Tape 9 - Side 1 - 530 to end
Side 2 - 1 to end (Tape begins p. 5)
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

June 2, 1972

Minutes

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Representative Norma Paulus (Delayed)

Excused: Mr. Donald E. Clark

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Mr. John W. Osburn, Solicitor General, Department of Justice
Mr. Charles Carnese, Deputy District Attorney, Multnomah County
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Captain George W. McCloud, Department of Public Safety, Hillsboro
Deputy Sheriff William R. Probstfield, Department of Public Safety, Hillsboro

Agenda: PRE-TRIAL DISCOVERY (Attorney General's Draft)

The meeting was called to order at 10:15 a.m. by Judge James M. Burns, Chairman, in Room 315 State Capitol.

PRE-TRIAL DISCOVERY (Attorney General's Draft) [See Appendix A]

Chairman Burns indicated that the Attorney General's draft on Pre-Trial Discovery had been prepared by Mr. John Osburn and asked him to proceed with an explanation of it.

Mr. Osburn recapitulated the basic provisions of Preliminary Draft No. 1 on Pre-Trial Discovery discussed at the meeting of Subcommittee No. 3 on March 16, 1972, which essentially provided for reciprocal discovery upon motion by the defendant. Following that meeting the Attorney General's draft was prepared which provided for discovery not based upon motion but based upon the concept that it was the pre-trial obligation of both parties to the court and to each other to provide information that would be made available at the time of trial. It contained provisions for protective orders in certain kinds of cases, for exclusion of legal research and work product type of papers and

for nondisclosure of confidential informants who were not intended to be produced at time of trial. Because the procedure under the draft did not require a motion, it would not be invoked by the parties themselves but would be invoked as a matter of law.

Mr. Osburn explained that there were two theories in the modern pre-trial discovery statutes under which the defendant may be required to produce evidence. One was the type of reasoning in Williams v. Florida, 399 US 78 (1970), which said that if the state must produce something, the defendant must also produce something and that the obligation to disclose is based upon the right to discover what the state has. That theory, he said, was embodied in Preliminary Draft No. 1 prepared by Mr. Paillette. Mr. Osburn's draft presented the subcommittee with an alternative theory and provided that the defense must produce what it intends to produce at the time of trial, the premise being that the defense is ultimately required to disclose certain things and the draft only requires them to do that prior to trial rather than on the morning of trial.

Section 1. Applicability. Because the procedure set forth in this draft is relatively automatic, Mr. Osburn said it appeared to be necessary to provide some means of eliminating pre-trial discovery in routine traffic cases. Consequently, section 1 provided that the provisions of this Article shall apply in any case in which an indictment or information is filed in the circuit court charging the defendant either with a felony or a misdemeanor. In other criminal prosecutions, such as misdemeanors in district court and justice court, the provisions of the Article may be invoked by the defendant, but it would obviate the situation where the state would be required, in a violation of the basic rule trial in district court, to provide 10 days in advance of trial all of the information required by this Article.

Chairman Burns asked if the second sentence of section 1 was intended to apply to misdemeanors in district, justice and municipal courts and received an affirmative reply from Mr. Osburn.

Mr. Paillette asked Mr. Osburn if he believed it was necessary to provide for discovery, either by motion or in some other manner, in misdemeanor cases and was told that he did not. Chairman Burns commented that discovery in misdemeanor cases would raise a problem in connection with cases that were routinely tried less than 10 days after a charge was filed. A defense lawyer could well argue that he did not get discovery because the cases were set less than 10 days after the charge was filed. A further problem in misdemeanor cases could be created if the defense were to use an automatic request as a kind of general harassment technique.

Mr. Paillette stated that Preliminary Draft No. 1 was not restricted to felony prosecutions and the subcommittee had discussed that point at the March meeting in connection with the ABA recommendation that pre-trial discovery should apply to all "serious" criminal cases.

Mr. Milbank said for certain types of traffic cases he presently requested pre-trial discovery and it was routinely granted. One was a DUIL charge where he asked for the field breathalyzer report and also copies of the officer's certification. He was of the opinion that the five major traffic offenses should be subject to discovery but it was unnecessary for minor traffic offenses. Mr. Carnese expressed agreement with Mr. Milbank's view that the major traffic offenses should be subject to discovery and said he could also foresee the need for discovery arising in other than major traffic offense cases. He could see no obstacle to discovery in misdemeanor cases from the district attorney's standpoint.

Chairman Burns asked if discovery in misdemeanor cases might not result in a flood of requests for discovery and was told by Mr. Blensly that all that would be required in most cases would be to supply a copy of the officer's report. Ordinarily, there was little else involved in the case.

Mr. Blensly was critical of imposing a duty to carry out discovery procedures involving felonies in the proposed Article without motion. Basically, he said, discovery was taken care of on an informal basis and when it was not, he believed there should be a requirement for a motion procedure.

Mr. Osburn advised that the draft did not include discovery of all information required by Brady v. Maryland, 373 US 83 (1963), the reason being that there was some question as to when Brady material must be provided. The draft took the position that it must be provided at a time when the defendant would be able to use it, but it would not necessarily have to be included in pre-trial discovery.

Chairman Burns commented that perhaps the draft contained the best approach by requiring that discovery would apply in misdemeanor cases, only when requested by the defendant. Mr. Carnese said he could see no objection to it provided some written notice was given to the prosecution, although not necessarily by motion. Chairman Burns replied that this could be accomplished by stating, "If the defendant serves upon the prosecutor a written request for discovery . . . . "

Mr. Blensly remarked that if one of the alternatives to not complying with the request was an expression by the court as to what was to be done, it would be more proper to require that the request for discovery be filed with the court rather than with some deputy district attorney who might resign, go out of town or lose the request, resulting in an argument as to whether the request was actually filed.

Chairman Burns said that as a practical matter, if the requests were reasonable and there was no continuing abuse of the number of requests filed, the court would never know about them. He believed it was unnecessary to clutter up the court records with such requests.

Chairman Burns noted that the first sentence of section 1 would need to be amended to conform to the Commission's proposed constitutional amendment relating to grand juries making the filing of an information optional with the district attorney. Mr. Osburn replied that this would be accomplished by striking "on waiver of indictment" and inserting "in the circuit court." The subcommittee consented to that revision.

Mr. Carnese said that "other criminal prosecutions" as used in the second sentence of section 1 would include the filing of an information on a felony in the lower courts. He did not believe that on a felony matter discovery should be mandatory upon request or court order in the lower courts prior to bind-over until an indictment was found or a waiver of indictment filed. There should, he said, be an exception for filing an information of either a felony or a misdemeanor in that situation. His contention was that absent a bind-over, discovery as a right should not attach prior to indictment, one reason being that many times the investigation was not complete before indictment and the state therefore could be in violation of the law if more information were gathered after whatever time period elapsed following the original disclosure.

Mr. Paillette pointed out that section 6 provided for a continuing duty to disclose. Mr. Carnese replied that every time the police officer interviewed another witness, it would require an additional letter or telephone call to the defense attorney to apprise him of that fact. That was an awkward situation that could be avoided by not requiring discovery until the investigation was basically complete, which in Multnomah County in a misdemeanor matter was at the time the complaint was issued and in a felony situation was at the time of indictment.

Chairman Burns commented that Mr. Carnese's suggestion again raised the 10 day problem because preliminary hearings were normally held less than 10 days after filing of the charge. He added that another problem was inherent in the phrase, "In other criminal prosecutions," in that there was a question as to whether discovery would be available in a case involving an ordinance violation in a municipal court. Mr. Paillette advised that if the offense carried a jail sentence, it was a crime under the Criminal Code which specifically defined an offense to include not only violations of state law but also violations of any law or ordinance of a political subdivision.

In reply to a question by the Chairman as to what action the subcommittee should take with respect to preliminary hearings, Mr. Milbank said that since there were no preliminary hearings in Marion County, he was perfectly satisfied to trade an expanded right of discovery for a preliminary hearing.

Mr. Blensly was of the opinion that the time to trigger discovery was not the trial date which was an uncertain date. The date that was certain and material was the date the defendant was arraigned. He contended that the trigger date for discovery should be a given number of days after arraignment.

Chairman Burns commented that if the preliminary hearing was strictly a probable cause hearing and not a truncated discovery device, perhaps there was no need for discovery at the probable cause stage. Mr. Blensly agreed that the defendant especially was not in a position to give much information at that point and both Mr. Milbank and Mr. Carnese concurred.

Mr. Osburn commented that the concept of this Article was not entirely to aid everyone's investigation in a case but rather to assist the court and the system in having as much thrashed out in advance of trial as possible. Mr. Paillette observed that if a motion was not required, the thing that would trigger discovery should be tied in with the trial objective and that would be at the indictment or information stage.

Tape 9 - Side 2

Mr. Milbank asked how section 1 would affect juvenile proceedings which were quasi-criminal in nature when a remand was involved. He asked if discovery was intentionally being excluded from that field of the law. Mr. Paillette commented that sooner or later discovery was always available in a juvenile case, and Mr. Blensly added that there was discovery at the present time of all the files in juvenile cases other than the police reports. After further discussion, the subcommittee decided to leave the matter of discovery in juvenile cases to the Juvenile Code Revision Committee.

Chairman Burns asked if the language in the second sentence of section 1 clearly indicated that it referred to matters in courts inferior to the circuit court. Mr. Osburn advised that when he was drafting the section, he had not considered municipal courts and had therefore used the term "criminal prosecutions."

Chairman Burns asked Mr. Blensly if he thought the request for discovery should be filed with the court or with the prosecutor. Mr. Blensly said that as long as the court was controlling discovery and would be required to make a decision if there was a failure to disclose under the provisions of the Article, he believed it should be triggered by a motion with the court. Mr. Carnese felt it was imperative that the prosecutor should also have a copy of the request. Chairman Burns said there might well be places in the state where local court rules would not require that a motion filed with the court also be served on the opposing party and suggested that if a motion was to be required, the proposed statute should specify that the defendant must serve a copy on the prosecutor.

Mr. Paillette pointed out that the whole thrust of this Article centered around good faith on both sides and asked what was accomplished by filing the request for discovery in the circuit court. Furthermore, if Mr. Blensly's suggestion were adopted, the defense instead of filing one paper would be filing two -- one with the judge and one with the prosecutor. He could see no reason why the defense should not be permitted to merely make his request to the prosecutor. Mr. Carnese said

he would have no objection so long as the prosecutor received the request in writing. Chairman Burns indicated that would be accomplished by inserting "if the defendant serves upon the prosecutor a written request for discovery" in the second sentence of section 1.

Mr. Blensly asked if the language should be "prosecutor" or "district attorney" and was told by Mr. Paillette that it should be "prosecutor" in order to include city attorneys as well as district attorneys.

Mr. Blensly asked what the subcommittee wanted to do about the question concerning informations in district court and was told by Mr. Osburn that the problem could be resolved in section 4. Mr. Carnese contended that section 4 should be tied into section 1. Chairman Burns suggested that the second sentence of section 1 begin with the phrase "Except as provided in section 4,". [For further discussion of this subject, see page 24 of these minutes.]

As approved by the subcommittee, section 1 would read:

> "Section 1. Applicability. The provisions of this Article are applicable to all prosecutions in which an indictment has been found by a grand jury, or in which an information has been filed in the circuit court. Except as otherwise provided in section 4, in other criminal prosecutions, the provisions of this Article shall be applicable if the defendant serves upon the prosecutor having jurisdiction of the prosecution a written request for discovery of any of the items discoverable under this Article."

Section 1 was later amended to delete "Except as otherwise provided in section 4,". (See page 24 of these minutes.) Also, "district attorney" was reinstated in place of "prosecutor." (See page 21 of these minutes.)

Section 2. Disclosure to defendant. Mr. Osburn noted that section 2 excluded the provisions of sections 5 and 7. The disclosure under section 2, he said, was not of everything the prosecution had and was not of Brady v. Maryland information which may or may not as a matter of policy be required to be disclosed prior to trial. The items to be revealed by the district attorney were listed in subsections (1) through (6). Omitted from section 2 was a definition of who the prosecutor intends to call as a witness at the trial and also omitted was a decision as to what should be done about the situation where the prosecutor decides he will not use a certain witness at trial and later changes his mind and wants to call him. If a rule were to be drawn to cover such a situation, he said it would of necessity be very lengthy. The draft, therefore, took the position that if the prosecutor believes there is a reasonable chance that he might call a particular witness and if he does not give the name of that witness to the defense, he assumes the risk that that witness may not be allowed to testify. Provisions were included for the court to provide for later disclosure

upon good cause shown. Mr. Milbank asked if this last statement applied to a rebuttal situation and received an affirmative reply from Mr. Osburn.

Mr. Osburn did not contemplate that the Discovery Article would alter the present rules on alibi or on insanity when notice was given that either defense was going to be relied upon. In the case of alibi witnesses, they would have to be disclosed by both sides, and this would cure the problem of nondisclosure by the state raised in State v. Wardius, 93 Adv Sh 147, ____ Or App ____ (1971).

Subsection (1). Mr. Osburn noted that subsection (1) of section 2 did not include memoranda of any oral statements in the possession of the prosecutor nor did it include grand jury minutes. Chairman Burns commented that frequently in Multnomah County the only written statements consisted of the police report which was a boiled down version of the officer's interview with the witness. If the district attorney didn't intend to call the police officer as a witness, then under section 2 he would not be required to disclose the police report. Mr. Blensly remarked that the same was true on the defense side. The defense attorney would probably only have his notes of examination of the witnesses and those too would be exempt from discovery.

Mr. Osburn said the objections just made could be cured by inserting "or memoranda of any oral statements" at the end of subsection (1). He informed the subcommittee that there were several kinds of information that could be required: (1) the name of the witness, which was the practice presently followed on indictments where only the names of the witnesses were endorsed thereon; (2) the name and address of the witness; (3) name, address and a summary of what the witnesses will testify to, although he believed this latter course could become very cumbersome.

Chairman Burns said there were basically three types of situations involved. One was where the police officer investigated the crime and wrote a report which contained a summary of what the witnesses told him. Second, the situation where the witness was interviewed by an attorney for either side, and this was close to the work product area. The third area was where an investigator for either side took statements from witnesses.

Mr. Osburn pointed out that the ABA standards excluded statements made to investigators from their definition of a work product, but it was his opinion that it was an indefensible exclusion. Chairman Burns said the police officer's report in Multnomah County was routinely shown to the defense at the present time and no one objected to that procedure. However, when the deputy sent out an investigator, it was very much like an extension of the attorney, and it did pose a problem as to whether his report should be considered a work product. Mr. Carnese commented that the defendant would have very little to offer in the way of discovery to the state if investigator's reports were excluded because that was all there would be in many cases.

Mr. Osburn said he did not consider a statement made to an attorney or to an investigator to be a work product. To him, he said, a work product was legal research, office memoranda, letters, etc.

Mr. Carnese remarked that a deputy district attorney might question a witness, yet make no notes of the meeting, and there would be nothing available other than what he remembered from the interview. Mr. Osburn stated that if the statement was not reduced to writing, there would be nothing to disclose other than the name and address of the witness. It would be virtually impossible, he said, to write a statute requiring that not only written reports, statements and memoranda be given but also a summary of anything the witness said. Both Mr. Carnese and Mr. Blensly expressed agreement and Mr. Blensly added that both sides would want to interview the witnesses in any case.

Mr. Carnese pointed out that subsection (1) of section 2 required only the names and addresses of officers who were going to testify at trial and asked if the names should also be given of officers who had taken statements.

Chairman Burns commented that the typical police report was not covered by subsection (1) but he believed it should be. To correct that problem Mr. Osburn suggested adding at the end of subsection (1), "or memoranda of any oral statements of such persons." This proposal was adopted.

Mr. Carnese agreed that the proposed amendment would be an improvement but it would still get the district attorney into the situation of Xeroxing portions of police reports. He urged that the draft state a specific policy as to whether an entire police report would be open for discovery. If a Brady problem were involved in a case where a witness was contacted by the district attorney who would not be called by the state because he was favorable to the defendant, he asked if the copy of that report could then be deleted from the reports given to the defendant. Mr. Osburn explained that the draft contained no requirement to disclose that type of information prior to trial, but the district attorney would take some risk if he disclosed it too late.

Chairman Burns said the area that caused him concern was where the police report mingled what the witness said along with the officer's impressions of the witness. If the draft were to require that a summary of witnesses' statements were discoverable, probably what would happen would be that there would be two reports -- one covering what the witness said and another dealing with the officer's impressions of the witness.

Mr. Osburn said the ABA standards contained a provision not included in the draft which provided for excising a portion of a report, not all of which was subject to disclosure. Perhaps that type of provision should be added to this draft, he said.

Chairman Burns said another answer to the problem would be to apply to the court, under the section on protective orders, for permission to excise certain portions of the report and have the court look at the matter in camera.

Mr. Paillette noted that section 4.5 of the ABA standards reads:

> "When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal."

In reply to the Chairman's question, Mr. Carnese said that such a provision would be acceptable to him but pointed out that under the ABA standard the district attorney was excising the material rather than the court.

Judge Burns suggested that section 4.5 of the ABA standards be inserted into section 7 along with the provisions concerning protective orders. Mr. Osburn said he would prefer to put it in section 5, "Property not subject to discovery," and probably all that would be needed was to add the first sentence of 4.5 as subsection (3) of that section. The subcommittee approved this proposal, the only change in the sentence being to substitute "this Article" for "the standards" where applicable.

Mr. Carnese said that when a police officer was to be called as a witness by the prosecutor and that officer had stated in a report his specific opinion concerning the veracity of a witness, that portion of the report normally would not be discoverable; yet subsection (1) of section 2 clearly indicated that it was. He asked if the officer's personal opinions were to remain discoverable under this draft.

Mr. Milbank said that he had seen officers' reports expressing the opinion that the witness had mental problems. That information, he said, was extremely helpful to the defense. Chairman Burns was doubtful that the officer could so testify when he was on the witness stand and Mr. Milbank said he had asked officers on the stand if they had formed an opinion about the mental capacity of the witness and they had been permitted to answer. Mr. Carnese commented that if that type of statement were to be allowed in court, there was no reason to exclude it as to a party who was not a witness. In other words, if an opinion by an officer who was the witness was to be permitted, even though normally not admissible, it was inconsistent not to permit also the opinion of an officer who was not a witness. Mr. Blensly contended

that situation embodied a Brady problem and if the opinion was favorable to the defendant, the information would have to be disclosed.

Chairman Burns was of the opinion that a lay witness had to be an intimate acquaintance before he could give an opinion as to sanity, and the normal rule of admissibility would therefore take care of the situation under discussion.

Following a brief recess, Mr. Milbank asked if subsection (2) of section 2 meant that the defense necessarily received written copies of the material outlined in the section or if it allowed inspection of the records with authority for the defense to make copies at his own expense of whatever portions he wanted. Mr. Osburn replied that the draft did not specifically answer that question. Mr. Milbank commented that as a defense attorney, he would be satisfied with authority to inspect and record by whatever means he chose the information he needed. The Bar committee had discussed, he said, the cost to counties of keeping a separate file of that which was discoverable to the defense, furnishing copies, etc. He could foresee the Association of Oregon Counties submitting to the legislature an estimated cost of such a procedure that could be damaging to passage of the bill. He said he could live with visual inspection and a right to make copies, recordings, etc. of whatever material he wanted.

Mr. Osburn called attention to the sentence in section 4 which said, "The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously." It was his contention that under the terms of that sentence the court could solve whatever problems of this type that might arise.

Mr. Blensly noted that the opening paragraph of section 2 should read "prosecutor" rather than "district attorney" in order to include city attorneys and the members agreed. The same revision was approved in the opening paragraph of section 3. However, this decision was later revoked. See page 21 of these minutes.

Representative Paulus inquired as to the meaning of "relevant written or recorded statements" as used in subsection (1) of section 2 and was told by Mr. Osburn that the provision referred not to any information which the prosecutor had but that which he intended to use at trial and which was relevant to the charge. Mr. Carnese asked if "relevant" referred only to the legal concept of relevancy and whether it would include the results of a lie detector test which, though relevant, were incompetent in a legal sense. Mr. Osburn noted that subsection (3) covered reports or statements of experts "including results of physical or mental examinations and of scientific tests" which would include a lie detector test.

Mr. Paillette stated that the ABA commentary spoke to the question raised by Mr. Carnese and read from the commentary to section 2.1, "Prosecutor's obligations." In summation, the ABA concluded that

discovery would be unworkable without the criterion of relevancy and said, "To implement full discovery, the system envisions that the prosecution and the trial judge should not be stingy in interpreting the meaning of relevancy." Mr. Paillette said the ABA obviously recognized some of the difficulties in the use of the term but apparently believed it would cause more problem to leave it out than to include it.

Subsection (2). Mr. Osburn noted that subsection (2) of section 2 was taken from the ABA standards. The statement made by a co-defendant, he said, would necessarily be included for discovery purposes if the prosecutor intended to call the co-defendant as a witness even though the trial were not joint. It it were a joint trial, the statement would still be included.

Mr. Blensly recalled that Mr. Osburn had said earlier that the minutes of grand jury proceedings were not included in section 2. Mr. Osburn stated that under subsection (1) an argument could well be made that if there were written or recorded statements of grand jury proceedings, they were included, particularly under the amended language "memoranda of any oral statements." Mr. Blensly said that if a court reporter transcribed proceedings of the grand jury, that would certainly be a memoranda of oral statements and Mr. Osburn agreed. Mr. Blensly was most reluctant to open up grand jury proceedings to a right of discovery. Mr. Osburn said the ABA standards specifically included grand jury minutes, but that provision was not contained in this draft. Mr. Blensly contended that the same result was achieved indirectly and objected to making grand jury minutes discoverable.

Mr. Blensly then pointed out that section 2 required the information to be disclosed by the prosecutor to be "within his possession and control" and asked why "knowledge" was not also included in that phrase. He said the prosecutor could, for example, be aware of police reports that were not within his possession and control, but he could get them if he needed to do so. Mr. Osburn replied that under the common law, knowledge was an element of possession. Judge Burns added that there had been no trouble in the Brady and Hansen types of cases. Hansen specifically cited those cases where the deputy did not have the knowledge but the police did and held that that information should have been disclosed.

Mr. Blensly questioned whether an exception to that ruling was being included in the proposed statute by the language "within his possession and control." Chairman Burns replied that if the police had the information, it was within the control of the prosecutor. Representative Paulus suggested that it would resolve the problem raised by Mr. Blensly to revise the phrase to read "possession or control." The subcommittee adopted this amendment and also approved the same amendment in the opening paragraph of section 3.

With respect to the question raised earlier as to whether grand jury minutes should be disclosed, Chairman Burns asked Mr. Blensly if he was concerned specifically with cases where a court reporter took verbatim minutes of grand jury proceedings. Mr. Blensly replied that he was concerned with minutes written by the clerk which involved a summary of the witnesses' testimony. Mr. Osburn suggested that this matter be discussed under section 5, "Property not subject to discovery." [For further consideration of this subject, see page 25 of these minutes.]

Subsection (3). Mr. Osburn advised that subsection (3) of section 2 should be discussed together with section 3. It raised the problem of whether the defense must disclose information which would tend to incriminate the accused which the defense did not intend to use at the time of trial. The basis for disclosure under this draft by the defense to the state was that if the defendant intended to use the information at trial in any event, there was nothing wrong with requiring him to do it prior to trial. Consequently, section 2, subsection (3), with respect to reports of experts, provided that any expert's report or statement must be disclosed regardless of whether the prosecutor intended to use it. That, he said, was consistent with Brady v. Maryland. In the case of disclosure to the state by the defense, only evidence which the defense intended to use in the trial was included.

Chairman Burns asked if subsection (3) included lie detector tests and was told by Mr. Osburn that it did.

Mr. Blensly said that section 2 began on the premise that Brady was not being codified and then went into areas where it appeared to cover Brady, subsection (6) being a specific example of the latter. He asked Mr. Osburn if he had decided whether as a matter of policy the draft codified Brady. Mr. Osburn replied that he had made no conscious effort to cover Brady. That being the case, Mr. Blensly asked why a distinction was made in the area of discovery of experts' reports between the defense and the prosecution.

Mr. Milbank replied that in some cases the scientific report would destroy the evidence seized. To illustrate, he said that if a blood-stain were tested, that piece of evidence would no longer be available because the stain would be taken out of the piece of cloth and put through a series of tests. By the very nature of pre-trial discovery, he said, the Brady type of disclosure was inherent in the draft.

Mr. Blensly said that as he understood the basic philosophy of this Article, it was drafted not to cover Brady situations necessarily but to apprise the defense of what the prosecutor was going to present in his case. If the defense were not required to show the prosecutor results of his tests that were unfavorable to the accused, he said he would object to requiring the prosecutor by statute to disclose results of tests to the defense that were unfavorable to the prosecution. He contended that the draft should contain parallel requirements for both sides.

Mr. Osburn advised that he had taken this language from the prosecution section of P. D. #1 which required reciprocal information. Mr. Blensly agreed that the state should have a duty to disclose this information because it had more facilities and personnel than the defense in the majority of cases, but he maintained that the provision should be reciprocal. In his opinion placing this requirement on the defendant would not raise a Fifth Amendment problem, except perhaps in the case of a lie detector test.

Chairman Burns commented that it came very close to a Fifth Amendment problem when the defendant's test showed him to be guilty. Mr. Blensly believed it did not so long as the test did not involve testimony.

Mr. Osburn explained that the draft limited disclosure of reports of experts which the defendant did not intend to use at trial. On a constitutional basis he believed it was difficult to justify a requirement that the defendant report evidence tending to show him guilty which he did not intend to produce at trial. Mr. Carnese remarked that in some situations such a requirement would be tantamount to requiring the defendant to hang himself and would certainly raise a constitutional question if he were compelled to do so. Under certain circumstances it would require the defendant to present evidence which the state did not have regarding results of tests the state had not made or requested, and that was different from requiring him to disclose results of tests that the state had also conducted.

Mr. Osburn said he did not know of any statute that could be enacted that would be constitutional and still require the defense to disclose the names of witnesses who would convict him -- for example, an eyewitness to the crime he had committed.

Mr. Paillette commented that the Advisory Committee on Federal Rules had proposed a change to Federal Rule 16 which followed essentially the same rationale as that set out in the draft with respect to this question.

Mr. Osburn pointed out that subsection (2) of section 3 required the defendant to disclose experts' reports which the defendant intended to use at the time of trial. In other words, if the defendant were going to have a report prepared by an expert for use at trial for the purpose of cross examination, even though he had no intention of introducing the report, he was required to disclose that information. Chairman Burns commented that this would be a difficult area to police. Mr. Osburn conceded it might be difficult to police, but it was part of the rationale behind expanding the state's disclosure to obtain broader discovery and to include other than that which the defendant intended to introduce as evidence.

Chairman Burns remarked that even though discovery tended to even out both sides of a case, there was still a tremendous disparity in

the state's favor in the vast majority of criminal cases. Mr. Paillette added that whatever was included in this draft requiring disclosure to the state was in all probability going to be challenged in the courts on Fifth Amendment grounds in any event.

Mr. Blensly asked why Brady was not codified in the draft and was told by Mr. Osburn that one reason involved the pre-trial aspect of Brady which said that the material had to be disclosed at a time when the defendant could use it. This caused problems because there were many cases where evidence was disclosed during the course of trial. Chairman Burns added that if Brady were included in the statute, it would be necessary to write in a time frame, and this was a virtual impossibility as demonstrated by the Supreme Court's attempt to do so in Dooley v. Connall.

The subcommittee recessed for lunch and reconvened at 1:30 p.m. with the same three members present as attended the morning session. Also in attendance were Mr. Osburn, Mr. Milbank and Mr. Carnese.

Discussion continued on the question raised by Mr. Blensly concerning mutuality of discovery with respect to experts' reports. He contended that the proposed discovery statute should not codify the Brady decision and that if it were not codified, the discovery requirements should be as parallel as possible for the defense and the prosecution.

Chairman Burns commented that the question being discussed involved a basic policy decision which might better be made by the full Commission and suggested that the draft be submitted to the Commission with the present provision plus an alternative proposal that would make discovery bilateral to the defense and the prosecution insofar as possible.

Representative Paulus expressed concern over the difficulty of enforcing and policing a provision requiring discovery of reports that were not placed in evidence. Chairman Burns noted that under section 6, subsection (2), the court had authority to take care of any situation where a party attempted to skirt the purpose and intent of the statute.

After further discussion the subcommittee agreed that an alternative subsection (3) should be drafted to be included in section 2 which would provide for parallel discovery so far as the reports and statements of experts were concerned.

Mr. Osburn commented that upon hearing Mr. Blensly's reasons for including mutuality, he was inclined to agree with him. Mr. Paillette added that Mr. Blensly's argument was also sound from the standpoint of the practical aspects of getting the Discovery Article through the Commission and the legislature. Furthermore, any disclosure requirement imposed upon the defendant would sooner or later be challenged in the courts.