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A Proposal for Discovery Depositions for Criminal Cases in Illinois, 16 J. Marshall L. Rev. 547 (1983)

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COMMENTS

A PROPOSAL FOR DISCOVERY DEPOSITIONS FOR CRIMINAL CASES IN ILLINOIS

The trend in criminal jurisprudence is away from the old "sporting theory"[1] of justice toward a system which eliminates surprise and allows the parties to prepare adequately.[2] The criminal trial is a search for truth, intended to acquit the innocent as well as convict the guilty.[3] Society's interest in the criminal process extends beyond convicting criminals to the integrity of the judicial system.[4] It is undisputed that a pretrial disclosure of facts encourages adequate preparation, an efficient, orderly trial, and an accurate disposition.[5] Because discovery is the process used to disclose facts prior to trial, society's interest in efficient, accurate trials requires its use in

1. The sporting theory placed emphasis on frustrating mutual knowledge and the orderly presentation of facts, thereby muddling the issues, confounding jurors and resulting in a distrust of litigation. Johnston, *Discovery in Illinois and Federal Courts*, 15 J. MAR. L. REV. 1, 2 (1982).

2. Wardius v. Oregon, 412 U.S. 470, 473 (1973) (increased discovery is premised on belief that justice will be served by liberal discovery); Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966) (trend in criminal law is toward elimination of surprise and discovery of facts prior to trial), *aff'd after remand*, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969). *See also* Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1119 (1957).

3. "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

4. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. 83, 87 (1963).

5. The goal of pretrial discovery is promotion of the fact-finding process and elimination of the advantages of surprise by either side. People v. Childs, 95 Ill. App. 3d 606, 420 N.E.2d 513 (1981). Discovery is to protect defendants against surprise, unfairness, and inadequate preparation as well as afford the defense the opportunity to investigate the circumstances surrounding the case. People v. Miles, 82 Ill. App. 3d 922, 926, 403 N.E. 2d 587, 591 (1980). *See also* Zagel & Carr, *State Criminal Discovery and The New Illinois Rules*, 1971 LAW FORUM 557, 560; 1978 ABA Standards for Criminal Justice, 11-1.1(a)(iii); *infra* notes 37-50 and accompanying text.

the criminal area.[6]

Illinois has specific rules which establish guidelines for criminal discovery,[7] but these rules, unlike their civil counterparts, do not allow complete discovery; discovery depositions are barred because they allegedly increase costs, harass witnesses, and create constitutional problems.[8] Discovery depositions, however, would improve the criminal justice system by improving pretrial preparation, thus facilitating accurate, efficient dispositions. Questionable dispositions compromise the integrity of the criminal system. Discovery depositions will provide both the state and defendant with an efficient fact-finding tool which will streamline the system while sustaining its integrity.[9] Defendants desperately need discovery depositions to close the gap between their fact-finding abilities and the state's vastly superior investigative powers.[10] It is illogical to give civil defendants better tools to protect their property than are given criminal defendants in protecting their lives and liberty. Beyond the practical benefits of discovery depositions, denying their use may violate a defendant's right to due process[11] and effective assistance of counsel.[12]

DISCOVERY IN ILLINOIS

Discovery is a relatively new concept in the United States,[13] not implemented until the late 1950's and early 1960's. While a

6. For views favoring liberalized discovery, see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Datz, *Discovery in Criminal Procedure*, 16 U. FLA. L. REV. 163 (1963); Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Nakell, *Criminal Discovery For The Defense and The Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972); Norton, *Criminal Discovery: Experience Under The American Bar Association Standards*, 11 LOY. U. CHI. L.J. 661 (1980); Pye, *The Defendant's Case For More Liberal Discovery*, 33 F.R.D. 82 (1963); Zagel & Carr, *supra* note 5; Note, *A Proposal For Prosecutorial Discovery Depositions in California*, 14 SAN. DIEGO L. REV. 936 (1977); Comment, *Discovery Depositions: A Proposed Right for the Criminal Defendant*, 51 S. CAL. L. REV. 467 (1978); Comment, *Depositions as a Means of Criminal Discovery*, 7 U.S.F.L. REV. 245 (1973).

7. *See* ILL. REV. STAT. ch. 110A, § 412(a) (1981).

8. *See infra* note 66 and accompanying text.

9. *See infra* notes 37-50 and accompanying text.

10. *See infra* notes 55-63 and accompanying text.

11. *See infra* notes 114-142 and accompanying text.

12. *See infra* notes 143-157 and accompanying text.

13. The major federal cases which discuss the merits of discovery are: Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); Brady v. Maryland, 373 U.S. 83 (1963); Jencks v. United States, 353 U.S. 657 (1957); and Hickman v. Taylor, 329 U.S. 495 (1947). *See also* Zagel & Carr, *supra* note 5, at 559.

number of states have recognized the value of discovery depositions and have provided for them by statute,[14] prior to the early 1970's, criminal discovery in Illinois was based on cases and scattered statutes.[15] Although the Illinois General Assembly specifically provided in 1964 that discovery procedure in criminal cases was to be in accordance with the rules of the Illinois Supreme Court,[16] the court did not exercise this rule-making authority until 1970 in *People v. Crawford*.[17]

In *Crawford*, a divided appellate court held that the trial court has the inherent authority to order discovery in criminal cases.[18] On appeal, the state did not contest the merits of the court's power to order discovery, but merely argued that discovery should not develop on a case-by-case basis,[19] resulting in inconsistencies among the different circuits and districts in Illinois. The Illinois Supreme Court entered an order appointing a committee to draft rules for discovery in criminal cases and remanded the case with instructions to proceed in accordance with the new rules.[20]

The rules drafted by the Committee on Discovery and Procedure Before Trial in Criminal Cases (the Committee) apply only following indictment or information and not prior to, or in the course of, any preliminary hearing,[21] and to cases which may

14. *See, e.g.*, 17 ARIZ. REV. STAT. ANN., Rules of Criminal Procedure, Rule 15.3 (1972); FLA. STAT. ANN. § 3.220(d) (West 1975); MO. ANN. STAT. §§ 545.380—545.400 (Vernon 1953); N.H. REV. STAT. ANN. § 517:13 (1974); OHIO REV. CODE ANN. § 2945.50 (1953); TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 1966 & Supp. 1978); VT. R. CRIM. P. 15 (1974).

15. *See, e.g.*, People v. Holiday, 47 Ill.2d 300, 304, 265 N.E.2d 634, 636 (1970) (dictum that defendant can discover names of all occurrence witnesses); People v. Sumner, 43 Ill. 2d 228, 252 N.E.2d 534 (1969) (state withholding of prior statement of witness denied defendant due process); People v. Cagle, 41 Ill. 2d 528, 244 N.E.2d 200 (1969) (an accused is entitled to production of a document that is contradictory to the testimony of a prosecution witness); People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (a defendant is entitled to have expert witnesses examine physical evidence prior to trial); People v. Neiman, 30 Ill. 2d 393, 397, 197 N.E.2d 8, 10 (1964) (prosecution must furnish statements made by state witnesses); People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960) (grand jury testimony and other statements are available for impeachment at trial); People v. Endress, 106 Ill. App. 2d 217, 245 N.E.2d 26 (1969) (trial court has authority, absent specific rules of Illinois Supreme Court, to provide for pretrial discovery of items of physical evidence which the prosecution will introduce at trial).

16. ILL. REV. STAT. ch. 38, § 114-13 (1981).

17. 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969), *remanded with instructions*, No. 42801 (Sept. 3, 1971).

18. People v. Crawford, 114 Ill. App. 2d 230, 235, 252 N.E.2d 483, 485 (1969).

19. *See* Zagel & Carr, *supra* note 5, at 575.

20. People v. Crawford, No. 42801 (Ill. Sept. 3, 1971), *remanding* 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969).

21. ILL. REV. STAT. ch. 110A, § 411 (1981). *Cf.* People *ex rel.* Fisher v. Carey, 77 Ill. 2d 259, 396 N.E.2d 17 (1979) (police report is subject to sub-

result in imprisonment in the penitentiary.[22] Upon written motion, a defendant may receive the names and last known addresses of all witnesses whom the state intends to call, along with their written or recorded statements. The defendant is also entitled to statements by the accused or a co-defendant and a list of witnesses to such statements, grand jury transcripts, any experts' reports, test results and statements, any books, papers, documents, photographs, or tangible objects obtained from the accused or to be introduced at trial, any record of prior criminal convictions of persons whom the state intends to call as witnesses, information of any electronic surveillance of the defendant, and any other information which tends to negate the guilt of the accused or reduce the possible punishment.[23] The defendant is also entitled to a list of those witnesses whom the state intends to call to rebut any defense which the defendant intends to assert.[24]

At present, the prosecution is entitled to extensive discovery from the defendant. The defendant may be compelled to appear in a line-up, pose for photographs, provide handwriting samples, try on articles of clothing, or permit taking of fingernail scrapings, samples of blood, hair and other materials which do not involve an unreasonable intrusion of the defendant's body.[25] The state is entitled to any reports, test results, and related testimony of any experts concerning such reports and tests which

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poena duces tecum prior to preliminary hearing, but subsequent to charging of accused).

22. ILL. REV. STAT. ch. 110A, § 411 (1981). The main factors in limiting the discovery rules to cases where imprisonment was possible was the substantial volume of less serious cases and the delay discovery would cause in those cases, and the desire to minimize variances in the scope of discovery permitted. People v. Schmidt, 56 Ill. 2d 572, 573, 309 N.E.2d 557, 558 (1974). *See also* People v. DeWitt, 78 Ill. 2d 82, 397 N.E.2d 1385 (1979) (discovery does not extend to probation revocation hearings).

23. ILL. REV. STAT. ch. 110A, §§ 412(a), (b), (c) (1981). *See also* Brady v. Maryland, 373 U.S. 83 (1963) (state must disclose to the defense any material which tends to negate the guilt of the accused or which would reduce punishment); United States v. Wade, 388 U.S. 218 (1967) (requiring the defendant to appear in a line-up does not violate the privilege against self-incrimination); Schmerber v. California, 384 U.S. 757 (1966) (the power of the state to require the defendant to give blood samples does not violate the privilege against self-incrimination).

24. ILL. REV. STAT. ch. 110A, § 413(d) (1981). The constitutionality of this portion of the discovery rules was brought into question in light of Wardius v. Oregon, 412 U.S. 470 (1973), which held that the defendant must have a reciprocal right of discovery of state witnesses called to rebut the defendant's alibi. In People *ex rel.* Carey v. Strayhorn, 61 Ill. 2d 85, 329 N.E.2d 194 (1975), the court construed the words "subject to constitutional limitations" to include the requirement of *Wardius* and held that the rule is broad enough to require the state to disclose the names and addresses of rebuttal witnesses.

25. ILL. REV. STAT. ch. 110A, § 413(a) (1981).

are to be introduced at trial.[26] The defendant must inform the state of any defenses intended to be made at trial, the names and addresses of witnesses whom the defendant intends to call along with relevant statements and any known record of convictions of those witnesses, and of the existence of any books, papers and tangible objects which the defendant intends to use as evidence.[27] Like the defendant, the state may move for disclosure of information not covered by the rules.[28]

The court has discretion to order disclosure of information not specifically covered by the rules upon a showing of materiality,[29] or deny disclosure of any information covered by the rules if it finds that a substantial risk of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment to any witness outweighs any usefulness of disclosure to the defense.[30] The rules impose a duty upon the state to take reasonable measures to ensure that it acquires the information amenable to discovery,[31] but exclude from discovery the state's work product, the names of informants, and information kept confidential for national security reasons.[32]

The only depositions allowed in criminal cases in Illinois are evidence depositions, which are taken only in the very limited circumstances[33] in which a deposition is necessary to preserve testimony because the court has decided there is a substantial possibility that the deponent will not be available at trial.[34] The Committee reasoned that evidence depositions are necessary to preserve evidence, and that their rare use would not create administrative problems.[35] Discovery depositions on the other hand would be too time consuming and costly and could be used to harass impartial witnesses.

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26. *Id.* at § 413(c). The defense must supply the state with statements of experts only if the defense intends to call the expert at a hearing or trial, or to use the reports at hearing or trial. People *ex rel.* Bowman v. Woodward, 63 Ill. 2d 382, 349 N.E.2d 57, 58-59 (1976).

27. ILL. REV. STAT. ch. 110A, § 413(d)(i)-(ii) (1981).

28. *Id.* at § 413(e).

29. *Id.* at § 412(h).

30. *Id.* at § 412(i).

31. *Id.* at §§ 412(d),(f).

32. *Id.* at § 412(j)(i)-(iii).

33. *Id.* at § 414.

34. *Id.* at §§ 414(a),(e). *See also* People v. Malone, 41 Ill. App. 3d 914, 919, 354 N.E.2d 911, 915 (1976).

35. "The Committee chose not to include depositions for discovery purposes, but did decide to follow the unmistakable trend and provide for depositions to preserve testimony." ILL. ANN. STAT. ch. 110A, § 414 (Committee Comments October 1, 1971) (Smith-Hurd 1976). *See* Zagel & Carr, *supra* note 5, at 589.

Further, state depositions of defense witnesses would create constitutional problems with self-incrimination. The Committee erred, however, in rejecting discovery depositions; it failed to recognize the numerous advantages and benefits which discovery depositions could provide to the system.[36] A closer look at the advantages of discovery depositions shows that the arguments against them are often specious, and even when sound are outweighed by the advantages of depositions.

THE ADVANTAGES OF DISCOVERY DEPOSITIONS

Benefits to the Judicial System

Discovery has developed in both criminal and civil cases because it promotes greater knowledge of the facts, thereby eliminating surprise, weeding out groundless suits, narrowing issues, and facilitating the presentation of evidence.[37] These benefits expedite litigation and reduce its cost; they also promote accurate verdicts which sustain the credibility of the judicial system. Discovery depositions are the best means of fully realizing the benefits of discovery.[38]

Discovery depositions will increase plea agreements and decrease collateral attacks and reversals. Once both sides are fully aware of the opposition's case, there will be a more equitable plea agreement.[39] Prosecutors will dismiss cases if greater pretrial discovery reveals the futility of proceeding to trial because

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36. The purpose of discovery is to promote the judicial search for truth by giving the defendant access to evidence which he might use on his own behalf, thereby facilitating the presentation of all relevant, unprivileged, and favorable evidence, and obtaining a fair decision on the merits of the case. ABA Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial (October 1980) [hereinafter cited as ABA Project]; Johnston, *supra* note 1, at 3. *See also* Williams v. Florida, 399 U.S. 78, 81-82 (1970).

37. Adequate pretrial preparation is a critical element in assuring a successful defense or prosecution. F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES § 1 (1970); Johnston, *supra* note 1, at 4.

38. Unquestionably, the oral deposition is the most effective device in civil discovery. It combines all the benefits of written interrogatories and motions to produce documents with the spontaneity and flexibility of cross-examination. . . . The deposition is, however, available to the prosecution through the grand jury and other procedures. It is essential to effective criminal defense discovery, which in turn is essential to assure defendants a fair trial.

Nakell, *supra* note 6, at 450.

39. If pretrial discovery shows that a defense is contrived or fabricated, a defense attorney should try to persuade his client to enter a plea of guilty. Williams v. Florida, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring). *See also* Norton, *supra* note 6, at 667.

of a weak case or because the accused is innocent.[40] A guilty defendant will be more likely to plea bargain upon learning of a strong state case because, in most instances, the sentence will be lighter than that imposed after a trial. The importance of ensuring accurate pleas is reflected in the fact that an estimated ninety (90) percent of all convictions in the United States result from guilty pleas.[41] Discovery depositions provide a complete pretrial factual record, promoting accurate pleas.[42] A complete factual record will also reduce collateral attacks because most are the direct result of a lack of adequate information and pretrial preparation.[43]

Beyond improving discovery, there are a number of qualities which inhere to depositions alone which would improve the criminal justice system. In a deposition, the parties are able to observe the veracity and demeanor of each witness and to draw conclusions as to that witness' credibility;[44] the key to the strength of that witness' testimony.[45] Only after interviewing a witness can it be determined if that witness is presentable and articulate. Depositions also provide the parties with more accurate facts than police reports.[46] Personal interviews avoid the inevitable distortions which occur with secondhand information;[47] the parties will no longer have to rely on the veracity and thoroughness of police reports. Depositions will greatly improve

40. Williams v. Florida, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring). *See also* Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732, 734 (1967); Osburn, *Pretrial Discovery Under the Oregon Criminal Procedure Code*, 10 WILLAMETTE L.J. 145, 160-61 (1974).

41. D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n. 1 (1966).

42. If a defendant has an overly optimistic view of the facts of a case, it may lead to a wasteful trial. A pessimistic view may lead to a premature plea which is subsequently challenged. 1978 ABA Standards For Criminal Justice, 11-1.1, Commentary.

43. "The profusion of collateral attacks upon convictions may be a direct result of the lack of discovery." Zagel & Carr, *supra* note 5, at 557.

44. Note, *A Proposal for Prosecutorial Discovery Depositions in California*, 14 SAN DIEGO L. REV. 936, 955 (1977).

45. Barber v. Page, 390 U.S. 719, 725 (1968) (right to confront witnesses includes right to have trier of fact observe demeanor of witness).

46. Law enforcement reports are frequently inaccurate or incomplete. In one case an injustice occurred when the defendant claimed that another person with the same nickname had committed the charged offense. The United States Attorney denied in court that such an individual existed. Through an error in F.B.I. procedures, however, the defendant gained access to normally closed F.B.I. files which showed that such an individual did in fact exist. The police officials had never informed the United States Attorney of this fact. *See* Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 88 (1964).

47. In Coleman v. Alabama, 399 U.S. 1 (1970) the Court, stating that counsel should be present at a preliminary hearing, recognized the principle that an interrogation of witnesses before trial will result in improved

the quality and quantity of information obtained through discovery.

Depositions will also allow a better factual presentation at trial.[48] Without depositions, attorneys avoid certain lines of questioning because they do not know how the witness will answer;[49] the evidence introduced at trial is thus limited to the knowledge of counsel. With depositions, the fear of unexpected answers will be removed because more thorough knowledge enables the attorney to present the facts more fully at trial, enhancing the possibility of accurate verdicts, reducing reversals, saving time and money and improving the credibility of the judicial system.

Another advantage of depositions is that they preserve testimony for trial in circumstances which do not warrant taking evidence depositions.[50] Moreover, it may not be reasonably predictable whether a witness will be unavailable for trial, and the witness' absence may destroy the case. Routinely taking depositions preserves the testimony for trial and removes the defendant's incentive to delay the trial, hoping that witnesses will become unavailable or that their memories will fade.

Benefits to the Defendant

The judicial system benefits from discovery depositions, but the defendant benefits even more; the defendant needs depositions to effectively prepare for trial in the face of the state's vastly superior investigatory powers. The United States Supreme Court and a number of commentators have recognized that the current system is greatly imbalanced in terms of the abilities of the parties to investigate the facts of a case.[51] The state has extensive discovery powers, including the power to compel the defense to specify any affirmative defenses.[52] The

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cross-examination, will preserve testimony for trial, and provide defense counsel with improved preparation to develop a proper defense. *Id.* at 9.

48. The theory behind the adversary approach to criminal justice is that the advocate will present the best supportive evidence and will thoroughly examine the opposition's evidence. The better prepared each advocate is, the better he can perform the adversarial role. *Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa*, 57 IOWA L. REV. 598 (1972).

49. *See* 5 WIGMORE, EVIDENCE § 1368, at 38-39 (Chadbourn rev. 1974) (dangers of cross-examination where the attorney does not know the witness' expected testimony).

50. *See supra* note 34 and accompanying text.

51. Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973). *See* Kampfe & Dostal, *Discovery in the Federal Criminal System*, 36 MONT. L. REV. 189, 205 (1975).

52. The ABA Standards promote greater discovery powers for the defense by treating the state's investigatory powers as discovery powers. In the sense that both discovery and investigations are designed to acquire

state also has the powers of the grand jury at its disposal. On threat of punishment for contempt, the state can compel the attendance of witnesses to give testimony or produce unprivileged documentary or physical evidence.[53] The grand jury, in effect, operates as a discovery deposition solely at the disposal of the state.[54]

The modern police force, with its advanced scientific facilities and extensive search and seizure powers, is also at the state's disposal. The police arrive at the crime scene and commence their investigation almost immediately,[55] and they have the first opportunity to find and interview witnesses, while the defendant's investigation commences much later.[56] The police also have the first opportunity to interrogate a defendant after an arrest, gaining valuable information which could also approximate a deposition if a defendant gives a statement or confession.

The defendant's investigative abilities are not nearly as effective or complete as the state's. Although a defendant is entitled to interview all the witnesses against him,[57] as a practical matter police officers, victims, and most witnesses do not cooperate with defense attorneys.[58] Depositions will alleviate this

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material and information before trial, the investigations are no different from taking depositions. ABA Project, *supra* note 36, standard 3.1. *See supra* notes 25-28 and accompanying text.

53. *See* ILL. REV. STAT. ch. 38, § 112-4 (1981) (stating the powers of the grand jury in Illinois).

54. The importance of the grand jury as an investigative device stems from the power of compulsory judicial process, which can, on threat of punishment for contempt, compel the attendance of a witness to give testimony or to produce unprivileged documents or other physical evidence so long as it is relevant to the grand jury's inquiry. The investigative power of a grand jury, however, operates only on behalf of the prosecutor. It is unilateral and non-adversary and, in essence, the grand jury gives the prosecutor an *ex parte* deposition procedure. *See* ILL. REV. STAT. ch. 38 § 112-4 (1981). The state's extensive grand jury powers were recognized by the President's Commission on Law Enforcement, which recommended allowing defense depositions in criminal cases. United States President's Commission on Law Enforcement, THE CHALLENGE OF CRIME IN A FREE SOCIETY 139 (1967). *See also* Stein v. New York, 346 U.S. 156, 184 (1953) (prosecution has power to detain a material witness in custody).

55. *See* Nakell, *supra* note 6, at 439.

56. The defendants have a natural handicap in criminal investigations; "[b]y the time . . . they are called upon to prepare a defense . . ., the prosecution has already tried to acquire . . . all of the evidence." *Id.* at 463. *See also* F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES § 2 (1970).

57. Gregory v. United States, 369 F.2d 185, 187-88 (1966) (both sides have equal right to interview witnesses to a crime and should have equal opportunity).

58. People v. Mason, 301 Ill. 370, 378-79, 133 N.E. 767, 771 (1921) (prosecution witness need not grant an interview to defense counsel unless he chooses to do so); People v. Lewis, 112 Ill. App. 2d 1, 6-7, 250 N.E.2d 812, 815

problem by giving the defendant the ability to depose police officers, victims, and witnesses.

The defendant also does not have the right to subpoena witnesses to appear before a grand jury,[59] nor can the defendant cross-examine any grand jury witnesses.[60] The written statements and arrest reports tendered to the defendant under the current discovery rules are insufficient for fact-finding or cross-examination;[61] the reports are incomplete, inaccurate, lack sufficient detail for impeachment, and are prepared by the police or state investigators, neither of which are likely to seek information with the defendant's interests or theory of defense in mind. Only the defense is aware of the defendant's theory of the case and is able to ask questions geared to elicit information consistent with that theory.[62] The state may also circumvent the discovery rules by not committing pretrial statements to writing.[63] All these factors point to discovery depositions as the only effective means of equalizing the imbalance between the state's and defendant's investigatory powers.

The defendant's need for discovery depositions is further illustrated by the number of cases where the state has been found to have withheld material evidence which may have exculpated the defendant.[64] There are numerous cases where an intentional or accidental withholding of information by the prosecution has resulted in an injustice to the defendant.[65] These

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(1969) (no rule allows the court to compel a witness to be examined in private by counsel for either side). The general inclination of most citizens is to cooperate with the police. Nakell, *supra* note 6, at 440.

59. ILL. REV. STAT. ch. 38, § 112-4 (1981).

60. *Id.*

61. *See supra* note 46 and accompanying text.

62. *See* Nakell, *supra* note 6, at 453.

63. Even though it is prohibited by the discovery rules, ILL. REV. STAT. ch. 110A, § 412(f) (1981), this activity occurs.

64. United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953) (prosecutor failed to disclose that a blood-stained bullet found next to slain policeman was not from the defendant's gun, but was the same caliber that police officers use); State v. Thompson, 396 S.W. 2d 697 (Mo. 1965) (prosecutor withheld a shell casing which had been found at the scene of a homicide; laboratory reports showed that the shell was from the co-defendant's gun); People v. Whitmore, 45 Misc. 2d 506, 257 N.Y.S.2d 787 (Sup. Ct. 1965) (prosecution withheld report which concluded that it was impossible to determine if a button pulled off the attacker's coat came from the defendant's coat).

65. *See, e.g.*, Giles v. Maryland, 386 U.S. 66 (1967) (prosecution withheld evidence that rape victim had a habit of engaging in sexual orgies and had engaged in sexual relations moments before the defendants arrived); Alcorta v. Texas, 355 U.S. 28 (1957) (prosecutor never disclosed evidence of an affair between the victim, who was the wife of the defendant, and a third party); Griffen v. United States, 336 U.S. 704 (1949) (prosecutor withheld a knife which had been found on the victim and which was consistent with a self-defense claim); United States v. Miller, 411 F.2d 825 (2d Cir. 1969) (pros-

cases all illustrate that for a variety of reasons the prosecutor is not the proper party to entrust with the responsibility of deciding what information the defendant needs to adequately defend himself. The defense attorney is the only one who knows what information will be consistent with his theory of the case and should be given direct access to all witnesses through discovery depositions.

THE ARGUMENTS AGAINST DISCOVERY DEPOSITIONS

The opponents of discovery depositions argue that depositions would result in increased incidents of perjury, bribery and intimidation of witnesses, would be too time-consuming and costly, would overly burden witnesses, and would prevent the prosecution from deposing defense witnesses because of the defendant's fifth amendment right against self-incrimination and the attorney/client privilege.[66] Depositions allegedly increase perjury, intimidation and bribery because a party armed with advanced knowledge of the adverse party's case will bribe or intimidate witnesses into providing testimony designed to defeat the adversary's evidence and legal theories.[67] This argument overlooks the fact that the risk of intimidation, bribery and perjury exists without depositions because the names and addresses of prosecution witnesses are already available to the defendant.[68] It also overlooks the fact that the current discovery rules provide for protective orders where a risk of harassment

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ecutor did not reveal that the state had hypnotized an important witness to jog his memory); Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967) (prosecutor withheld a laboratory examination of victim's shirt which showed slivers of wood and glass, indicating he may have been climbing through defendant's window when shot); Ashley v. Texas, 319 F.2d 80 (5th Cir.) (prosecutor withheld psychiatric reports that defendant was incompetent to stand trial), *cert. denied*, 375 U.S. 931 (1963); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.) (prosecution did not disclose that the arresting officer told the prosecutor that defendant appeared to be intoxicated), *cert. denied*, 350 U.S. 875 (1955); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949) (prosecutor did not disclose a doctor's report that the alleged rape victim was still a virgin).

66. State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953) (full discovery will provide the defendant with the opportunity to bribe or intimidate witnesses into perjury). *See also* Zagel & Carr, *supra* note 5, at 560; Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732, 734 (1967); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 57 (1961). Even if, arguendo, there is some validity in the arguments against depositions, the interests behind these arguments are outweighed by the greater concerns of life and liberty and the possibility of convicting the innocent. *See* Case v. Superior Court, 53 Cal. 2d 72, 75, 346 P.2d 407, 408-09 (1959) (the possibility that increased knowledge may result in perjury is subordinate to the danger of convicting the innocent).

67. *See supra* note 66 and accompanying text.

68. *See supra* note 23 and accompanying text.

exists.[69] Protective orders would be equally applicable to discovery depositions.

Even without protective orders, discovery depositions would decrease the incidents of perjury and intimidation, rather than increase them. If both parties are present at the same deposition, the possibility of abuse is less than in the usual informal interview.[70] The presence of both parties will assure proper attorney conduct and hinder witness tampering. If depositions are taken early and at the same times, the parties will not have time to fabricate a story prior to the taking of the deposition or use the deposition of one witness to change the deposition of another.[71] Early depositions will also give each party sufficient time to verify the respective stories. Depositions will also lessen the incidents of intimidation because prior inconsistent statements may be used as substantive evidence and are admissible for their truth.[72] An accused will have little to gain by intimidating or killing a witness because the prosecution will be able to use the witness' deposition,[73] and any changes in a witness' testimony may lead to an inference against the defendant.

Further evidence that depositions will actually prevent perjury is the experience in the civil area.[74] Justice Brennan made a powerful statement against the possibility of increased perjury through discovery depositions in criminal cases:

> I could not be persuaded . . . that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of truth, supports the case against criminal

69. ILL. REV. STAT. ch. 110A, § 415(d) (1981).

70. "There are certain inherent dangers to interviewing witnesses rather than taking formal depositions [such as] the potential danger of being accused of suborning perjury or witness tampering." 4 J. DEMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 16.03(2) (1971).

71. The parties can "freeze" the testimony of witnesses at an early date, and the possibility of impeachment will then deter the defendant from attempting to change the testimony at trial. *ABA Minimum Standards for Criminal Justice—A Student Symposium—Louisiana and Criminal Discovery*, 33 LA. L. REV. 596, 599 n.13 (1973).

72. *See* California v. Green, 399 U.S. 149 (1970). Using prior inconsistent statements as substantive evidence will remove the incentive to intimidate witnesses since the prosecution can use the prior statement to prove its case. Zagel & Carr, *supra* note 5, at 561.

73. If the witness dies, the deposition preserves the testimony for trial as an evidentiary deposition. *See* ILL. ANN. Stat. ch. 110A, § 414 (Smith-Hurd 1979). Even without the right to take a deposition, the state with its superior investigative powers obtains sufficient evidence to contradict any perjury. The state's basic investigatory power is clearly superior to that of the defendant. *See supra* notes 51-63 and accompanying text.

74. *See* Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951) (study of civil practice by Administrative Office of United States Courts concluded that most attorneys reject contention that discovery leads to perjury).

> discovery. I should think, rather, that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil cases.[75]

The presumption that discovery depositions will lead to increased perjury and intimidation ignores the fundamental principle of our criminal justice system that a defendant is presumed innocent until proven guilty.[76] This principle goes beyond merely placing the burden of proof on the state; it establishes a guideline for criminal procedure.[77] It also requires that in deciding whether to give defendants the evidentiary means necessary to protect themselves, it should not be assumed that all defendants are guilty or that all defendants and their attorneys will misuse information given to them.[78] Because a defendant is presumed innocent, he must know nothing of the crime charged and should be given exhaustive tools to investigate the facts of a case.

A further argument against discovery depositions is that they are too costly and time-consuming. Depositions, however, are more efficient and economical than expensive investigations and save time and money by saving the costs of unnecessary trials. The information obtained in a single hour-long deposition exceeds in quality and quantity the information obtained through hours of investigations.[79] Because each party conducts its own investigation,[80] the cost of depositions must be compared to the costs of two separate investigations. With the less expensive discovery depositions, the state could shift its funding from investigative agencies to prosecutorial agencies.

Depositions can also make a criminal trial more efficient, with fewer interruptions or continuances.[81] There will be fewer continuances for surprise because counsel will be more fully

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75. Address by Associate Justice William J. Brennan, Symposium at the Judicial Conference of the District of Columbia Circuit, Wash., D.C. (May 9, 1963), *reprinted in* 33 F.R.D. 56, 62 (1964). "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis for the one-time refusal of the criminal law to allow the accused to produce any witnesses at all." 6 J. WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940).

76. *In re* Winship, 397 U.S. 358 (1970).

77. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 161, 167 (1968).

78. Nakell, *supra* note 6, at 446.

79. Comment, *Depositions as a Means of Criminal Discovery*, 7 U.S.F.L. REV. 245, 251 (1973).

80. In the case of indigent defendants, the cost of both investigations falls on the state. ILL. ANN. STAT. ch. 38, § 113-3 (Smith-Hurd 1979).

81. Full and timely disclosure encourages efficiency at trial by minimizing potential interruptions and complications. 1978 ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, Standard 11-1.1(a)(iv).

aware of the facts.[82] Evidentiary questions which usually arise in the midst of trial could be addressed at the pretrial stage, and could then be appealed, before trial, by writ of mandamus or prohibition, thus reducing the number of cases reversed and retried.[83] Discovery depositions will also encourage an open-file policy, saving time and money.[84] Since the information is obtainable by deposition, the state may voluntarily open its files. Previously uncooperative witnesses may grant interviews if they know they will be subpoenaed and forced to cooperate.

Discovery depositions are also alleged to discourage witness participation. Requiring witnesses to appear for depositions in addition to trial will supposedly overburden witnesses, discouraging them from coming forward, and destroying valuable sources. Attending depositions is no greater burden than testifying at a preliminary hearing or before a grand jury.[85] Witnesses are subjected to such inconveniences in civil suits, and it makes little sense to inconvenience witnesses in civil cases more than witnesses in criminal cases when the criminal defendant's interests are much greater. Even if there is a greater burden on witnesses a slight inconvenience should not prevent a defendant from discovering facts in his defense.[86]

The most common arguments against discovery depositions are that they will give the defendant too great an advantage[87] and that the state will not be able to use discovery depositions because of the defendant's right against self-incrimination and the attorney-client privilege.[88] The state already has a great ad-

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82. Note, *A Proposal for Prosecutorial Discovery Depositions in California*, 14 SAN DIEGO L. REV. 936, 963 (1977).

83. *See* Zagel & Carr, *supra* note 5, at 560.

84. Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732, 733 (1967).

85. Nakell, *supra* note 6, at 473.

86. *Id.*

87. "Under our criminal procedure the accused has every advantage. . . . Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). *See also* Goldstein, *The State and the Accused: Balance of Advantage in the Criminal Procedure*, 69 YALE L.J. 1149 (1960).

88. Norton, *supra* note 6, at 662. The U.S. Constitution provides that "no person . . . shall be compelled . . . to be a witness against himself." U.S. CONST. amend. V. This privilege is made applicable to the states as part of the fourteenth amendment's due process requirement. Malloy v. Hogan, 378 U.S. 1, 3 (1964). The state does not benefit from the due process protections of the fourteenth amendment; there is no required reciprocal right to discovery by the state if that right is given to the defendant. Due process is to protect persons, not states. South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966); Curry v. McCanless, 307 U.S. 357, 370 (1939); People v. Williams, 87 Ill. 2d 161, 163, 429 N.E.2d 487, 489 (1981).

vantage in investigative powers, however, and allowing the defendant to take discovery depositions merely equalizes this imbalance.[89] The great discrepancy between the state's investigative powers and the defendant's has led some commentators to suggest that the only reason that the state does not want the defendant to have deposition power is that the prosecution's powers are already so broad that there is nothing which could be offered them as a tradeoff.[90]

Secondly, regardless of whether the state should be given the right to take depositions, the fifth amendment and attorney-client privilege are not a bar to deposing defense witnesses. The witnesses to a crime are not the property of either side, and both sides have an equal right to interview them.[91] The rights of the accused are not violated by deposing nonparty witnesses. The fifth amendment privilege against self-incrimination is a personal privilege which inheres to the person, not information;[92] it is limited to communicative oral or written statements made by the defendant.[93] The privilege does not encompass the list of witnesses which a defendant must supply to the prosecution under the current discovery rules, or their testimony.[94] Physical evidence, scientific reports, and witnesses are not protected by the fifth amendment privilege.[95]

The attorney-client privilege also is not a bar to state discovery depositions. The privilege is narrowly construed and applies

89. If the defendant is not given substantial discovery devices, discovery will remain a one-way street running in favor of the prosecution, and the defendant is left with a haphazard, expensive investigation. Nakell, *supra* note 6, at 442.

90. Comment, *Depositions as a Means of Criminal Discovery*, 7 U.S.F.L. REV. 245, 256-57 (1973).

91. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

92. The privilege is a personal one which cannot be asserted by one individual for another. 8 J. WIGMORE, EVIDENCE § 2270 (McNaughton rev. 1961); MCCORMICK, EVIDENCE § 120 (2d ed. 1972).

93. Schmerber v. California, 384 U.S. 757, 761-64, (1966) (the fifth amendment privilege only protects accused from testifying against himself); People *ex rel.* Bowman v. Woodward, 63 Ill. 2d 382, 385-86, 349 N.E. 2d 57, 59 (1976) (privilege is limited to testimonial disclosure and is to prevent use of legal process to extract admission of guilt from defendant).

94. *See* Williams v. Florida, 399 U.S. 78 (1970) (upholding a notice-of-alibi statute against a claim that it violates fifth amendment); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (compelling defendant to speak and to provide handwriting samples does not violate fifth amendment). *See also* United States v. Wade, 388 U.S. 218 (1967) (requiring defendant to appear in line-up does not violate fifth amendment). *Cf.* Brooks v. Tennessee, 406 U.S. 605, 609-10 (1972) (fifth amendment allows defendant to remain silent until he has heard both the prosecution's case-in-chief and his own witnesses). The holding in *Brooks* effectively precludes the taking of the defendant's depositions.

95. Jones v. Superior Court, 58 Cal.2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

only to communications from the client to the attorney.[96] The privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation, nor does it cover defense witnesses.[97] Experts employed by the defendant may be examined by the prosecution without an attorney-client privilege violation.[98] All potential witnesses except the defendant are therefore outside the realm of the attorney-client privilege.

Another argument against discovery depositions is that they are not necessary because preliminary hearings are sufficient.[99] A preliminary hearing, however, is not a discovery tool, but is intended to determine if probable cause exists.[100] In jurisdictions which use a grand jury, no preliminary hearing is held, no defense witnesses may be called, and no cross-examination takes place.[101] The inherent limitations in a preliminary hearing, and the fact that the hearing is not held in every case precludes its use as an effective discovery device.

The falacies in the arguments against discovery depositions are shown by the only empirical study on criminal discovery depositions which was conducted for an article written on Vermont's discovery rules,[102] which provide for discovery deposi-

96. The attorney-client privilege applies only: (1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waived. 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961).

97. Hickman v. Taylor, 329 U.S. 495, 508 (1947). *See also* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

98. *See* United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964) (privilege does not extend to dealings with third parties on behalf of client), *cert. denied*, 377 U.S. 976 (1964); Sachs v. Alcoa, 167 F.2d 570 (6th Cir. 1948) (expert retained by attorney cannot assert attorney-client privilege); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (attorney-client privilege does not extend to experts employed by defense), *rev'd in part on other grounds*, 403 U.S. 946 (1971).

99. One author noted that a defendant may call witnesses at the preliminary hearing, and a preliminary hearing may thus serve as a form of deposition for each side. This proceeding often provides the defendant with information to help him determine whether he will plead guilty. *See* J. DEMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 16.03(5) (1971).

100. [C]ross-examination at a preliminary hearing is subject to the general rule that it may not extend beyond the scope of the direct examination and such further interrogation is directed to show interest, bias, prejudice or motive of the witness to the extent that these factors are relevant to the questions of probable cause. . . . Clearly, the preliminary hearing is not intended to be a discovery proceeding.

People v. Horton, 65 Ill. 2d 413, 416-17, 358 N.E.2d 1121, 1123-24 (1977).

101. *See supra* notes 59-60 and accompanying text.

102. Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

tions.[103] The author gathered information regarding criminal discovery in Vermont by sending questionnaires to all prosecutors, criminal judges, and defense attorneys in the state. The principal witnesses in depositions were police officers and eye witnesses, and depositions were restricted to more serious offenses. Not a single prosecutor, judge or defense attorney indicated that the likelihood of trial increased, and most stated that depositions decreased the likelihood of trial. The open-file policy which resulted from Vermont's broad discovery rules also reduced the likelihood of trial. Discovery depositions removed the element of bluffing and encouraged defense counsel and prosecutors to work out a solution to the charge. There was not a single mention of abuse of the discovery statutes.[104] In summation, the article stated:

> The parade of "horribles" escaping from Pandora's box as proposed by the opponents of change in this are numerous. They include possible intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on the prosecution officer, increased costs of the administration of criminal law, etc. *The interesting thing shown by Vermont's experience is that all of these "horribles" are imaginary*.[105]

The right to take depositions has given the Vermont defendant a tool with which he can thoroughly investigate the state's case at minimal expense. After five years of experience in Vermont, not a single prosecutor, judge or defense counsel called for the repeal of discovery depositions.[106]

The favorable experience with depositions in Vermont is reinforced by the experience with depositions in civil cases. The only criticism of discovery depositions in the civil context has been that they are too time-consuming and are often used for "fishing expeditions."[107] Such abuses would not occur in the criminal context. Criminal proceedings are not initiated without evidence in expectation that sufficient evidence to sustain a conviction will surface in the discovery process. Discovery is initi-

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103. VT. R. CRIM. P. 15(a)-(i) (1974).

104. Langrock, *supra* note 102, at 733-34 (1967).

105. *Id.* at 734 (emphasis added).

106. *Id. See also* Rooney & Evans, *Let's Rethink the Jencks Act and Federal Criminal Discovery*, 62 A.B.A.J. 1313 (1976) (experience in those jurisdictions affording liberal discovery has been favorable, without incidents of perjury, and time-saving).

107. Fishing expeditions occur when the plaintiff initiates a suit without a sufficient evidentiary basis, hoping to secure evidence through extensive discovery. *See* Speck, *The Use of Discovery in the United States District Court*, 60 YALE L.J. 1132, 1154 (1951); Comment, *Depositions as a Means of Criminal Discovery*, 7 U.S.F.L. REV. 245, 251 (1973).

ated only after an indictment or information;[108] a certain requisite amount of evidence against the defendant is necessary before discovery begins, and delays because of mountainous documentary evidence will occur only rarely.[109] Discovery depositions in the criminal area, therefore, will not suffer from the same problems which have resulted in the civil context and are an even more appropriate tool for criminal discovery than for civil discovery.

CONSTITUTIONAL CONSIDERATIONS

In addition to a practical need for discovery depositions in the criminal context, denying a defendant the right to take a deposition may violate that defendant's constitutional rights to due process[110] and effective assistance of counsel.[111] A number of courts have held that there is no general constitutional right to pretrial discovery,[112] and others have held that there is no due process right in a criminal case to depose witnesses.[113] All these cases, however, were decided before discovery was recognized as a valuable tool in the judicial process. The recent trend has been to recognize and broaden a defendant's rights to a pretrial disclosure of facts.

Due Process

The fifth and fourteenth amendments guarantee a criminal defendant due process of law. Generally, due process has not been construed to require a pretrial disclosure of facts, but a few courts hold that a failure to disclose certain materials and facts prior to trial is a violation of due process. One decision requiring pretrial disclosure of facts was *Jencks v. United States*.[114] Although *Jencks* was not decided on constitutional grounds, the commands of the constitution must have been close to the sur-

108. *See supra* note 21 and accompanying text.

109. Zagel & Carr, *supra* note 5, at 598.

110. U.S. CONST. amend. XIV.

111. U.S. CONST. amend. VI.

112. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977); People v. Siefke, 97 Ill. App. 3d 14, 421 N.E.2d 1071 (1981).

113. *See* Minder v. Georgia, 183 U.S. 559 (1902) (failure of state to provide method for obtaining depositions of witnesses beyond jurisdiction of state did not violate due process); People v. Bowen, 22 Cal. App. 3d 267, 99 Cal. Rptr. 498 (1971) (generally recognized that there is no right to take a deposition in a criminal case). *See also* Annot., 2 A.L.R. 4th 704 (1980). *Weatherford* also stated that there is no general constitutional right to pretrial discovery in a criminal case, but did not give any reasoning for this conclusion. *See* Weatherford v. Bursey, 429 U.S. 545 (1977).

114. 353 U.S. 657 (1957).

face of the decision.[115] In *Jencks*, the defendant was convicted of falsely swearing in an affidavit that he was not affiliated with the Communist Party.[116] On appeal, the defendant alleged error in the trial court's refusal to order the government to produce reports made to the FBI by two witnesses against the defendant.[117] The United States Supreme Court held that justice requires the government to produce, for inspection and impeachment purposes, all written or recorded reports made by witnesses which touch the events and activities to which those witnesses testified at trial;[118] the government's failure to produce those reports was reversible error. Although *Jencks* was clearly limited to production of prior statements solely for impeachment purposes at trial, it did hold that, under certain circumstances, justice requires a pretrial disclosure of information. The next decision requiring a pretrial disclosure of information was *Brady v. Maryland*.[119] In *Brady*, the defendant was found guilty of first-degree murder and sentenced to death.[120] Prior to trial, the defendant had requested the prosecution to disclose any statements made by a co-defendant. Several statements were produced, but one statement, in which the co-defendant admitted actually doing the killing, was withheld and did not come to the defendant's attention until after he had been tried, convicted, and sentenced.[121] The United States Supreme Court held that the suppression of this statement was a violation of the

115. *Id.* at 668-69. Although *Jencks* was not decided on constitutional grounds, "it would be idle to say that the commands of the Constitution were not close to the surface of the decision. . . ." Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring).

116. Section 9(h) of the National Labor Relations Act provided that the processes of the NLRB will be unavailable to a labor organization "unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization . . . that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in . . . or teaches, the overthrow of the United States Government. . . ." 29 U.S.C. § 159, repealed by Pub. L. No. 86-257, § 201(d) (1959).

117. The two principal witnesses against the defendant were Communist Party members paid by the F.B.I. to make oral and written reports of Communist Party activities in which they participated. They made such reports to the F.B.I. of activities allegedly participated in by the defendant. 353 U.S. at 659.

118. *Jencks* was followed by the enactment of the Jencks Act, 18 U.S.C. § 3500 (1957). The Jencks Act, not the *Jencks* decision, governs the production of statements of government witnesses for a defendant's inspection at trial. The Jencks Act clearly limits the production of statements to those made by witnesses who testify at trial. *Id.*

119. 373 U.S. 83 (1963).

120. "At his trial Brady took the stand and admitted his participation in the crime, but claimed that [the co-defendant] did the actual killing." *Id.* at 84.

121. *Id.*

due process clause of the fourteenth amendment.[122]

Justice Douglas reasoned that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when an accused is treated unfairly."[123] A prosecutor who withholds evidence which, if made available, would tend to exculpate a defendant or reduce the penalty "casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice."[124] There seemed to have been three basic public policy propositions recognized in the *Brady* decision: (1) equalizing the sides will more readily create a fair trial and reach the truth; (2) fairness is an important element of a trial; and (3) the ultimate conviction of the accused is not the paramount consideration.

Wardius v. Oregon[125] was the next major decision dealing with pretrial disclosure of information. In *Wardius*, the defendant was prohibited from calling an alibi witness because he failed to comply with an Oregon statute requiring the defendant to disclose the names of the alibi witnesses prior to trial.[126] The defendant contended that the alibi statute was unconstitutional as a denial of due process because the statute did not require the prosecution to disclose the names of witnesses to be called to rebut the alibi.[127] The United States Supreme Court held that the due process clause of the fourteenth amendment forbids enforcement of alibi statutes unless a reciprocal right to the names

122. "We now hold 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." *Id.* at 87. *See also* Moore v. Illinois, 408 U.S. 786 (1972) (evidence withheld must be material); Clewis v. Texas, 386 U.S. 707, 712 n.8 (1967) (may be a denial of due process for a defendant to be refused any discovery of his statements to the police); Giles v. Maryland, 386 U.S. 66 (1967) (evidence of the mental condition of the complaining witness was suppressed by the prosecution); Wilde v. Wyoming, 362 U.S. 607 (1960) (the prosecutor suppressed evidence of two eye-witnesses who could have exonerated the defendant); People v. Burns, 75 Ill. 2d 282, 290, 388 N.E.2d 394, 397 (1979) (failure to provide defendant with requested information which would have created reasonable doubt as to defendant's guilt is constitutional error). Some courts have interpreted the constitutional duty of disclosure to require that it be made in time for the defendant to capitalize on it. *See* United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967); United States v. Gleason, 265 F. Supp. 880, 884-85 (S.D.N.Y. 1967).

123. 373 U.S. at 87.

124. *Id.* at 88.

125. 412 U.S. 470 (1973).

126. *See* OR. REV. STAT. § 135.875 (1973) (renumbered 135.455).

127. 412 U.S. at 472.

of rebuttal witnesses is given to the defendant.[128] Justice Marshall recognized the general principles stated in the earlier case of *Williams v. Florida*,[129] that the

> adversary system of trial . . . is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room for [a rule] . . . designed to enhance the search for truth . . . by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[130]

The Court also recognized that the due process clause has little to say concerning how much discovery each party must be afforded, but "it does speak to the balance of forces between the accused and his accuser."[131] Absent a showing of strong state interests to the contrary, "discovery must be a two-way street;"[132] the defendant must be given an equal opportunity to learn the names of the witnesses that the state intends to call to rebut the defendant's alibi.

Jencks, *Brady* and *Wardius* all express a general policy in favor of pretrial disclosure of facts. The decisions also state minimal due process requirements for discovery in criminal cases. The state is not to withhold evidence favorable to the defendant and equal discovery procedures must be provided to the state and defendant. The state is to ascertain the truth, not just obtain convictions.

In addition to the minimal due process requirements of discovery, the Court of Appeals for the District of Columbia recognized a defendant's strong interest in interviewing witnesses before trial. In *Gregory v. United States*,[133] the prosecutor had instructed the witnesses, prior to trial, not to speak with the de-

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128. "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." 412 U.S. at 472.

129. 399 U.S. 78 (1970). In *Williams*, the defendant contested his conviction claiming, among other things, that the Florida notice-of-alibi statute compels a defendant to be a witness against himself in violation of the fifth amendment. *Id.* at 79. The Florida statute provided the defendant with reciprocal discovery rights. The Court upheld the notice-of-alibi statute, recognizing the state's interest in protecting itself against an eleventh-hour defense. " [T]he privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." *Id.* at 83.

130. 412 U.S. at 474 (citing Williams v. Florida, 399 U.S. 78, 82 (1970)).

131. 412 U.S. at 474.

132. *Id.* at 475.

133. 369 F.2d 185 (D.C. Cir. 1966), *aff'd after remand*, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969). The defendant was charged with second-degree murder, two robberies, and assault with a dangerous weapon. The indictment covered two liquor-store robberies. The government's evidence as to appellant's participation in the second robbery, resulting in the murder of the operator of the liquor store, consisted of three witnesses who

fense unless he was present.[134] The Court of Appeals reversed the convictions, holding that the prosecutor's actions denied the defendant his due process right to interview witnesses.[135] The court reasoned that witnesses to a crime are not the property of either the prosecution or the defense. Both parties have a right to, and should be given, an opportunity to interview witnesses.[136] The court also stated that:

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. [Footnote omitted].[137]

Relying on *Brady*, the court reasoned that although there was no direct suppression of evidence, there was a "suppression of the means by which the defense could obtain evidence."[138] The prosecutor's statements to the witnesses frustrated the defense counsel's attempts to interview witnesses and denied the defendant a fair trial.

In light of the principles expressed in *Jencks*, *Brady*, *Wardius* and *Gregory*, denying a defendant the right to take discovery depositions is a violation of due process. *Wardius* held that although there is no general constitutional right to discovery, due process does require that the abilities of both the state and the defense to discover facts prior to trial must be equal.[139] The *Wardius* Court recognized the state's inherent information-gathering advantage, and stated that, if there is to be any imbalance in pretrial opportunity to discover facts, it should work in the defendant's favor.[140] Under the principles expressed in

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identified the defendant as the robber, and a fourth who stated the defendant was not the robber. *Id.* at 186-87.

134. "The prosecutor embarrassed and confounded the accused in the preparation of his defense by advising the witnesses to the robberies and murder not to speak to anyone unless he were present." *Id.* at 187.

135. "The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless the defense counsel was provided a fair opportunity for interview." *Id.* at 189.

136. *Id.* at 188.

137. *Id.*

138. *Id.* at 189. The court also recognized that Canon 39 of the Canons of Professional Ethics expressly states: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." *Id.* at 188.

139. *See supra* note 133 and accompanying text.

140. The state's inherent information-gathering advantages suggest that any imbalance in discovery rights should work in the defendant's favor. The state has greater financial and staff resources, and the prosecutor has a number of tactical advantages. He begins his investigation shortly after the crime has been committed when witnesses are more apt to remember events, and at the time the defendant begins any investigation, the trail is

Brady and *Gregory*, denying the defendant the right to take discovery depositions is a "suppression of the means by which the defense could obtain evidence."[141] Discovery depositions provide a "fair opportunity for interview"[142] and are the only effective method of equalizing the defendant's investigative tools with those of the state.

Effective Assistance of Counsel

The sixth amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[143] The right to counsel is a fundamental right which is fully incorporated by the fourteenth amendment,[144] and the sixth amendment guarantees a criminal defendant the right to effective assistance of counsel.[145] In order to achieve effective assistance, a defense counsel must confer with the client to ascertain potential defenses and discuss potential strategies and tactical choices, advise the defendant of his rights and take all actions necessary to preserve them, make appropriate motions, do adequate legal research, and conduct appropriate factual investigations.[146] One of the most prevalent areas in which inef-

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not only cold, but a diligent prosecutor will have removed much of the evidence from the field. The prosecutor may compel people, including the defendant, to cooperate and may compel the defendant to participate in various non-testimonial identification procedures. The police may search private areas, seize evidence, tap telephone conversations, and they have access to vast amounts of information in government files. Also, citizens will cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant. Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973) (citations omitted).

141. Gregory v. United States, 369 F.2d 185, 189 (D.C. Cir. 1966) (state should not interpose obstacles to disclosing facts unless it is interested in convicting defendants on testimony of untrustworthy persons).

142. *Id.*

143. U.S. CONST. amend. VI.

144. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (guarantee of counsel under sixth amendment was fully incorporated by fourteenth amendment). *See also* Powell v. Alabama, 287 U.S. 45 (1932) (recognizing right to assistance of counsel not as a sixth amendment right, but as a fundamental right guaranteed by due process clause of fourteenth amendment); *In re* Gault, 387 U.S. 1 (1967) (individual's liberty has such a unique character that it merits a particularly high degree of protection; therefore, a defendant is entitled to assistance of counsel).

145. Powell v. Alabama, 287 U.S. 45 (1932) (right to effective assistance of counsel is right that is basic, fundamental and secured to every person by due process clause); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) ("defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

146. United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973). *See also* People v. Nichols, 27 Ill. App. 3d 372, 327 N.E.2d 186 (1975) (defendants are entitled to aid of counsel from arraignment to trial; this time of consulta-

fective assistance of counsel has been found is where the attorney has failed to adequately prepare for trial. In *Coles v. Peyton*,[147] a rape case, the court found that counsel appointed by the lower court did not investigate the reputation of the alleged victim for chastity, did not attempt to learn the identity of or interview her male companion, and did not attempt to interview a woman who had heard the commotion in an alley and had called the police.[148] The court found a denial of effective assistance of counsel, holding that counsel must conduct factual investigations and allow himself enough time for reflection and preparation.[149] Another decision where failure to interview witnesses resulted in ineffective assistance of counsel was *Tucker v. United States*.[150] In *Tucker*, the defense attorney failed to interview a key prosecution witness prior to trial. The Ninth Circuit concluded that failing to question the manager of the robbed bank denied the defendant his constitutional right to effective assistance of counsel.[151]

Beyond the failure of defense counsel to prepare a case by their own inaction, a denial of effective assistance has been found where the state or court has imposed extrinsic barriers to adequate representation of a defendant. In *United States ex rel. Kimbrough v. Rundle*,[152] defense counsel was not appointed until the day of trial. The court held that the defendant was denied effective assistance of counsel because the last-minute appointment of counsel is "functionally equivalent to the absence of counsel."[153] The defense counsel was, in effect, precluded from preparing his case, and therefore, the defendant was denied effective assistance. In *United States v. Knight*,[154] defense counsel was allowed only thirty minutes to discuss the case with the three defendants and was denied any opportunity to interview witnesses or to investigate the case. The court held that denying defense counsel an opportunity to prepare the case "is so fundamentally unfair that a conviction resulting therefrom can-

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tion, investigation and preparation is vitally important). Illinois courts have held that failure to file pretrial discovery motions is not *per se* proof of ineffective assistance of counsel, but it can be a violation under certain circumstances. *See* People v. Williams, 63 Ill. 2d 371, 349 N.E.2d 14 (1976); People v. Stepheny, 46 Ill. 2d 153, 263 N.E.2d 83 (1970).

147. 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

148. *Id.* at 226.

149. *Id.*

150. 235 F.2d 238 (9th Cir. 1956).

151. *Id.* at 240.

152. 293 F. Supp. 839 (E.D. Pa. 1968).

153. *Id.* at 843. "As a result of this lack of opportunity for consultation and investigation defense-counsel's participation at trial was necessarily perfunctory." *Id.* at 842.

154. 443 F.2d 174 (6th Cir. 1971).

not be permitted to stand."[155]

According to the principles in *Coles*, *Tucker*, *Rundle* and *Knight*, the right to effective assistance of counsel under the sixth and fourteenth amendments includes the obligation and opportunity of counsel to adequately investigate the facts of a case and interview key prosecution witnesses prior to trial. Where circumstances prevent defense counsel from investigating a case or interviewing witnesses, the defendant has been denied his fundamental right to effective assistance of counsel. Because only the defense can adequately determine what facts and information are essential to the defense[156] and most witnesses may refuse to cooperate with the defense,[157] the absence of discovery depositions to criminal cases prohibits defense counsel from adequately preparing for trial and denies defendants their constitutional right to effective assistance of counsel.

CONCLUSION

The current discovery rules in Illinois do not provide for discovery depositions in criminal cases, even though depositions would reduce the number of collateral attacks and reversals, save time and money, and promote accurate dispositions. The opponents of discovery depositions argue that they increase the incidents of perjury, bribery and intimidation of witnesses, and that the state will be unable to depose defense witnesses because of the defendant's right against self-incrimination and the attorney-client privilege. Actually, discovery depositions will decrease the incidents of perjury and bribery, and the fifth amendment is not a bar to discovery depositions because the privilege is narrowly construed to apply to the defendant's statements only and does not apply to defense witnesses. The attorney-client privilege is also not a bar to discovery depositions because the privilege applies only to communications from the defendants to their attorneys.

In addition to these benefits, discovery depositions equalize the investigative abilities of the parties. Under the current system, the defendant is at a great disadvantage in discovering the facts of a case. This disadvantage is so great that depriving defendants of discovery depositions may violate their rights to due process and effective assistance of counsel. Recent United States Supreme Court cases have set out certain minimal due process requirements for pretrial discovery; the state cannot

155. *Id.* at 178.

156. *See supra* note 62 and accompanying text.

157. *See supra* note 58 and accompanying text.

withhold evidence favorable to the defendant, and the investigative abilities between the state and the defense should be equal. Discovery depositions will equalize the information gathering imbalance because it will give defendants access to prosecution witnesses. Barring discovery depositions also denies defendants their right to effective assistance of counsel. Because the defense is unable to interview prosecution witnesses, the defense cannot adequately prepare for trial. It is for these reasons that Illinois should allow discovery depositions in criminal cases.

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