Five Years under State v. Thompson Criminal Pretrial Discovery in Washington

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COMMENT

FIVE YEARS UNDER STATE V. THOMPSON
CRIMINAL PRETRIAL DISCOVERY IN WASHINGTON

Shortly after its 1959 decision in State v. Thompson,1 the Washington Supreme Court was credited with having made substantial change in the availability of pretrial discovery in Washington criminal procedure.2 This comment seeks to determine the effect of State v. Thompson by surveying the law of pretrial discovery on two levels of the Washington judicial system. First, the comment analyzes the recent supreme court cases that followed State v. Thompson, emphasizing the policy reasons behind current Washington procedure. Then the comment discusses a survey of the state’s trial judges, which was made in conjunction with this paper for the purpose of investigating the actual day-to-day workings of criminal pretrial discovery. The article is thus a case study of pretrial discovery as developed in Washington over the last five years.

A number of courts3 and writers4 have fully discussed the merits of pretrial discovery. Their work has reduced the arguments to a relatively small number which are presented here to allow evaluation of the Washington developments. The arguments against pretrial discovery generally are: such discovery further imbalances the burden on the state; the prosecutor has no duty to disclose his case; such disclosure will allow perjury and dilatory action; defense counsel will be induced to do less work; and no mutuality exists, as the prosecutor is not also allowed discovery before trial. The protagonists argue: a just society will eliminate trial by surprise; there is an obligation of

1 54 Wn.2d 100, 338 P.2d 319 (1959).
2 Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 299 (1960); Note, 35 Wash. L. Rev. 168 (1960).
4 For a thorough coverage of all the arguments on both sides, see Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56 (1961). The developments in other states and the so-called perjury problem are developed in Fletcher, supra note 2. See also, Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1180-98 (1960); Brennan, The Criminal Prosecution: Sportmg Event or Quest for Truth? 1963 Wash. U.L.Q. 279, 282-95 (1963).
the court, prosecutor, and defense counsel to assure the defendant a fair trial; and even in some quarters, that pretrial discovery is necessary to due process of law. The Washington decisions have accepted and rejected these arguments in varying degrees by the adoption of a rule that leaves the granting of pretrial discovery to the discretion of the trial judge under specified criteria, which have been formulated in the course of recent decisions.

WASHINGTON CASE LAW

Washington case law on pretrial discovery may be readily divided into two distinct categories. The bulk of the cases involve general pretrial motions for discovery of material the defendant needs for the preparation of his defense. These motions often include requests for inspection of the defendant's confession or statements to the police, statements by witnesses, physical evidence, reports of investigators and experts, etc. The second category, motions for discovery of evidence or testimony before a grand jury, is based not on the difference in subject matter, but rather on the difference in policy considerations. A comparison of these two categories of pretrial discovery follows.

GENERAL PRETRIAL DISCOVERY

While State v. Thompson is the landmark case in Washington, it was by no means the first case to deal with the problem in this state. The

5 It is important to note the delicate decisions the prosecutor must make in this area. For example, the most recent Supreme Court case held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). For a full discussion of the cases in this area, see Comment, The Duty of the Prosecution to Disclose Exculpatory Evidence, 60 COLUM. L. REV. 858 (1960).

6 Only one state has held pretrial discovery (of defendant's statement) necessary to fundamental justice under the federal constitution. State v. Dorsey, 207 La. 298, 22 So.2d 273, 285 (1945). But in that case the court also was ruling under its own state constitution and the case has been limited to its facts in later opinions. Note, 35 WASH. L. REV. 168, 172 n.24 (1960). In the two Supreme Court cases, the Court has refused to equate a denial of pretrial discovery with a denial of due process. Cincenia v. Lagay, 357 U.S. 504, 511 (1958); Leland v. Oregon, 343 U.S. 790, 801 (1952). But the court in both cases was careful to point out that the denial of discovery resulted in no prejudice to the defendant. This obviously leaves the door ajar for a due process argument where the defendant can show prejudice. In fact, one writer has asserted that criminal discovery is a fundamental right, and that future Supreme Court decisions will not follow the above two cases. Garber, The Growth of Criminal Discovery, 1 A.B.A. CRIM. L. Q. 3, 12 (1962). A contrary position is taken in Jones v. Superior Court, 22 Cal. Rptr. 879, 881, 372 P.2d 919, 921 (1962), where the court expressly rejects an argument that pretrial discovery is required by due process.

7 The following list of cases appears to comprise all the Washington decisions on criminal discovery: State v. Gilman, 63 Wn.2d 7, 385 P.2d 369 (1963); State v.
interesting element in the Washington cases is that they all use the same test. In 1895 the court stated that the granting of defendant's demand for statements in the possession of the prosecutor was within the trial court's discretion, and in 1963, the court still claimed to follow the same test. But there is a vast distinction between the results under these two "discretionary" rules for under the recent cases, starting primarily with State v. Thompson, the defendant has actually succeeded in obtaining pretrial discovery. Significantly, the dissent in State v. Thompson stated that the majority was creating a new right to pretrial discovery in Washington.

The difference between the early "discretionary" rule and the current rule is rather subtle, but there is a difference. The prior "discretionary" rule can be characterized by the following statement from State v. Payne:

The object of a trial is that all the facts may be made to appear. If the prosecution is compelled to bring out the facts favorable to the defendant as well as those against him, and its action is supplemented by the efforts of the defendant, aided by able counsel, which may be and are entirely partisan, it is evident that more emphasis will be placed upon the facts upon one side than upon the other.

Furthermore, State v. Clark, claiming to allow trial court discretion stated:


8 State v. Payne, 10 Wash. 545, 39 Pac. 157 (1895). This case involved motions for discovery at the trial but it is relevant to a discussion of pretrial discovery because the court often cross-cites these cases, and the same test is used in both instances. In fact, the court refused to take the opportunity to draw a distinction between discovery prior to trial and at trial in State v. Robinson, 61 Wn.2d 107, 112, 377 P.2d 248, 251 (1962). 9 State v. Gilman, 63 Wn.2d 7, 385 P.2d 369 (1963).

10 Supra note 1. It should be noted that the first recorded affirmative grant of pretrial discovery was in State v. Ingels, 4 Wn.2d 676, 104 P.2d 944 (1940), where the trial judge allowed the defendant, in a prosecution for perjury before a grand jury, to see part of his testimony given before the grand jury.

11 The dissent asserted that "neither the legislature, nor this court by the exercise of its rule-making power, has extended discovery procedure to include criminal cases." State v. Thompson, 54 Wn.2d 100, 110, 338 P.2d 319, 325 (1959).

12 10 Wash. 545, 39 Pac. 157, (1895).

13 Id. at 551, 39 Pac. at 159.

14 21 Wn.2d 774, 153 P.2d 297 (1944).
A prosecuting attorney is under no obligation to submit any evidence he has in his possession to counsel for a person charged with crime. *State v. Payne*, 10 Wash. 545, 39 Pac. 157. The State is not required to submit its evidence to counsel for the accused. The accused is not, as a matter of right, entitled to have for inspection before trial evidence which is in possession of the prosecution. Such matter is peculiarly within the trial court's discretion . . . 15

These statements indicate that the required "discretion" should be tempered with a high regard for the stated policy of protecting the prosecutor from unnecessary disclosure. This reluctance to intrude upon the State's evidence is undoubtedly one reason for the lack of effective pretrial discovery in Washington before *State v. Thompson*. This "restrictive discretion" should be contrasted with the attitude after *State v. Thompson*.

Even though the court is currently using the same verbal test, there is definitely a new meaning in "discretion." In *State v. Mesaros*, 16 the court remarked that "there appears to be a growing tendency, not only in this state, but in other jurisdictions as well, to liberalize the right of a defendant to discovery in criminal cases." 17 In the most recent case, *State v. Gilman*, 18 the court made a special effort to explain its meaning for the word "discretion."

Judicial discretion to grant or to deny the examination of the state's files in a criminal case is compounded of many things, among which are: timeliness of the application; time and opportunity of the defendant to prepare for trial; reactions and attitudes of witnesses if interviewed before trial; indications of prior inconsistencies in the testimony; surprise at the trial, which reasonable diligence in preparation would not have avoided; reasonable opportunity for examination and experiment by experts consistent with the preservation of the evidence; a clear showing of real danger to and concern for the personal safety of witnesses; needless damage to reputation; financial inability of the defendant to obtain technical and investigative aid; and any other considerations, the denial of which shows an unfair deprivation or the granting of which supports the ideal of substantive due process—all, of course, to be considered in keeping with the responsibility of the trial judge to control the pace of the trial and keep it moving at reasonable speed to its conclusion. 19

This seems to be a clear direction to the trial court to consider all

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15 *Id.* at 778, 153 P.2d at 299.
17 *Id.* at 587, 384 P.2d at 377.
19 *Id.* at 8, 385 P.2d at 371.
sides when faced with a motion for pretrial discovery. The court is to consider the interests of the defendant, prosecutor, witnesses, and even the court calendar, and then use its "discretion."

These recent cases can be interpreted as directing a "liberal attitude" toward granting discovery, but in the backdrop of the earlier cases, which seem in retrospect quite restrictive, the position of the Washington trial court now may be better described as one of "neutrality" or perhaps of "balanced-advantage." Certainly the factors which Gilman directs the trial judge to consider in deciding whether to grant pretrial discovery support this characterization of "neutrality." Some of those factors, it will be noted, favor the defendant while others are obviously concerned with the effective presentation of the prosecution's case.

Although the recent cases may thus be thought to demand "neutral discretion" from the trial judge, the old language—that the trial judge is to use his discretion—persists. Yet the camouflage of old terminology, common to divided courts taking new steps, may hide the fact that the court has now reached a working compromise. Adopting a policy which requires a balancing of the conflicting needs of both prosecution and defense, the court has simply listed the factors to be considered in each case and passed the burden of specific decisions on to the trial judge. In other words, the trial judge, in each new case, must consider the advantages and disadvantages of pretrial discovery in relation to the facts of the individual case before him.

This "neutral discretion" may prove to be an intermediate position on the road to pretrial discovery by right. However, before the court extends the law to that point, it should compare discretionary pretrial discovery to the results when pretrial discovery is given as a right. Continued experience with pretrial discovery may prove neutral discretion to be preferable. The developments in California provide a ready comparison.

Since California has not grounded discovery on a principle of trial court discretion, its law in this area has traveled quite a different route. The first major case in California, People v. Riser, held that, upon motion at trial, a defendant had a right to the pretrial statement of a witness upon a showing of some inconsistency between the requested statement and the trial testimony. Then in Powell v. Superior Court,

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20 See question ten in the appendix to this article. Forty of the responding trial judges have interpreted the recent cases as demanding a liberal attitude.
21 47 Cal.2d 566, 305 P.2d 1 (1956).
22 48 Cal.2d 704, 312 P.2d 698 (1957).
the court applied *People v. Riser* to pretrial discovery, basing its decision on the policy that the state's obligation is to give a fair trial.

Continuing from the *Powell* case, the California court has required the granting of pretrial discovery in order to “promote the orderly ascertainment of the truth.” It should be noted, however, that the California court has not based its grant of pretrial discovery on concepts of procedural due process; rather, it is founded simply on the proposition that discovery best provides for the fair and orderly conduct of a criminal trial. Washington, in contrast, has decided that trial court discretion will secure the best criminal trial.

The most striking result of the California cases is that trial court discretion is strictly limited, and therefore rarely exercised in motions for pretrial discovery. Some writers assert that if the defendant follows the correct procedures, the trial court is powerless to deny discovery.

In summary, these three judicial attitudes as to pretrial discovery—the earlier restrictive Washington rule, the current “neutral” policy, and the California rule—are clearly different. Washington has evolved

25 “In the five years that have passed since the *Riser* and *Powell* decisions, the California Appellate Courts have tremendously expanded the meaning of *Riser* and *Powell* to the point where a trial court no longer has the discretion to deny criminal discovery when it is made in an appropriate [sic] manner according to proper procedure. The law of the State of California is now clear that whenever the defendant cannot recollect what he said or alleges other sound bases for criminal discovery, the trial court is divested of discretion and pre-trial inspection to an accused becomes a matter of absolute right.” Garber, *supra* note 6, at 20. Professor Louisell also points out that the California rule is not based on discretion, and while it is not a matter of right in all cases, “the trial court will be allowed little leeway to deny it.” Louisell, *supra* note 4, at 82.
26 Yet another system of pretrial discovery, purposely omitted here, is found in the federal rules of criminal procedure. Fed. R. Crim. P. 16. These rules are excellently treated in Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 312 (1957). See also, Louisell, *supra* note 4, at 68. The short outline of the federal procedure which follows will serve as a contrast to the Washington developments. Under the present federal rules, pretrial discovery is rather limited. Rule 16 allows pretrial discovery of “books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.” However, the defendant can obtain the pretrial statements of the government's witnesses only after the witness has testified at trial. This situation is the result of Congressional reaction to *Jencks v. United States*, 353 U.S. 657 (1957), which laid down a broad rule permitting the defense to inspect prior statements of a government witness. The so-called Jencks Act, 18 U.S.C. § 3500 (1958), provides: “In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.” For a full discussion of the cases under this statute, see Comment, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133 (1963).

The proposed amendments to the federal rules would extend the scope and liberality
from a position of "restrictive discretion" to a policy which requires a neutral use of discretion, while California in the eyes of many, has given the defendant a nearly absolute right to such discovery. It is doubtful that Washington, with its emphasis on trial court discretion, will reach the California rule. However, the California practice will provide the Washington court with helpful information if it is faced with future arguments that Washington should allow discovery by right.

Since the Washington trial judge continues to play an important role in pretrial discovery, it is helpful to examine the factual situations of cases where the exercise of discretion has been approved by the Washington Supreme Court. In *State v. Thompson*, the trial court allowed the defendant to have copies of his statements to police, "any written statements or reports made by the Federal Bureau of Investigation, as the result of any examination made of the clothing and/or personal effects and of and/or blood samples of the defendant and Ethel Tussing, deceased, the alleged victim," and a copy of the autopsy of the victim. The supreme court, in affirming this use of discretion, stressed the following peculiar circumstances of the case. The defendant was from Canada, scarcely above juvenile court age, indigent, without funds to conduct his own investigations, and charged with a capital offense.

In *State v. Mesaros*, the defendant made an extremely comprehensive motion for pretrial discovery, asking for inspection of his statements, all physical evidence, ballistic reports, photographs, statements of witnesses, autopsy reports, laboratory and Federal Bureau of Investigation reports, and police reports in the possession of the prosecutor. The trial court allowed the defense attorney to hear the tape recording of the interrogation of the defendant and ordered the prosecutor to supply the defendant with the addresses of all his witnesses. The court denied the rest of the motion with leave to reconsider if counsel could show cause for a different ruling. On appeal after trial, the supreme

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27 54 Wn.2d 100, 338 P.2d 319 (1959).
28 Id. at 102, 338 P.2d at 320.
29 Id. at 104, 338 P.2d at 321.
court affirmed this decision, holding that the trial judge had not abused his discretion and that, indeed, the record “indicates a liberal and fair attitude” on his part. The supreme court also stressed that counsel had not taken advantage of the trial court’s willingness to renew the motion. Further, in striking contrast to the Thompson case, the defendant in Mesaros was able to hire counsel and even an investigator. 31

In State v. Gilman,32 the supreme court again affirmed the action of the trial judge who denied a motion for the production of the pretrial statements of witnesses for the state. The denial was proper, according to the supreme court, because the defendant had failed to lay an appropriate foundation: “none of the witnesses was asked what the statements contained, nor were any inconsistencies shown between the written statements and the testimony of the respective witnesses”33. The ultimatum is apparent: the defendant must give the trial court sufficient reasons to order production of a prior statement by a witness.

**Pretrial Discovery of Matters Presented to a Grand Jury**

The general discovery cases should be compared to those involving requests for discovery of grand jury matters. Here the cases34 are fairly rare due to the limited use of grand juries in Washington.35 However, the first recorded case allowing pretrial discovery, State v. Ingels,36 was a grand jury case. The defendant, charged with perjury before the grand jury, requested a copy of his recorded testimony. The court read the whole transcript and gave the defendant fifteen pages of his testimony. On appeal, the defendant argued that the court erred in so limiting discovery. The supreme court held that the grant of partial discovery was a proper use of discretion.

While the same verbal test is used for discovery of grand jury matters—discretion of the trial judge—it is different from the discretion used in the general pretrial area. An additional item, the importance of secrecy to grand jury proceedings, is added to the scales. In the most recent case,37 the Washington court cited with favor the leading

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31 Id. at 581, 385 P.2d at 374.
33 Id. at 8, 385 P.2d at 370.
35 The grand jury is normally used only for investigation of public officials under RCW 10.28.110. However, RCW 10.28.090 does allow use of a grand jury to inquire broadly into “offenses against this State.” But the general criminal charges are customarily brought by the prosecutor’s information. RCW 10.37.026.
36 Supra note 32.
federal cases that impose a heavy burden on the defendant to show a compelling need to overcome the policy of protecting the secrecy of the grand jury."\textsuperscript{8} This attitude places the discovery of grand jury matters in the class of the pre-\textit{Thompson} "restrictive discretion" cases. In other words, in the grand jury area, the trial court will refuse a motion for discovery unless the defendant can show a substantial need for the information. However, there are signs that the high value given to the secrecy of grand jury proceedings is lessening with the increased use of discovery.\textsuperscript{9} Perhaps later developments in Washington will move grand jury discovery closer to the present neutral position of the trial court in general pretrial discovery cases.

\textbf{Mutuality in Washington—Pretrial Discovery by the Prosecutor}

One of the most serious obstacles to pretrial discovery is the argument that the prosecutor is not given equal advantages for discovery. This argument usually proceeds from the assumption that the privilege against self-incrimination allows the defendant to ward off pretrial discovery by the prosecutor.

Once again, California has taken the lead in the development of the law in this area. In \textit{Jones v. California}\textsuperscript{40} defense counsel moved for a continuance in a rape trial to prepare a newly discovered defense of impotence. The prosecutor asked for names and addresses of the expert witnesses, and for inspection of all medical reports and X-rays. The motion was granted. On appeal the concept of discovery by the prosecutor was affirmed, but such discovery was limited to matters the defendant intended to use at trial. Judge Traynor stressed that since discovery was allowed in California in order to produce fair trials, discovery procedure "should not be a one-way street." The court stated:

Absant the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in


\textsuperscript{9} For example, the proposed amendments to the Federal Rules of Criminal Procedure would allow discovery of a defendant's statements before the grand jury. Second Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure before the United States District Courts, Comments to Rule 16(a) (3) (1964).

\textsuperscript{40} 22 Cal. Rptr. 879, 372 P.2d 919 (1962).
denying the prosecution access to evidence that can throw light on issues in the case.\textsuperscript{41}

Thus, it appears that California has opened the door for discovery by the prosecutor to the limits prescribed by self-incrimination. One writer interprets the \textit{Jones} case as balancing the need for discovery and the policy involved in the privilege of self-incrimination, and argues that the decision pushed back the privilege.\textsuperscript{42} Thus, evidence in the hands of the California defendant is now protected only if the defendants does \textit{not} intend to use it at the trial.\textsuperscript{43} The impact of the \textit{Jones} case will undoubtedly be to enlarge discovery for the prosecutor in California and in the other states following California's lead in the discovery field.\textsuperscript{44}

While not going as far as the California court's position, statutes in many states now require some degree of advance notice to the prosecutor. In Washington, for example, the defendant must enter a plea of insanity at the "time of pleading to the information or indictment."\textsuperscript{45} However, this is the only defense which must be disclosed prior to trial in Washington. In comparison, statutes of several other states require the defendant to give advance notice of an alibi.\textsuperscript{46} The legislature could certainly extend the list; it could even require the defendant to give notice of all his defenses, which would, of course, go far beyond alibi and insanity.\textsuperscript{47} Such a requirement would end guesswork for the prosecutor, allowing him to concentrate on preparation for the known defenses.

Washington also has a statute, not found in California, that requires

\textsuperscript{41} Id. at 880, 372 P.2d at 920.
\textsuperscript{43} Id. at 140.
\textsuperscript{44} The proposed amendments to the Federal Rules of Criminal Procedure would go a long way toward providing mutuality for the prosecutor. They provide that the court can condition the grant of pretrial discovery to the defendant upon his consent to discovery by the federal agents. Thus the defendant, in an appropriate case, could be forced to waive his privilege against self-incrimination. Even further, the proposals add an alternative subsection which would allow the prosecutor to obtain pretrial discovery even when the defendant had not moved for discovery. See \textit{SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE BEFORE THE UNITED STATES DISTRICT COURTS, Comments to Rule 16(c)} (1964).
\textsuperscript{45} RCW 10.76.020.
\textsuperscript{46} The fourteen statutes are collected in the comment cited in note 40 supra, at 135 n.24.
\textsuperscript{47} In fact, several prosecutors in California have requested legislation that would require advance notice of the following defenses: alibi, violation of due process in arrest or in obtaining evidence from the defendant, invalid confession, intoxication, unconsciousness, idiocy, lunacy or insanity, inability to form specific intent, lack of knowledge required by law, threats, menaces or duress, ignorance or mistake of fact, and self-defense. Carr & Lederman, \textit{Criminal Discovery}, 34 CAL. S.B.J. 23, 36 (1959).
the prosecutor and defendant to exchange lists of the witnesses they intend to use. In *State v. Sickles* the court, however, removed nearly all effective sanctions against the defendant by holding that, under the Washington constitutional provision giving the accused the right to compel attendance of witnesses, testimony of a witness whom the defendant had failed to list could not be excluded. The result of this case, as reported by one observer, is that defendants typically do not file such lists. It appears that the *Sickles* opinion confused the distinction between the right to call witnesses and the constitutional right of the state to require certain procedures before a witness can qualify to testify.

Subsequent cases added an important qualification to *Sickles*. These cases held that the trial court committed no error in refusing an unlisted witness if the defense counsel failed to make an offer of proof of what the witness would say if allowed to testify. This simply prevents a reversal where the trial judge was not given sufficient facts for a ruling on admissibility. If the witness is important, he will be allowed to testify if the defense counsel simply tells the judge what he will say.

Washington's lack of court-ordered discovery for the prosecutor might be partially explained by the availability of information under the above statutes. However, it is more probable that prosecutors simply do not feel the need for discovery as modern investigating facilities are efficient, thorough, and effective.

While the statutory provisions for mutuality on the superior court level are clearly lacking, recent amendments to the justice court criminal rules have provided for discovery by both the defendant and the prosecutor:

Rule 3.12(a) A subpoena duces tecum may be issued by the trial court upon application of either party, commanding the person to whom it is directed to produce the books, papers, documents, or other objects des-

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48 RCW 10.37.030. "[A]nd at the time the case is set for trial the prosecuting attorney shall file with the clerk a list of the witnesses which he intends to use at the trial and serve a copy of the same upon the defendant, and within five days thereafter the defendant shall file with the clerk and serve upon the prosecuting attorney a list of the witnesses which the defendant intends to use at the trial. Either party may add such additional names at any time before trial as the court may by order permit...."

49 144 Wash. 236, 257 Pac. 385 (1927).

50 *WASH. CONST.* art. 1, § 22.

51 Fletcher, supra note 2, at 315.

52 See *State v. Thomas*, 8 Wn.2d 573, 113 P.2d 73 (1941), which discusses the prior cases and reaffirms the requirement of making an offer of proof in order to produce a witness not listed by the defendant.
ignated therein. The court, on motion made promptly may quash or modify the subpoena if compliance would be illegal, unreasonable or oppressive.

(b) The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

This rule will accomplish two things. First of all, subsection (b) affirmatively provides for pretrial discovery, moving discovery to a point even before preliminary examination. Second, subsection (a) allows discovery of the named subjects by either party. The last clause of that subsection allows the court to grant discovery for the prosecutor except where illegal. The obvious problem will be the application of the privilege against self-incrimination by the justice courts. A narrow construction of the privilege combined with equal exchanges of information under this rule could advance the Washington justice court practice.

**Survey of Washington Trial Judges**

Since the trial judge will continue to play a leading role in the drama of pretrial discovery in Washington, these judges were surveyed to provide a more complete picture of discovery in Washington. The questionnaire and tabulations are printed in an appendix to this article.

The survey investigated four main areas. The first three questions asked the judge how often counsel made pretrial discovery motions, how often he granted them, and how often he granted discovery of specified items. The next three questions dealt with the factors of perjury and integrity of counsel, and with the practice of limiting discovery to counsel alone. The next series of questions sought to determine whether the judges desired statutory changes. Here each judge was allowed to give an opinion on a statute requiring the defendant to give advance notice of all defenses. The judge was also asked whether he favored giving the defendant discovery as a matter of right, with the burden on the prosecutor to show cause for denial. In the last section, the judge was asked how he interpreted the recent cases in this area.

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58 Wash. Ct. R. ch. 2 § 3.12(a).

54 See text at 869 infra.
Questionnaires were sent to all the seventy-eight trial judges in Washington. Fifty-seven, or roughly seventy-three percent, responded. Clearly this survey cannot predict how any one judge will react to a situation because judges are truly individuals, each with his own high sense of duty to the law as he interprets it. But the tabulations in the appendix provide a general guide to the boundaries of judicial thinking on these questions.

Before discussing the specific questions, it might be appropriate to mention a few points of general interest. Five judges stressed that their conclusions were based on only a few cases, and many judges were able to fill out only certain parts of the questionnaire. The survey requested the judge to give his professional background. Out of the fifty-seven returns, twenty-two had been prosecutors. It might be thought that these judges would be reluctant to grant pretrial discovery, but they were, as a group, slightly more liberal than the average in this respect. It was also thought that there might be a difference between the experience of judges in rural and urban counties. By attaching the return envelope to each questionnaire, a geographic comparison could quickly be made. It was found that the rural or small city judges seemed more aware of discovery practices and developments than the judges in the urban areas. Some urban judges blamed their rare contact with the problem on the motion calendar procedure, under which only the judge assigned to the motion calendar is faced with these motions.

The majority of judges reported that defense counsel "never" or "rarely" move for pretrial discovery. A smaller group stated that they "occasionally" receive such motions. Some judges explained that this lack of activity resulted from the practice of voluntary disclosure by the prosecutor. However, the failure of defense counsel to use this technique may also be explained by a lack of knowledge that a trial judge can compel such discovery.

While it appears that defense counsel generally fail to take advantage of pretrial discovery, the tabulations clearly show that the judges are open minded about granting these motions. In fact, in answer to...
a later question, the judges stated that they interpreted the recent cases as directing them to be liberal in granting these motions. It appears that judges will be inclined to give even more liberal decisions than is literally demanded under the supreme court decision which seem to require a "neutral discretion."

Eight judges commented that an indigent and a non-indigent should be treated alike in pretrial discovery. This was somewhat surprising as State v. Thompson, upholding the grant of discovery, stressed the fact that the defendant was indigent, while State v. Mesaros, upholding the denial of discovery, stated that the defendant was able to hire his own attorney and investigators. However, the trial judges seem at least consistent within their own group, for the questionnaire answers show clearly that indigent and non-indigent defendants are treated similarly.

A variety of treatment is given to the different types of items subject to discovery. The majority of judges "always" give the defendant a copy of his confession or statement to the police. A great number of judges "often" or "always" allow inspection of physical evidence. A number of judges are reluctant to allow the defendant to see the reports of investigators for the state. However, there seems to be a split as to inspection of reports of experts, with a little more liberality given to the indigent. Thus, it appears easier to obtain a report of an expert than that of an investigator. The judges are also hesitant to grant inspection of statements of other witnesses, but a number of them would even allow this. A few judges would "always" grant discovery in every category; but on the whole, the judges will consider the nature of the particular item requested when called to rule on discovery.

A sizable portion of the responding judges state that the grant of

that question number two was poorly worded and thus some confusion was created. Several judges who answered "never" to both parts of question number one went on and filled out the rest of the questionnaire as if they had passed on these motions before. Thus, part of the answers must be considered to be indications of what these judges would do if faced with a motion of this type. Some confusion was also found when a judge answered "never" to part of a question. For example, a judge might mark "never" in the indigent category, and "rarely" in the non-indigent category of question number one. Then the judge would usually continue to fill out the indigent categories, normally following his pattern in the non-indigent cases. So to this extent, some of the answers necessarily indicate the judge's prediction of his attitude towards the subject matter.

See question number ten in the appendix to this article. Note that forty answered "Yes" to this question while five answered "No." However, twelve judges did not answer this question.

63 See question number three in the appendix to this article. 
64 Ibid.
discovery, to their knowledge, has never resulted in perjury or other substantial harm.\(^6\) Only four judges said they had "occasionally" seen such results, and only one noted these results occur "often." However, a number of judges professed a lack of knowledge on this matter. These disclosures give added weight to the arguments of those who have felt the threat of perjury was not serious enough to prevent the use of discovery.\(^6\)

The judges dramatically split on the question of whether the integrity of defense counsel should be considered as a factor in allowing pretrial discovery.\(^7\) The large number of judges who "always" consider this factor are almost equal to those who "never" give it weight in their deliberations. This very definitely portrays two opposing attitudes as to the role of counsel in pretrial discovery. It will probably be very difficult for individual counsel to determine whether his integrity is being considered by any particular judge, but these figures show that in a good many cases the judge will consider this factor, as, for example, when a witness needs protection.

While a substantial number of the judges "never" limit inspection to the defense counsel, a number of judges do so "occasionally," or "often," and a few "always" do.\(^8\) When this is compared to the answers on the perjury question it is apparent that while many judges do not know of actual perjury, they might suspect a defendant in some cases. Thus, a number of judges will restrict inspection to the attorney to minimize the possibility of perjury or other harm that may result from the discovery.

It should be realized that it might be unrealistic to try to limit discovery to defendant's counsel. Surely counsel could not ordinarily make effective use of discovered material without discussion of it with his client. Indeed, should the trial court prevent his doing so, it might be considered ineffective representation and thus in itself a basis for reversal.

The judges strongly favored the adoption of a statute requiring the defendant to give advance notice to the prosecutor of his defenses.\(^9\) They also favored a sanction for failure to meet the requirements of the statute.\(^10\) Such a sanction would seem to be necessary if the statute

\(^{6}\) See question number four in the appendix to this article.
\(^{6}\) E.g., Fletcher, supra note 2, at 308-11.
\(^{6}\) See question number five in the appendix to this article.
\(^{6}\) See question number six in the appendix to this article.
\(^{6}\) See question number seven in the appendix to this article.
\(^{6}\) See question number eight in the appendix to this article.
were to operate effectively.\(^7\) Of course, under the current discretionary rule, the trial judge could probably condition discovery for the defendant upon giving advance notice of defenses, but it would seem advisable to have the benefit of advance notice of defenses in all cases.

While the judges favor requiring the defendant to give advance notice of defenses, they split on the question of giving the defendant a right to discovery, with the burden on the prosecutor to show a cause for denial.\(^2\) Even though twenty-seven judges rejected this suggestion, it is significant that twenty-three favored such a change. This indicates that many judges favor discovery and perhaps, that many judges wish to have a set rule which will remove the \textit{ad hoc} basis of decision now required.

**Conclusion**

The cases following \textit{State v. Thompson} appear to direct the trial courts to act on motions for pretrial discovery with "neutral discretion". This attitude will require the trial courts to take a more liberal attitude, in comparison to past treatment. The survey of Washington judges shows that counsel can probably make greater use of discovery opportunities and that such motions will be favorably received by many judges of the state. The practical use of pretrial discovery is sure to grow from its present stage. The informed discretion of the trial judges, combined with close attention from the Washington supreme court and legislature, will provide maximum support for this development.

\textbf{Kenneth L. Schubert, Jr.}

\footnote{See text accompanying note 48 \textit{supra}.}
\footnote{See question number nine in the appendix to this article.}
APPENDIX

SURVEY OF WASHINGTON STATE TRIAL JUDGES CONCERNING PRETRIAL DISCOVERY IN CRIMINAL CASES

The following results were obtained from the 78 questionnaires sent to Washington judges. Of the 78, 57 replies were received—which amounts to 73%.

Occasionally

<table>
<thead>
<tr>
<th></th>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. In the cases in which you have acted as the judge at the time of trial how frequently has defense counsel moved for pretrial discovery?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. Indigent cases</td>
<td>[14]</td>
<td>[22]</td>
<td>[13]</td>
<td>[5]</td>
<td>[—]</td>
<td>54</td>
</tr>
<tr>
<td>2. How frequently do you generally grant a motion for pretrial discovery?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. How frequently do you grant pretrial discovery of the following specific items?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. Indigent cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Confession or statement of defendant</td>
<td>[3]</td>
<td>[2]</td>
<td>[7]</td>
<td>[9]</td>
<td>[22]</td>
<td>43</td>
</tr>
<tr>
<td>(2) Inspection of physical evidence (e.g., guns, clothing)</td>
<td>[6]</td>
<td>[1]</td>
<td>[6]</td>
<td>[14]</td>
<td>[16]</td>
<td>43</td>
</tr>
<tr>
<td>(4) Reports of experts</td>
<td>[9]</td>
<td>[9]</td>
<td>[8]</td>
<td>[8]</td>
<td>[8]</td>
<td>42</td>
</tr>
<tr>
<td>(5) Statements of witnesses taken by police or other investigators</td>
<td>[12]</td>
<td>[12]</td>
<td>[10]</td>
<td>[3]</td>
<td>[7]</td>
<td>44</td>
</tr>
<tr>
<td>b. Non-indigent cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) Inspection of physical evidence (e.g., guns, clothing)</td>
<td>[5]</td>
<td>[2]</td>
<td>[8]</td>
<td>[14]</td>
<td>[16]</td>
<td>45</td>
</tr>
</tbody>
</table>

869
APPENDIX—(Continued)

(3) Reports of investigators

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>17</td>
<td>9</td>
<td>3</td>
<td>6</td>
<td>45</td>
</tr>
</tbody>
</table>

(4) Reports of experts

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>10</td>
<td>13</td>
<td>6</td>
<td>7</td>
<td>44</td>
</tr>
</tbody>
</table>

(5) Statements of witnesses taken by police or other investigators

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>11</td>
<td>10</td>
<td>3</td>
<td>7</td>
<td>44</td>
</tr>
</tbody>
</table>

4. In your experience, how often has the grant of pretrial discovery resulted in perjury or other substantial harm at the time of trial?

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>27</td>
<td>8</td>
<td>4</td>
<td>1</td>
<td>—</td>
<td>40</td>
</tr>
</tbody>
</table>

5. To what extent do you consider the integrity of defense counsel in determining whether to grant pretrial discovery?

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>12</td>
<td>41</td>
</tr>
</tbody>
</table>

6. How frequently do you limit inspection to the defense counsel alone?

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>4</td>
<td>6</td>
<td>7</td>
<td>7</td>
<td>38</td>
</tr>
</tbody>
</table>

7. Would you favor a statute or rule requiring the defendant to notify the prosecutor of his defenses (such as alibi or mistaken identity)?

a. Indigent cases

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
<td>15</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>49</td>
</tr>
</tbody>
</table>

b. Non-indigent cases

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>14</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>50</td>
</tr>
</tbody>
</table>

8. If the statute or rule in question seven were adopted, would you favor, as a means of enforcement, a provision that if the defendant wilfully refused or failed to give such notice, he could not introduce such evidence except by his own testimony? (Assume that the rule would allow the court to permit exceptions if in his judgment the interests of justice demanded such exception. Assume further that constitutional problems, if any, could be overcome.)

<table>
<thead>
<tr>
<th>Never</th>
<th>Rarely</th>
<th>Occasionally</th>
<th>Often</th>
<th>Always</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>32</td>
<td>16</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>48</td>
</tr>
</tbody>
</table>
9. Would you favor a statute or rule presumptively giving a defendant discovery as a matter of right, with the burden on the prosecutor to show why in particular cases the grant of discovery should not be made, upon his showing the likelihood of substantial harm?
   a. Indigent cases
   b. Non-indigent cases

10. Have you interpreted the recent Washington cases as a direction to be liberal in the granting of pretrial discovery in criminal cases?