclose is obviously necessary in order to make the preceeding discovery rules effective. Under the existing discovery statute,[159] it has been held the state is not required to make available discoverable evidence found subsequent to the discovery order, unless the de-

155. WASH. REV. CODE ANN. §10.37.030 (1951).
156. State v. Sickles, 144 Wash. 236, 257 Pac. 385 (1927).
157. State v. Willis, 37 Wash. 2d 274, 223 P.2d 453 (1950).
158. See Advisory Committee Note, 1964 proposed amendments, FED. R. CRIM. P. 16(g). 34 F.R.D. 411 (1964).
159. FLA. STAT. §925.04 (1965).

fendant files another motion for that purpose.[160] Under the proposed rules, however, if either attorney learns of additional witnesses who may have information relevant to the case, or any other discoverable evidence previously sought, he must make these available. If he knowingly fails to comply with this provision, the court would be justified in excluding such evidence.

While the requirement that the prosecutor submit a list of witnesses is mandatory if the defendant first offers to do the same, it is not an absolute requirement. The prosecuting attorney may, prior to filing his list of witnesses, move the court for a protective order as provided in subsection (h) of Rule 22. Such an order may be necessary, for example, in order to protect the identity of a confidential informant. This rule would not affect the present case law, which allows identity of an informer to be concealed on grounds of public policy unless such disclosure is material to the issue or necessary to meet the ends of justice.[161] If, however, the confidential informer is to be used as a witness his identity must be disclosed.[162]

This list of witnesses' requirement is obviously a valuable discovery device for both the state and the accused. The defendant maintains his existing right to discover the witnesses upon whom the indictment or information is based.[163] In addition, if he is willing to reciprocate, the defendant has opportunity to discover the names of all relevant witnesses. This procedure would have the beneficial effect of eliminating surprise on either side and would allow the state a method of discovery, which it previously did not have. Since the defendant would have the right to obtain a list of essential witnesses in any event, the conditional right to secure all the prosecution's witnesses could not be effectively used as a weapon against his own discovery rights. Moreover, from a practical standpoint, this rule is necessary in order to effectuate the other proposed rules. The right to take the deposition of a witness, for example, would be of little practical value if the identity of such witness is not known.

Depositions: Rule 22 (f)

Rule 22 (f) of the proposed rules, giving the defendant the right to take discovery-depositions, offers the accused a means of discovery unknown at common law[164] and almost unique among the American

160. Belger v. State, 171 So. 2d 574 (1st D.C.A. Fla. 1965).
161. See, *e.g.*, State v. Hardy, 114 So. 2d 344 (1st D.C.A. Fla. 1959).
162. Committee Note, note 154 *supra*.
163. Proposed Rule 22 (d). Presently FLA. STAT. §906.27 (1965).
164. State v. Lampp, 155 So. 2d 10 (2d D.C.A. Fla. 1963), *appeal dismissed*, 166 So. 2d 891. (1964).

jurisdictions.[165] The use of depositions as a means of discovering what a witness will testify to at trial was first made generally available in civil actions in Florida by statute in 1947[166] and was carried forward into the Florida Rules of Civil Procedure in 1954.[167] No one can seriously contend that the civil rules have not been an invaluable tool in civil procedure, making all the relevant facts available to the parties, and thus rendering surprise at trial practically impossible.[168] Despite this experience, use of the deposition as a discovery device has remained totally unavailable or severely limited in the criminal law.

The great majority of states,[169] and the federal courts,[170] allow either the defendant, the prosecutor, or both a partial right to take a deposition when it can be shown that the witness will be unavailable at trial. The present Florida statute is typical in that it allows the defendant the right to take depositions only when it can be shown "that the testimony of absent persons is material and necessary . . . and that such witnesses reside beyond the jurisdiction of the court or are so sick and infirmed that with diligence their presence cannot be procured."[171] In effect, these statutes cannot be considered as discovery statutes, but are solely for the purpose of perpetuating testimony to avoid a miscarriage of justice because of the absence of a material witness.[172]

With the exception of this very restricted use of depositions, the right of the defendant to talk to prosecution witnesses, much less take their deposition in a criminal case, is highly doubtful. The Florida Supreme Court has recognized that it is not merely a right but a duty of defense counsel to interview the persons having knowledge of an alleged offense[173] and has considered it a violation of defendant's constitutional rights for the state to refuse defense counsel access to a

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165. In 1961, Vermont passed a statute almost identical with the Proposed Rule. VT. STAT. ANN. tit. 13, §§6721-27 (1961).

166. Fla. Laws 1947, ch. 24041.

167. FLA. R. CIV. P. 1.21.

168. Bowen v. Manuel, 144 So. 2d 341 (2d D.C.A. Fla. 1962).

169. See Note, *Criminal Procedure: Depositions and Change of Venue*, 36 TEMP. L.Q. 326, 331 nn.29, 30; 5 WIGMORE, EVIDENCE §1141 (3d ed. 1940) for a list of state criminal statutes allowing discovery.

170. FED. R. CRIM. P. 15.

171. FLA. STAT. §916.06 (1965).

172. Kelly v. People, 121 Colo. 243, 215 P.2d 336 (1950). In State v. District Court, 253 Iowa 903, 114 N.W.2d 317 (1962) and State v. Axelrod, 248 Minn. 204, 79 N.W.2d 667 (1956), statutes providing that a defendant in a criminal case may examine witnesses "in the same manner and with like effect as in civil actions" were held not to give a defendant the right to take discovery-depositions permitted by the civil rules in those states.

173. Mathews v. State, 44 So. 2d 664 (Fla. 1950).

material witness who is confined in jail.[174] But access is the limit of the defendant's rights, and he presently has no means of compelling a witness to talk to him. Succintly stated: "[I]t is true that any defendant has the right to attempt to interview any witness he desires. It is also true that any witness has the right to refuse to be interviewed, if he so desires."[175] Even when the witness is willing to talk to the defendant, the court has discretionary power to place restrictions or conditions on the interview or prohibit the interview altogether.[176]

In contrast with the very limited opportunity of the defendant to talk to witnesses, the prosecutor, by statute in Florida, has a very broad power to summon *all* witnesses, to administer oaths, and to require them to testify as to any violation of the criminal law.[177] These statutes are considered remedial in nature and are liberally construed in order that the prosecutor may carry out the duties and powers of his office.[178] Since neither the defendant nor his counsel are present when the statement is taken, the procedure raises a constitutional question concerning the defendant's right to confrontation and cross-examination of the witnesses against him.[179] Although by implication the Florida Supreme Court has upheld the constitutionality of these statutes,[180] the rules committee alluded to this problem by expressing their feeling that some limitation should be placed on the state's unilateral right to take depositions. They were unable, however, to agree on a means of altering the situation.[181]

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174. Hodgins v. State, 139 Fla. 226, 190 So. 875 (1939); *accord,* Bobo v. Commonwealth, 187 Va. 774, 48 S.E. 213 (1948).

175. Byrnes v. United States, 327 F.2d 825, 832 (9th Cir. 1964).

176. Baker v. State, 47 So. 2d 728 (Fla. 1950); Nations v. State, 145 So. 2d 259 (2d D.C.A. Fla. 1962).

177. FLA. STAT. §27.04 (1965) (state attorney); FLA. STAT. §32.20 (1965) (county solicitor).

178. Barnes v. State, 58 So. 2d 157 (Fla. 1952) (defense witnesses); Collier v. Baker, 155 Fla. 425, 20 So. 2d 652 (1945) (defense witness); Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939) (applicable to assistant state attorney).

179. In general, the statutes permitting the prosecution to take depositions when the witness will be unavailable for trial have been held constitutional. See Annot. 90 A.L.R. 377 (1934). But a small minority of states have indicated, largely by dicta, that the use of depositions even in this limited circumstance would be a violation of the defendant's right to confront the witnesses. See Kaelin v. Commonwealth, 84 Ky. 354, 1 S.W. 595 (1886); Harrison v. Commonwealth, 266 Ky. 840, 100 S.W.2d 837 (Ky. App. Ct. 1937) (no statute authorizing depositions); State v. Chambers, 44 La. Ann. 603, 10 So. 886 (1892); State v. Lonergan, 201 Ore. 161, 269 P.2d 491 (1954) (statute admitting deposition of imprisoned felon); State v. Mahoney, 122 Vt. 456, 176 A.2d 747 (1961). Under Federal Rule of Criminal Procedure 15(b) the Government must give notice of the taking of a deposition.

180. Barnes v. State, 58 So. 2d 157 (Fla. 1952).

181. Committee Note, FLA. R. CRIM. P. 22(f) (final draft 1966).

Not only has the defendant no right to take a discovery deposition of his own, he has generally been unsuccessful in obtaining the statements of witnesses taken by the prosecutor. There is one reported case in which the trial court has granted the defendant's pretrial motion to inspect a witness's statement,[182] but in all other cases the Florida appellate courts have sustained the refusal of the trial court to permit the defendant to inspect the statements.[183] The rationale of these decisions is that these statements are the "work product" of the prosecutor, and as such are not discoverable.[184] A statement may be obtained by the defense during the trial, however, if the prosecutor uses it to refresh or to impeach a witness.[185]

There is an obvious imbalance in the present law, and it is to this problem that proposed Rule 22(f) is addressed. The rule provides that upon motion of the accused, the court: "[S]hall order the taking of the deposition of any person other than a confidential informer . . . who may have information relevant to the offense." The defendant is required to show "that the testimony of the witness may be material or relevant on trial, or of assistance in preparation of his defense, and that the witness *will not cooperate* in giving a voluntary, signed, written statement to the person charged or his attorney."[186] The rule further provides that notices must be given the prosecuting attorney and that depositions shall be taken in the manner provided in the Florida Rules of Civil procedure. The depositions may be used for the purpose of contradicting or impeaching the testimony of a deponent as a witness.

The rule has substantial limitations in that it requires a showing of relevancy, materiality, and lack of cooperation before a deposition may be taken. These limitations represent a compromise between the members of the rules committee who wanted unlimited discovery, and those who wanted to condition the defendant's right to take a deposition upon the waiving of his privilege against self-incrimination

182. In Drozewski v. State, 84 So. 2d 329 (Fla. 1956) the trial court ordered production of the witness's statement, but it was not error for the prosecutor to fail to produce these statements when the defendant made no further effort to obtain them.

183. Raulerson v. State, 102 So. 2d 281 (Fla. 1958); McAden v. State, 155 Fla. 523, 21 So. 2d 33, *cert. denied*, 326 U.S. 723 (1945); Bedami v. State, 112 So. 2d 284 (2d D.C.A. Fla.), *cert. denied*, 361 U.S. 883 (1959); Russom v. State, 105 So. 2d 380 (2d D.C.A. Fla. 1958), *cert. dismissed*, 109 So. 2d 30 (Fla. 1959); Urga v. State, 104 So. 2d 43 (2d D.C.A. Fla. 1958). *But cf.* the dicta in State v. Smith, 95 So. 2d 525 (Fla. 1957).

184. See generally Note, *Defendant's Right To Inspect Written Statements of Prosecution Witnesses*, 11 U. FLA. L. REV. 107 (1958).

185. State v. Shouse, 177 So. 2d 724 (2d D.C.A. Fla. 1965).

186. Emphasis added.

and submitting to an interrogation under oath by the prosecuting attorney.[187]

The proposed deposition rule is almost identical with a 1961 Vermont statute,[188] the only difference being the Florida requirement that the defendant show that the witness will not cooperate. In *State v. Mahoney*,[189] the Vermont Supreme Court, noting that the statute was the first of its kind, held it constitutional and refused to give it a narrow interpretation. It should be anticipated that similar litigation will result in Florida, probably concerning the meaning of the phrase "will not cooperate." The committee suggested the possibility that a witness may say he is making himself available and yet never actually submit himself to an interview.[190] Additionally, a witness may voluntarily submit to an interview and then be so evasive as to render the session worthless. The committee recognized the difficulty in interpreting the word "cooperate" but emphasized that it should "be given a liberal interpretation."[191]

To prevent abuse of the deposition privilege, proposed Rule 22 (h) provides for protective orders whereby, upon a sufficient showing, the court may deny, restrict, or defer the taking of a deposition. In addition, proposed Rule 22 (i) assures that the discovery procedures will be available to all persons accused of crime by providing that: "After a defendant is adjuged insolvent, the reasonable cost incurred in the operation of these rules shall be taxable as cost against the county." The committee recognized that a statute is probably needed since there is serious doubt whether the court by a rule of procedure can impose this additional expense on the counties. The committee felt, however, that the provision was necessary to comply with the recent trend of federal decisions requiring the state to pay the litigation costs of indigents and that without this provision it is likely the rules will either be declared void or their application will be confused.[192]

The deposition-discovery rule greatly expands the right of the defendant to determine prior to trial the nature of the evidence against him. If the legislature and courts continue to allow the prosecutor almost complete discretion in taking statements of witnesses, this proposal is highly justified in granting the defendant a corresponding right. The proposed rule should reduce the defendant's need for pretrial inspection of the statements of prosecution witnesses since he will have an equal opportunity to interview them. Proposed

187. Committee Note, FLA. R. CRIM. P. 22 (c) (final draft 1966), alternate proposals (1) and (2).
188. VT. STAT. ANN. tit. 13, §6721-27 (1961).
189. 122 Vt. 456, 176 A.2d 747 (1961).
190. Committee Note, FLA. R. CRIM. P. 22 (f) (final draft 1966).
191. *Id.*
192. Committee Note, FLA. R. CRIM. P. 22 (l) (final draft 1966).

Rule 22(e), which provides for the exchange of witness lists, becomes meaningful only in relation to the deposition rule. Without some guarantee that he will have the right to talk to prosecution witnesses, the defendant would have little reason to initiate the proceedings to exchange lists.

Traditionally, the main criticism of criminal discovery has been the argument that it will increase the incidence of perjury. However, when depositions are taken at an early stage in the proceeding and both sides come to trial armed with materials to refresh or impeach the "mistaken" or "confused" witness, the likelihood of perjured testimony will be reduced. Of all the discovery provisions in the proposed rules, the deposition rule probably represents the greatest innovation. Yet, by its adoption, it will merely give the defendant a right coequal with that already enjoyed by Florida prosecuting attorneys.

CONCLUSION

The proposed Florida Rules of Criminal Procedure offer the Florida Supreme Court a unique opportunity to rethink the whole area of criminal procedure. This area of the law has often been neglected. It lags behind developments made in civil procedure and is saddled with historic precedents that, in light of modern experience, have become anachronisms. No one could seriously argue but that the ultimate purpose of any procedural rule is to guarantee a fundamentally fair trial. Logically, it would seem this purpose would dictate that criminal procedure afford a reasonable opportunity for preparation of a defense. The absence of discovery, or limited discovery allowable at the discretion of the trial judge, however, fails to accomplish this purpose. The only way that discovery can effectively operate is in accord with objective standards established by rule or statute.

The proposed rules expand the discovery rights of both prosecution and defense. If adopted, they would make Florida a leader in the area of criminal procedure. Dean Griswold of Harvard has challenged the bar and bench to take the "long view" on criminal procedure and to reexamine the problem.[193] Implicit in Dean Griswold's challenge is that within the expanding concept of due process and fundamental fairness, the standards of justice will improve with or without the cooperation of the states.[194] The Florida Bar has amply

193. Griswold, *The Long View*, 51 A.B.A.J. 1017 (1965).

194. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964); Brady v. Maryland, 372 U.S. 83 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).