TOWARD EFFECTIVE CRIMINAL DISCOVERY IN CALIFORNIA—A PRACTITIONER'S VIEW

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I

THE CALIFORNIA ORIGINS

In 1957, John Dyson Powell sought and was granted by the Supreme Court of California the right to inspect and copy his own signed statement to the police and a typed transcript of another statement allegedly made by him at the police station.[1] In 1965, less than ten years later, the defendant in *People v. Bazaure*[2] asserted and secured the right to inspect the statements of some 35 people who might have had some knowledge of the murder with which he was charged. During the intervening period, California courts expanded the right to criminal discovery in an ever-widening manner. Today, we are told, in *Cash v. Superior Court*,[3] that in certain respects this right is inherent in the concept of a fair trial. Tomorrow, arguments will be joined as to what extent discovery is constitutionally required and how effective such discovery must become to satisfy the constitutional requirements of due process and equal protection.

In civil litigation there is both a statutory framework for discovery and a general acceptance of its processes.[4] Each party may compel the other to disclose the evidence on which he proposes to rely, and failure to comply with such disclosure is discouraged by multiple sanctions.[5] But in criminal litigation, the defendant may claim his fifth amendment privilege against self-incrimination, and the reluctance of prosecutors to divulge their secrets without a reciprocal right to discover the defendant's case is understandable. Equally predictable, perhaps, is the

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[1] 48 Cal. 2d 704, 312 P.2d 698 (1957).

[2] 235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (1965).

[3] 53 Cal. 2d 72, 346 P.2d 407 (1959); *see* Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 898 (1968).

[4] *See* authorities cited in Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964). *See generally* D. LOUISELL, MODERN CALIFORNIA DISCOVERY (1963).

[5] CAL. CIV. PRO. CODE §§ 2019(g), 2034 (West Supp. 1967).

reluctance of the defense to open itself to discovery by the prosecution in exchange for frequently ineffectual disclosures by district attorneys.

In criminal discovery, as in the early development of civil discovery, the very concept of disclosure invites resistance.[6] Yet, this resistance to the concept of discovery in a criminal case is really nothing more than opposition to the further extension of an already accomplished fact. The criminal attorney has so long lived with accepted discovery devices that he has perhaps ceased even to consider them as such. The prosecution, for example, has invaluable opportunities for discovery in grand jury proceedings, where it may question witnesses on the record in the absence of the defendant or his attorney. Although transcripts of such hearings are now made available to the defendant,[7] he is at the prosecutor's mercy as to what witnesses and evidence will be disclosed; the prosecutor need not put in more than the minimum prima facie case.[8] In cases where the prosecution elects to afford the defendant a full preliminary hearing, the scope of discovery for both parties may be considerably enlarged. The defendant then has the right of cross-examination, and the people may question any witnesses that the defendant elects to present in his behalf. Still, no more than a prima facie case need be made at the preliminary hearing.

The prosecution has other and more subtle means of discovery. An incarcerated defendant cannot be interviewed in most counties by a potential expert witness without disclosing the expert's name to the jailers. If the defendant wishes to have his experts examine physical evidence in the possession of the police, this must be done in the presence of the prosecutor's staff—making inevitable the disclosure of the identity and frequently also the concerns of the expert.[9] The prosecutor, with the resources of the state at his disposal, finds it easier to obtain informal cooperation from witnesses than does the defendant. A defendant in custody is a ready source of physical evidence to the prosecution—from the traditional fingerprints and mug shots to the

[6] *See Traynor, supra* note 4, at 249.

[7] CAL. PEN. CODE §§ 869 (West 1956), 938.1 (West Supp. 1967). *See also* CAL. PEN. CODE § 943 (West 1956).

[8] In Newton v. Superior Court, Crim. No. 25413 (Dist. Ct. App., First App. Dist., Feb. 28, 1968), *hearing denied*, 68 A.C. No. 13 at Minutes 4 (1968), and in People v. Barry, Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968), defendants challenged the constitutionality of CAL. PEN. CODE §§ 682, 737, and CAL. CONST. art. 1, § 8 (allowing prosecution by either grand jury indictment or by the district attorney's filing of an information) as authorizing and vesting absolute discretion in the prosecution to elect which procedure it will invoke in any given case, thereby denying specific defendants equal protection and due process of law.

[9] In People v. Barry, Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968), the court allowed the defendant's criminologist to take all the physical evidence into his laboratory for testing. This was preconditioned on the disclosure of the expert's identity and reputation.

more questionable taking of blood samples.[10] In the area of disclosure, it is now established that the prosecution may discover the names of the defendant's witnesses and the factual bases for certain affirmative defenses.[11] Such orders are almost always in the form of continuing orders of discovery.

In regard to disclosures available to the defense, a district court of appeals stated in *People v. Lindsay*:[12] "[I]n a proper case, one charged with a crime may, before trial, inspect: statements of his own in possession of the prosecutor, whether signed, unsigned, or on recording tapes; real evidence or reports of state officers' examination thereof; statements of persons expected to be prosecution witnesses at trial; and names and addresses of eyewitnesses of an alleged crime."[13] This language has been extravagantly and erroneously cited by prosecutors as establishing the outer limits of discovery and by the defense as delineating its bare minima. In fact, the language focuses on a constantly changing procedure linked to a standard of fairness which is currently in the process of functional redefinition.[14]

What is the philosophical underpinning of the defendant's judge-made right? The clearest statement of the theory is contained in *People v. Riser*.[15] The court said that, "Absent some governmental requirement that information be kept confidential . . . the state has no interest in denying the accused access to all evidence that can throw light on issues in the case . . . ."[16] More recently, Chief Justice Traynor commented that the defendant must show inability to obtain material information readily before discovery will be permitted.[17] Appellate decisions suggest that

[10]Although Schmerber v. California, 384 U.S. 757 (1966), upheld the right of the police to take blood samples against a fifth amendment challenge, the practice is possibly open to challenge if the sample is taken in the absence of counsel. Thus in People v. Barry, Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968), the prosecutor's effort to obtain blood was blocked in the absence of a court order.

[11]People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

[12]227 Cal. App. 2d 482, 38 Cal. Rptr. 755 (1964). For substantive coverage in the area of discovery see Moore, *supra* note 3; Traynor, *supra* note 4, at 244.

[13]227 Cal. App. 2d at 510-11, 38 Cal. Rptr. at 773.

[14]Consider for example the recent U.S. Supreme Court decisions in the area of suppression by the prosecution of evidence favorable to the defendant. *E.g.*, Brady v. Maryland, 373 U.S. 83 (1963); Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960). In relation to discovery of statements of codefendants, see, e.g., People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965); for discovery of the identity of a nonwitness informer, see People v. Garcia, 67 A.C. 857, 434 P.2d 366, 64 cal. Rptr. 110 (1967).

[15]47 Cal. 2d 566, 305 P.2d 1 (1956).

[16]*Id.* at 586, 305 P.2d at 13.

[17]Traynor, *supra* note 4, at 244.

defendants must show both the need for information and some specificity of demand before the fullest reach of discovery is allowed.[18] These requirements should not impose on the defendant the impossible burden of alleging facts he cannot know until they are discovered, but the more extensive or unusual his request for discovery, the better the case the defendant will be required to establish in order to obtain the requested information.

At present, criminal discovery is in its formative stages. For the great majority of California defendants, justice is what trial courts do. This article will address itself to the mundane questions of the effectiveness and enforcement of discovery in lower courts. The focal point for the discussion will be the unreported, strange happening of *People v. Wolf*.[19]

II

THE STRANGE CASE OF *People v. Wolf*

In 1967, Professor Leonard Wolf was charged with violating California Penal Code section 272—contributing to the delinquency of minors.[20] He had become concerned about the increasing number of dropouts from San Francisco State College where he was a professor of English literature. He followed his ex-students into the Haight-Ashbury area of San Francisco to learn what caused them to abandon their formal education. There, he concluded that society owes its dropouts the duty to maintain bridges for their ultimate reconciliation. At Wolf's request, some 40 professors and medical doctors joined him to establish first a medical clinic and then an educational facility where informal courses could be offered on short notice. Suggestions for programs were solicited at meetings where the whole Haight-Ashbury community was invited to articulate its personal concerns. In the wake

[18]People v. Cooper, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960). Defendant needs only to claim ignorance of the details, after making a showing of materiality or claiming that the material may be helpful in ascertaining facts. People v. Estrada, 54 Cal. 2d 713, 716, 355 P.2d 641, 642-43, 7 Cal. Rptr. 897, 898-99 (1960); Traynor, *supra* note 4, at 244. Justice Fortas, concurring in Giles v. Maryland, 386 U.S. 66, 98 (1967) stated: "No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

[19]Crim. No. M69692 (San Francisco Mun. Ct., Oct. 20, 1967). The author acted as defendant's attorney in this case.

[20]The original complaint read: "[I]n that said defendant did commit an act and omit the performance of a duty, which act and omission caused and encouraged a person under the age of twenty-one years to come within the provisions of § 601 of the Welfare and Institutions Code of the State of California" (conferring jurisdiction upon the juvenile courts over the minors who habitually refuse to obey parents or are in danger of leading an idle, dissolute, or immoral life). Nov. 14, 1967.

of a wave of arrests in the area, someone suggested a conference on runaways.

The conference was mounted in seven days. Dr. Wolf organized panel discussions to which the police, community organizers, runaways, and parents were invited, and the Haight-Ashbury community organized their own portion of the conference including (unbeknownst to Dr. Wolf) a nude ballet. When the formal part of the conference was over, Dr. Wolf returned to the darkened auditorium and saw six dancers, illuminated by a spotlight and unencumbered by clothing, doing a slow dance. Within one minute, the police rushed past him into the auditorium. In the resulting confusion, the dancers escaped and, for lack of any other available suspect, Dr. Wolf was arrested as the person in charge. Though only a misdemeanor, the alleged offense nevertheless endangered Wolf's teaching credential, raised questions concerning the criminal responsibility of organizers of educational conferences, and presented constitutional issues of first impression in the area of artistic presentations to audiences composed at least in part of minors.[21]

[21]The *Wolf* case raised free speech issues of first impression. Art, including ballet, is protected against prosecution by both statutory and constitutional stricture. Convictions under the California Penal Code can be obtained only where an entire performance is utterly devoid of redeeming social interest, is shown to appeal to the prurient interest of its anticipated audience, and exceeds the contemporary limits of candor. CAL. PEN. CODE § 311(a) (West Supp. 1967). A good defense under the Penal Code to charges of obscene performances would be that the ballet was performed "in aid of [a] legitimate educational purpose." *Id.* § 311.8. However, the prosecution could not proceed against Wolf under the anti-obscenity statutes because the Penal Code, *id.* § 311(b), omits ballets from its definition of "obscene matters." Accordingly, charges against him could be brought only under a different section of the Penal Code. First amendment protections are not limited to prosecutions under specific obscenity statutes; they are meant to protect all forms of art, regardless of the specific section of the Penal Code invoked to repress expression. Thus, actors could not be charged with uttering lewd words or performing an indecent act on the stage, since these charges may not be treated as isolated acts, outside of the context of the performance, taken as a whole. *See* Dixon v. Municipal Court, Civil No. 24685 (Dist. Ct. App., First App. Dist., June 22, 1967).

The *Wolf* case raised the novel issue of whether persons in charge of an educational conference featuring a nude ballet could be charged with contributing to the delinquency of minors in the audience. It could be argued that a conference on runaways implicitly contemplated an audience of juveniles. But the first amendment test of "customary limits of candor" must be determined without any regard to a possible impact on children. *See* Butler v. Michigan, 352 U.S. 380 (1957). Furthermore, in Redrup v. New York, 386 U.S. 767 (1967), the Supreme Court implied that first amendment standards apply where state laws are not specifically aimed and factually applied to the protection of juveniles. *See also* Ginsberg v. New York, 88 U.S. 1274 (1968). *Quaere* whether the previously enacted Penal Code § 272 could reach the uncharted area under *Redrup v. New York*, where the section was not intended to apply to art, was never before invoked to prosecute artistic expressions (or the failure to prevent them) and contained no provisions to protect free artistic expression.

III

DISCOVERY IN THE *Wolf* CASE

The defendant demurred to the complaint on the grounds that section 272 was unconstitutionally vague and overbroad on its face and that he was not given adequate notice of the charges against him, as required by Penal Code section 952. The court overruled the constitutional demurrer and sustained the statutory one. The state then filed an amended complaint couched in the language of section 272 and further alleging that the defendant "did aid, assist, promote, encourage, allow and cause the performance of a nude dance . . . ." This amended complaint was again demurrable in that, *inter alia*, it failed to name the juveniles allegedly corrupted[22] but the defendant chose to argue that effective use of criminal discovery might cure defects in the accusatory pleading.[23] He filed jointly a demurrer and a motion for discovery, reserving argument on the demurrer until disposition of the motion. A plea was not entered[24] and time for trial was not waived.

The discovery motion sought only facts to which the defendant believed he was entitled on the basis of prior case law.[25] There were, however, two innovations in the motion: The defendant requested (and the court ordered) first, that all answers be submitted in writing and, second, that the return include a written admission that the answers given were complete and correct to the then present knowledge of the prosecution and all of its agents and employees.[26] The prosecution

[22]This was the judge's ruling in the municipal court. Subsequently, however, the higher court ruled for the prosecution, mechanically and erroneously citing People v. Gann, 259 A.C.A. 743, 66 Cal. Rptr. 508 (1968). People v. Strahn, Crim. No. 1295 (App. Dept. Super. Ct., San Francisco County, April 10, 1968). Before 1961, prosecutions under the "contributing" section had to originate in actual juvenile court proceedings. Ch. 1446, § 1, [1953] Cal. Stats. 3039 (repealed 1961). The new law made prosecution possible even where the juvenile himself was merely "in danger" of corruption, or where an act "tended" to corrupt, without any presently ascertainable effects on the juvenile. CAL. WELF. & INST'NS CODE § 601 (West 1966). *See also* People v. Aadland, 193 Cal. App. 2d 584, 14 Cal. Rptr. 462 (1961).

[23]*E.g.*, Cohen v. Municipal Court, 250 Cal. App. 2d 861, 58 Cal. Rptr. 846 (1967).

[24]To have entered a plea voluntarily would have waived the constitutional demurrer. *See* Cal. PEN. CODE § 1004 (West 1956).

[25]Authorities are collected in D. LOUISELL, MODERN CALIFORNIA DISCOVERY 399 n.97 (1963).

[26]On the issue of extension of orders to agents and employees of the state, see People v. Renchie, 201 Cal. App. 2d 1, 19 Cal. Rptr. 734 (1962). This inclusion is necessary because of the increasing tendency of the arresting police officers to dictate unsigned reports and their suggestion that all errors, inexactitudes, or false statements in such reports result from improper transcription. In the *Wolf* case itself, the police report was admittedly in error as to the time of the occurrence; the conversations in the report were neither exact nor chronologically correct; one juvenile was erroneously reported to be present at the scene, and nothing was said as to the identity of the officers who "interviewed" another addressless juvenile.

argued that these innovations constituted automatic importation of civil discovery procedures into criminal discovery in violation of the exclusive enumeration of *People v. Lindsay*.[27] The defendant successfully contended, however, that he merely requested the court to use its inherent discretionary powers to assure reliability of the information furnished to him.

The district attorney first elected to comply with the order and submitted a written document bearing no title and containing only seven names of alleged juveniles together with the name of the school at which each was allegedly interviewed. The defendant excepted to this document as incomplete and unresponsive, and the court sustained his objections.[28] A court order imposing sanctions for willful failure to comply with the discovery order then issued, prohibiting the introduction into evidence of any matter unsuccessfully sought by the discovery motion or obtained as a consequence of such matter unless all such information was delivered to defendant in writing not later than three days before the trial. The demurrer to the amended complaint was then overruled on the ground that sufficient discovery had been ordered; the court entered a plea of not guilty for the defendant, and the matter was transferred to the jury department for trial. The district attorney did not seek review of the order.

The trial judge was advised of the pretrial orders in chambers, before the jury was selected, and requested briefs on the subject of their scope and effect. On the morning of the fifth day of trial, the court vacated the pretrial sanctions and permitted the people to introduce evidence in disregard of the discovery orders. Since the jury subsequently acquitted Professor Wolf, these facts are now relevant only for academic, rather than appellate, review.

[27]227 Cal. App. 2d 482, 38 Cal. Rptr. 755 (1964); see text at note 12 *supra*.

[28]The return did not contain the ages and addresses of the juveniles from whom the statements were taken, where and when taken, or the officers' names and badge numbers. The document was signed without certification under pain of perjury (declaration for an order requiring discovery requires such a verification). CAL. CIV. PRO. CODE § 2015.5 (West Supp. 1967). Defendant asked for names, addresses, and ages of juveniles, if any, who were known to have been present at the theater during the dance; whether any among the juveniles were expected to be called as witnesses during the trial; whether any transcribed statements were given by any juveniles; and the names and badge numbers of the officers, if any, who took such statements. The court agreed with the defendant, stating: "Well, frankly, I think the reply here is extremely sketchy. It kind of reminds me of some replies that I might have prepared if I wanted to avoid disclosing too much . . . ." Record at 24. "I made an order and I don't think that order has been adequately complied with . . . ." Record at 27. "[A]n attempt was made to supply that information, which I found inadequate and not in compliance with my original order." Record at 31.

IV

COURTS HAVE DISCRETION TO ORDER WRITTEN RETURNS IN CRIMINAL CASES

In criminal cases, where prosecution and defense counsel are both fair and experienced, informal discovery is utilized much more often than its formal counterpart. Nonetheless, there are cases where informal discovery is inadequate. In San Francisco, criminal cases are usually handled by a succession of assistant district attorneys, and it is extremely rare for the trial prosecutor also to have handled the arraignment, plea, motion, jury setting, and preliminary hearing calendars. The informal request for discovery is accordingly addressed to successive assistant district attorneys whose contact with the case is likely to be minimal. Furthermore, the workload of an assistant district attorney is so heavy that effective preparation of cases for trial is frequently left for the final hours before the trial deadline. In the interim, investigations continue under the supervision of the police. If approached before the date of the trial, the assistant district attorney may tell the defense counsel quite frankly that his knowledge of the people's case is inadequate. Unless pressed for a careful study of the case, including a conference with both the police officer in charge and the witnesses, he will rarely be in a position to offer reliable answers to the defendant's questions. Nevertheless, as the following cases indicate, district attorneys regularly purport to provide answers and in so doing they often overstate or misrepresent facts and invite reliance by defense counsel.

This practice raises two problems: First, how to insure accuracy in the district attorney's disclosure where the investigation is not yet completed or some factual information is not readily available to him; and second, how to ascertain with reasonable exactitude the nature of the district attorney's return, so as to preserve a record of what was in fact relied upon by the defense.

That both problems are grave is clear to anyone practicing in criminal courts. In *People v. Fauss*,[29] in which the defendant was charged with three armed robberies, the defendant formally moved for answers to 16 questions. The people were ordered to answer nine questions, and the assistant district attorney promptly answered them orally on the record. Not less than six of the nine answers so given were incorrect or misleading and were at that time known by defense counsel to be

[29]Crim. No. 69756 (Super. Ct. San Francisco County, July 10, 1967.) The author acted as defendant's counsel in this case.

incorrect or inadvertently false.[30] Yet there was no issue of malice or willful misrepresentation in the case.[31] It is submitted that if these answers were required to be in writing, they would not have been so given without an appropriate conference with the several police officers who investigated the various aspects of that case.

In *People v. Litzius*,[32] the defendant moved for pretrial discovery in a sodomy case in an effort to determine whether a sperm count had been taken and was assured that all relevant records and information available in the San Francisco Public Health Department files had been disclosed to him. At the trial he had to face the "nonexistent" records which had been in the files all the time.

In *People v. Donaldson*,[33] in which the extent of alleged harassment by the police department of a conference on religion and the homosexual was at issue, the defense was told repeatedly by the assistant district attorney that no photographs of any participants in the conference, other than those produced, were taken in connection with the arrest. During the trial the defense served a subpoena duces tecum on the custodian of police photographs and found, when the photographs were produced in court, that there were over one hundred photographs whose existence had previously been denied. Cases of this kind are not uncommon.

In the *Wolf* case, the police report listed two juveniles interviewed at the scene of the nude dance by unnamed police officers. One of the juveniles was listed without address. The other juvenile was found by the defendant's investigators not to have been in the theater on the date of the dance. The written return of the district attorney stated that "the following juveniles were interviewed by the police," listing seven names. The return omitted the name of one of the juveniles named in the police report. None of the juveniles listed were identified as to age or address. During the trial, the police officer in charge of investigation of the *Wolf*

[30]In the *Fauss* case, the defense had arranged to notify the police that a man other than the defendant was suspected of being the real perpetrator of the crime, but the police failed to investigate this for five weeks after the discovery motion was filed asking whether such information was in fact submitted to the police. The case was dismissed on the morning of the trial. During argument on the discovery motion the district attorney denied that any such information was disclosed to the police.

[31]That the problem is not malice but mere inadvertence also seems clear from People v. Mackaness, Crim. No. 70058 (Super. Ct. San Francisco County, Aug. 14, 1967). In that case the defense moved for discovery and had two documents made available for inspection, including one police report. Several months later, just prior to the preliminary hearing, the defense was again informally shown the file of the district attorney and found another police report, not previously shown to him, which also had been made on the date of the arrest. *See* People v. Williams, 187 Cal. App. 2d 355, 9 Cal. Rptr. 519 (1960). *Cf.* D. LOUISELL, MODERN CALIFORNIA DISCOVERY 420-22 (1963).

[32]Crim No. 68900 (Super. Ct. San Francisco County, July 28, 1967).

[33]Crim. No. K250 (Mun. Ct. San Francisco County, Feb. 11, 1965).

case testified that on the date of the district attorney's return the seven juveniles listed therein still had not been interviewed by the police but were known to them to have been present at the scene of the dance. Were these facts disclosed at the time of the return, defense could successfully have moved for a dismissal, since there can be no prosecution for contributing to the delinquency of unknown minors.[34] The *Wolf* case demonstrates that even where written returns are filed, such returns do not of themselves guarantee full and careful disclosure. The mere act of reducing answers to written form might not necessarily have altered the outcome of the cases discussed above. At the very least, however, such written returns would probably have been prepared with more care, on the basis of more careful consultation with the police and the witnesses in the case. By requiring written returns, chances of inadvertent misinformation will be minimized and the exact nature of the disclosure will be less open to disputes and acrimony during the trial, at which one or both of the original counsel may be replaced by other attorneys.

The authority to order written returns is inherent in the discretion of the court. There is no statutory authorization for written returns in criminal cases. The Code of Civil Procedure—which provides for interrogatories in civil cases—does not apply to criminal proceedings. In *People v. Lindsay*[35] the appellate court found no error in the lower court's suppression of interrogatories in a criminal case where the interrogatories were neither attached to the transcript nor described in the appellate record, and where the defense failed to allege on appeal that the striking of interrogatories was unfair, prejudicial to the defendant, or adversely affected his trial in any way. *Lindsay* requires the conclusion that courts have discretion to compel answers to interrogatories on a proper showing. To hold otherwise would require disregarding that part of the decision which deals with the substance of the interrogatories. The court in *Lindsay* could have limited its observations to the simple statement that no authority exists for written interrogatories in criminal cases. Instead, it went into specific analysis of circumstances under which the denial of interrogatories does not constitute reversible error. Even without *Lindsay*, the inherent power of the court to protect fairness in the proceedings before it would have sanctioned the same result. Written returns should be ordered routinely wherever the defense is willing to risk demanding them, inviting the twin dangers of encouraging

[34]The defense should have the opportunity to question the alleged juvenile victims in order to establish that the victim may not have seen the act in question. The defendant must be apprised of the act charged with sufficient certainty to enable him to make a defense thereto. *See* CAL. PEN. CODE § 956 (West 1955).

[35]227 Cal. App. 2d 482, 38 Cal. Rptr. 755 (1964).

the district attorney to complete his investigation promptly and, possibly, a similar countermotion.

In the *Wolf* case there were two objections to written returns. First, the district attorney argued that there was no authority to order returns in written form. This argument was based on a logical error of equating selective adaptation of a section of the Code of Civil Procedure with the proscribed automatic incorporation of the whole of the civil rules into criminal law.[36] The second objection was that written returns would impose an unjustified burden on the inadequate stenographic resources of the district attorney's office. With all due deference and abiding sympathy for understaffed prosecutors, this objection appears insubstantial, if not altogether flippant.

The requirement that returns be in writing is only one of the alternative methods for insuring reliable discovery. Another problem may arise in cases where numerous items of evidence or potential evidence are either delivered to the defendant or made available for his inspection. How should defendants protect the record as to the exact nature of items disclosed? There are several alternative solutions. Both counsel, or whoever is present at the inspection, may sign a memorandum of all matters inspected and file it with the court; the defendant's counsel may do this on his own, and deliver a copy to the district attorney. In *People v. Barry*,[37] the defendant sent to the district attorney a stipulation covering 13 documents furnished to him by the district attorney, 58 names and addresses of witnesses, and some 30 items of physical evidence. In the stipulation, the defendant included not only the physical description of all relevant matters disclosed to him but also all statements made to him about the location of these items, their condition at the time, the results of scientific tests conducted on these items, and other information imparted to him with the obvious prosecutorial intention that he rely thereon. The district attorney refused to sign the stipulation or even to approve it as to form, neither admitting nor denying that the list was complete and that the statements listed therein were correct. The defendant then requested that omissions or

[36]*See* Yannacone v. Municipal Court, 222 Cal. App. 2d 72, 34 Cal. Rptr. 838 (1963), which held that the defense in a criminal case may not take depositions. A tactical maneuver which can be used occasionally to circumvent this restriction is to bring a civil suit involving the alleged criminal act, and then use the civil discovery procedures. However, timing problems may limit the availability of this device.

[37]Crim No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968). In *Barry*, the defendant was denied answers to interrogatories on jurisdictional grounds. However, the court then treated the request as a discovery motion, and granted the request. The author acted as defendant's counsel in this case, which resulted in a hung jury.

corrections regarding these items be filed with the court within ten days or that all matters mentioned in the request for admissions be deemed admitted. While it could be said that the defendant was converting the disclosure into a semi-deposition,[38] he was really doing no more than recording what information was disclosed. The question before the court was essentially one of the reasonableness of the demand, and, in the circumstances of the case, was fully discretionary with the court. The court refused to order admissions.

V

DENIALS OF DISCOVERY

When disclosure to the defendant is impossible or dangerous, and such impossibility or danger is demonstrated to the court's satisfaction, discovery might be denied altogether.[39] Where disclosure of a witness' name is made but the witness himself is instructed not to discuss the case with the defendant, the court may order the prosecution to cease interfering with the witnesses,[40] but it may not direct the witness to submit to interviews,[41] and it is not clear whether under these circumstances such witness' testimony may be suppressed.

The *Wolf* case raised another question: Whether mere inconvenience in the prompt obtaining of information raises inaccessibility to the dignity of "impossibility." Where names of juveniles were supplied with the names of their schools as their sole identifying address, and where the school authorities have a policy of allowing the police, but not the defendant, to obtain information about the students and to interview them on school premises, the practical effect of disclosure by reference only to the school is to deny the

[38]This would violate the rule stated by Yannacone v. Municipal Court, 222 Cal. App. 2d 72, 34 Cal. Rptr. 838 (1963); *accord*, Clark v. Superior Court, 190 Cal. App. 2d 739, 12 Cal. Rptr. 191 (1961).

[39]*See* People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963), *cert. denied*, 377 U.S. 945 (1964). The FBI refused to disclose to the prosecution information sought by the defendant from the prosecution. Defendant's motion to suppress was denied in the absence of a showing of conspiracy. *Accord*, People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), *cert. denied*, 375 U.S. 994 (1964), approving denial of discovery on a showing that witness' life would be endangered by a pretrial disclosure, when there was provision for disclosure in time to permit cross-examination during trial. In People v. Flores, 253 A.C.A. 1073, 61 Cal. Rptr. 230 (1967), it was held that no error was committed where the police gave the defendant all the information they had on two informers who disappeared and who did not testify at trial, but withheld their names. The facts of the case are insufficient for a critique of the holding which on its face sounds inconsistent with an earlier case involving similar issues. *See* People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673, 3 Cal. Rptr. 1 (1960).

[40]Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958).

[41]Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957).

defendant access to vital information. If the return to the defendant's discovery motion is taken at face value, the police had interviewed seven juveniles whose addresses should have been readily available. A refusal to communicate this information to the defendant was improper and rightly resulted in the imposition of sanctions.

Defendants also face significant issues involving the right to disclosure of information which is accessible but not presently available to the police. Could a court order the district attorney to speed up police investigation of the case, to obtain proper addresses of victims of the crime, and to make them available to the defense? In *People v. Barry*,[42] blood tests, botanical analysis, and chemical analysis of items of potential physical evidence in a murder trial were not complete four months after the alleged crime took place, and barely hours before the date set for trial. In the absence of these reports the defense could only guess at the real extent of the scientific evidence in the case. In appropriate cases and especially where the very validity of the charge depends on it—as in *Wolf*—the court could order dismissal of the complaint in the absence of such information. It should be able to similarly order the lesser relief of reasonably prompt ascertainment of such relevant facts and their disclosure.

When a district attorney responds to discovery motions with answers anchored in abiding ignorance of the case, there is an inherent duty in the courts to order the district attorney to complete investigations, obtain information, or perform other acts by a specified date in order to assure the defendant of a fair trial.

VI

CONTINUING ORDERS FOR DISCOVERY

In *Wolf*, formal discovery was sought before entry of a plea. In general, however, discovery is least effective when conducted at this stage of the case. Despite the requirement of probable cause for arrest, answers elicited from the prosecution within the first two weeks thereafter tend to blend overcooked double hearsay with underbaked investigation. In most cases of such early discovery, the defendant gets a bland, "All I have in the file is the police report," or some similar variation on the theme of "investigations are pending." Unless, as in *Wolf*, questions arise concerning the validity of the charge, defendants should try to plot their discovery so that the return will be early enough to assist in preparing their defense while being sufficiently close to the date of trial

[42]Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968).

to elicit a reasonably complete report. The alternative is to renew the motion immediately before the trial.

When crucial information is sought early in the case, the practice is to invoke an informal if limited system of "continuing discovery:" An oral request for information is made in open court in response to which the district attorney informs the court that he will try to determine whether the evidence exists and will thereafter promptly disclose the results to the defendant. On occasion courts suggest keeping the matter on the calendar to assure effective disclosure. "I don't want you to delay until the trial" is a common statement from the bench. Cynics suggest that justice is often done in this manner as long as neither party admits that there is no legal authority to order continuing discovery.

The purpose of continuing orders is obvious since without them the defendant cannot prevent the admission of afteracquired evidence.[43] Static motions (requiring noncontinuing returns) produce no information wherever the prosecution either delays interviewing witnesses or carries its investigation into midtrial. In the first case repeated motions are required; in the latter case discovery is inherently ineffective. Some last minute investigations may be justifiable and on occasion necessary. This is not to say that investigative delays ought to be encouraged. In cases like *Wolf* the prosecutor's very knowledge that he may delay crucial investigation at will, and that courts will routinely admit evidence acquired by such investigations, encourages sloppy police procedure, delays vindication for the innocent defendant, and substitutes apparent compliance with pretrial discovery orders for effective disclosures thereunder.[44]

It is nevertheless impractical to suggest that continuing discovery be formally available to every defendant in all cases and as to all evidence. Such practice would impose on the prosecution the automatic duty of promptly notifying every defendant of every minor development in every case. However, the ease with which this strawman argument is raised should not obscure the realistic requirement that in some cases, upon a showing of good cause, specific items of evidence and the names and addresses of witnesses ought to be made available to the defendant as

[43]People v. Barry, Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968). The court refused questions as to "an expected date when presently foreseeable tests which could be presently performed on the existing items of physical evidence will be completed." (Law and Motion file for *Barry*, available upon request from the author.) The court also refused to order a continuance until after the completion of the tests.

[44]For discussion of a situation where continuing discovery orders may be essential, see text accompanying notes 66-72 *infra*.

soon as available to the prosecution. If new evidence is not made available, it should be inadmissible.

The first appellate recognition of continuing orders of discovery came in cases authorizing discovery for the prosecution[45] although the full scope and meaning of the "continuing order" in criminal cases is not settled. In *People v. Barry*,[46] for example, the court ordered continuing discovery for the people as to affirmative defenses. On the theory and in a spirit of mutuality, the court then ordered that the defendant also be given continuing discovery orders, imposing on the people the duty to disclose all further information as it became available.[47]

The meaning of such orders is both unclear and untested. Their primary disadvantage is that they place in the hands of opposing counsel the power and duty to determine when and what is relevant and required to be disclosed. A defendant may therefore run substantial risks in relying on a continuing order rather than repeated discovery motions. The prosecutor may withhold vital facts as "irrelevant;" the defendant may cease to explore additional theoretical possibilities of the case; and the chance of obtaining meaningful sanctions immediately prior to trial may be jeopardized.

These dangers are reduced, however, if the original motion subject to a continuing order is carefully drawn. Specificity of both the motion and the order is imperative to comply with the stated rules of criminal discovery (no fishing expeditions); to make meaningful the material obtained or withheld; and to impose viable sanctions for noncompliance.

VII

SANCTIONS FOR NONCOMPLIANCE WITH AN ORDER FOR CRIMINAL DISCOVERY

When a written or oral return has been ordered, the attorney's task is regrettably far from complete. Such orders can be and are disobeyed or disregarded, either willfully or by neglect. It is also possible that such an order will be frustrated by delay in carrying out its provisions. Each situation calls for its own approach to the problem of effective sanctions.

The court's inherent authority to impose sanctions is codified in section 128 of the Code of Civil Procedure, which empowers any court to

[45]*See, e.g.*, Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

[46]Crim. No. 136128 (Super. Ct. San Mateo County, filed Mar. 19, 1968). For a discussion of the mutuality problem, see Moore, *supra* note 3, at 902-05.

[47]The *Barry* court construed the meaning of "continuing motion" to signify within a reasonable time after witnesses are ascertained but not later than the time when subpoenas are issued.

compel obedience to its orders.[48] The authority of section 128 is extremely useful but seldom invoked.[49]

In a criminal case in which sanctions for noncompliance with a discovery order are appropriate, the better practice requires both parties to "make their record" concerning the order before it is filed. The prevailing party is ordered to prepare a draft of the proposed order which the other party approves as to form before it is submitted for signature by the court. This allows the opposing counsel to correct any misstatements of fact or infelicitous phraseology contained in the proposed order. The resulting arguments may bring about a modification of the proposed order, but when the order is signed and filed it should serve as a terminal point to the efforts of both counsel to determine the manner and the extent of the discovery and to fix blame for its grant or denial.

What sanctions are appropriate in criminal discovery proceedings? Wholesale application of civil procedure sanctions seems inappropriate and unwarranted. Fines and contempt citations against the prosecution have apparently never been imposed in California criminal cases, but such procedures might reasonably be considered against particular assistant district attorneys (few and far between) with a long and consistent record of disregard for such orders. An order striking accusatory pleadings is a gesture as empty as it may be costly to the defendant, since the district attorney can refile under the authority of section 999 of the Penal Code,[50] frequently requiring the setting and posting of another bail on the "new" charge, tying up still more of the defendant's assets with his bondsman. In practice, only two kinds of sanctions are seriously contemplated:[51] dismissal and suppression of testimony. There is some authority for both. In cases involving asserted federal governmental privileges, the United States Supreme Court has held that,

> [T]he criminal action must be dismissed when the Government, on the ground

[48]The question of whether § 128 applies to criminal cases is moot, since the power to compel obedience to court orders is an "inherent power" requiring no statutory sanction. Fairfield v. Superior Court, 246 Cal. App. 2d 113, 54 Cal. Rptr. 721 (1966); Mellone v. Lewis, 233 Cal. App. 2d 4, 43 Cal. Rptr. 412 (1965); Neal v. Bank of America, 93 Cal. App. 2d 678, 209 P.2d 825 (1949); Security Trust & Savings Bank v. Southern P.R.R., 6 Cal. App. 2d 585, 45 P.2d 268 (1935). As to the court's inherent power in criminal cases see People v. Eggers, 30 Cal. 2d 676, 185 P.2d 1 (1947).

[49]*See, e.g.*, Meehan v. Hopps, 45 Cal. 2d 213, 288 P.2d 267 (1955).

[50]CAL. PEN. CODE § 999 (West 1967) provides that "[a]n order to set aside an indictment or information . . . is no bar to a future prosecution for the same offense."

[51]On May 27, 1968, however, a mistrial was granted by a Superior Court in Santa Barbara County, People v. Kuhns, No. 81648, after three weeks of trial, where a vital item of evidence was introduced by the district attorney in contravention of discovery orders. San Francisco Chronicle, May 30, 1968, at 6, col. 2.

> of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements . . . .[52]
>
> [S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of *anything* which might be material to his defense.[53]

On the other hand, in California cases dealing with disclosure of informers' identity, the courts have held that such testimony ought to be stricken.[54] Where a greater sanction—dismissal—could be legally imposed, the court may always exercise its discretion to impose lesser sanctions, such as the suppression of evidence, possibly even with a proviso as to the circumstances under which suppressed or suppressable testimony would be rehabilitated.

Once the order is filed, there is nothing more defense counsel must or can do to assure that sanctions are effectively carried out. He should be able to rely on the order. "Reviews of judicial orders by the same court are not countenanced except to cure clerical errors *or determine jurisdictional questions* . . . ."[55]

Every policy consideration militates against affording the district attorney another attack on the pretrial sanction orders before the trial judge. At the very least, the prosecution should be expected to test the orders in special proceedings in advance of trial. In practice, however, some district attorneys attack the order not by way of a writ but by way of reargument before the trial judge. This practice is clearly destructive of orderly procedure where there are no new factual circumstances shown to justify reopening the question.[56]

[52]Jenks v. United States, 353 U.S. 657, 672 (1957). Thereafter, Congress amended the federal law, 18 U.S.C. § 3500 (1964), to substitute the striking of testimony for a dismissal. *See also* People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958); DeLosa v. Superior Court, 166 Cal. App. 2d 1, 332 P.2d 390 (1958).

[53]United States v. Reynolds, 345 U.S. 1, 12 (1953) (emphasis added). *Cf.* People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956).

[54]*See, e.g.*, Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958). Defendant should carefully consider which sanction he asks the court to impose. A dismissal with prejudice is bound to invite immediate review. A dismissal without prejudice accomplishes very little in that the district attorney may simply cause a new complaint or an information to be filed. The disadvantages of suppression of testimony are equally obvious where trial courts do not consider themselves bound by pretrial orders.

[55]Fallon v. Superior Court, 33 Cal. App. 2d 48, 52, 90 P.2d 858, 859-60 (1939) (emphasis added).

[56]If the district attorney prevails before the trial judge, the defendant ends up without his discovery but with a doubtful consolation of an appellate issue and a possible continuance which, at this late stage, is unlikely to be particularly helpful.

One major exception to this suggested approach is where pretrial orders are void on their face.[57] Void orders can be set aside at any time by any judge[58] upon a review of the entire record of the proceedings. The question is: How void is "void"? It is difficult to argue that an order is void on its face where the district attorney had an opportunity to view the proposed order, the issue of jurisdiction was argued before the pretrial court, and that court ruled on the issue. *Fallon v. Superior Court*[59] appears to hold that jurisdictional issues once decided should not be subject to redetermination by a court of coequal jurisdiction.

In the *Wolf* case, the pretrial judge found the conduct of the district attorney willfully "evasive,"[60] but the trial judge substituted his own discretion for that of his predecessor, holding the district attorney in substantial compliance with the pretrial order of discovery, and that the order imposing sanctions was in excess of the jurisdiction of the pretrial court of coequal jurisdiction.

Wolf is significant because this was not an isolated ruling. Battles are seldom fought over conceded territory. In most cases, the district attorney would refuse to answer defense questions only if the extent of discovery sought or its manner deviated from the ordinary norm. Traditionally, these issues are discretionary with the court. But if every deviation, regardless of how rationally justified, can be deemed "void on its face," no defendant can ever trust such an order of pretrial courts. The developments in *Wolf* at the trial court level suggest that the defense counsel should seek the sanction of dismissal rather than mere suppression of evidence in all cases of willful failure to comply with discovery orders.

It is ironic that the defendant, with his relatively broad right of discovery, is saddled with such ineffective enforcement of his rights, while the prosecution's discovery, which is said to be narrower, is much more effectively enforceable. Thus, the defendant's failure to respond fully and properly to the district attorney's questions will absolutely bar defenses of insanity, alibi,[61] and presumably illegal search and seizure. But failure by the district attorney to respond fully and properly to the defendant's motions is seemingly immune from effective sanction. The result, from a defense point of view, are discovery orders of monumental triviality.

[57]For example, if a municipal court purports to issue a permanent injunction. *See* CAL. CIV. PRO. CODE § 89(h) (West Supp. 1967).

[58]*See* Ross v. Murphy, 113 Cal. App. 2d 453, 248 P.2d 122 (1952).

[59]33 Cal. App. 2d 48, 90 P.2d 858 (1939).

[60]Order imposing sanctions for failure to comply with discovery orders. December 14, 1967.

[61]*See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) and cases cited therein.

VIII

AFTERACQUIRED INFORMATION AND INADVERTENT FAILURE TO DISCLOSE

The problem of sanctions is more difficult where evidence is brought forward which was allegedly discovered during the period which followed the discovery order and sanction for noncompliance. Here, trial courts balance their natural repugnance for suppression of otherwise competent testimony with the need to enforce prior orders of the court. New matter should be admissible only if the prosecution demonstrates that it was not "fruit of the poisonous tree" but was obtained without reliance on matters suppressed, and in borderline questions, the defendant, not the prosecution, should be given the benefit of the doubt. This resolution of the problem is justified for several reasons: First, because the defendant obtained the order imposing sanctions; second, because the burden is on the prosecution to show why any evidence of the kind suppressed should be allowed; third, because if the defendant is not likely to be gravely prejudiced by the admission of such evidence neither will the prosecution be greatly aided by its admission; and, finally, because it is difficult, if not impossible, to speculate prospectively about the effects of any given testimony. Lack of prejudice to the defendant is an appellate standard, similar in effect to the doctrines of harmless error and substantial evidence. The use of this standard before and during the trial should be deliberately avoided.

The courts utilize a number of devices to justify admitting evidence not previously made available to the defendant as previously ordered in discovery. Where evidence is afteracquired and there is no order imposing sanctions against such evidence, courts tend to admit it as "nonprejudicial."[62] On the question of timeliness of disclosure, disclosure in midtrial or immediately preceding the trial may be deemed timely enough.[63] The tests of "prejudice," "cumulative effect," "harmless error," or the test of an implied knowledge or ability to deduce that such testimony exists or that it could be produced, have all been used on occasion by the courts, almost always in favor of the prosecution.[64] This policy is ripe for a review. If we pose the question in

[62]*See, e.g.*, People v. Briggs, 58 Cal. 2d 385, 374 P.2d 257, 24 Cal. Rptr. 417 (1962).

[63]*See* People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); People v. Bazaure, 235 Cal. App. 2d 1, 44 Cal. Rptr. 831 (1965). On the other hand, where a request for discovery was first made ten days before trial and not renewed at the trial itself, it could be held that the information was not vital. D. LOUISELL, MODERN CALIFORNIA DISCOVERY § 13.05, at 404 (1953).

[64]*See, e.g.*, People v. Williams, 187 Cal. App. 2d 355, 9 Cal. Rptr. 722 (1960); People v. Nothnagel, 187 Cal. App. 2d 219, 9 Cal. Rptr. 519 (1960). *See also* People v. Briggs, 58 Cal. 2d

terms of a substantial evidence rule, it is logical to conclude, as in *People v. Bazaure*,[65] that an inadvertent failure to disclose one item where 35 items were disclosed did not amount to a reversible error. But if the question is raised in terms of justifying admissibility of a cumulative item of evidence, should not the answer be the opposite? Is it not up to the defense to determine what is cumulative? Why should cumulative material be admitted altogether? In *People v. Morris*,[66] the names of two witnesses were omitted inadvertently from a list of witnesses supplied the defendant. During trial these witnesses were allowed to testify over defendant's objections. The court held that as to one of the witnesses there was no prejudice since the witness testified in the preliminary hearing, and the sole prejudice to defendant resulting from the district attorney's failure to disclose related not to the substance of testimony but merely to the implied representation that the witness would not testify at the trial. The testimony of the other witness was apparently "cumulative." But in *Wolf*, *Litzius*,[67] and *Donaldson*,[68] trial courts interpreted *Bazaure*, *Morris*, and cases like them, as a mandate to favor the prosecution where (a) the error was not the defendant's, and (b) the evidence was not cumulative. This typifies the problems facing defense counsel when prosecution-minded trial judges interpret and apply the broad principles enunciated by appellate courts.

CONCLUSION

Criminal discovery before trial in California is a morass of unreported trial court rulings, shrouded in intermittent appellate fog. The defense attorney faces difficult problems in his dealings with the police, the district attorney, and the courts. He must cope with problems of drafting and timing his request for a discovery order, he must obtain assurances of the reliability of information disclosed to him, and occasionally he must seek appropriate sanctions for noncompliance. Afteracquired evidence also presents thorny problems. While much has been done to expand criminal discovery in California, much more remains to be done. It is hoped that the experiences recounted in this Article may serve to accelerate this expansion and thereby make available to the defense attorney at the earliest possible moment the discovery procedures essential to the full and adequate defense of his client.

385, 374 P.2d 257, 24 Cal. Rptr. 417 (1962).

[65]235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (1965).

[66]226 Cal. App. 2d 12, 37 Cal. Rptr. 741 (1964).

[67]Crim. No. 68900 (Super. Ct. San Francisco County, July 28, 1967).

[68]Crim. No. K250 (Mun. Ct. San Francisco County, Feb. 11, 1965).