CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 7. PRE-TRIAL DISCOVERY

Preliminary Draft No. 2; July 1972

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Subcommittee No. 3

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ARTICLE 7. PRE-TRIAL DISCOVERY

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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. In other criminal prosecutions, the provisions of this Article shall be applicable if the defendant serves upon the district attorney having jurisdiction of the prosecution a written request for discovery of any of the items discoverable under this Article.

COMMENTARY

A. Summary

Section 1 makes the provisions of the Article applicable to all criminal prosecutions in which an indictment has been returned and filed in circuit court, or in which an information has been filed on waiver of indictment. The Article would also be applicable to informations filed by the district attorney under the proposed amendment to Amended Article VII, Section 5 of the Oregon Constitution.

Section 1 and section 5 (1), considered together, provide for disclosure in felony cases only after the filing of an indictment or information. The Article also applies to misdemeanor prosecutions originating in circuit court. The Article is not applicable to require discovery in the district or justice court in connection with pre-indictment procedures in felony cases.

The Article is not automatically applicable to the prosecution of municipal ordinance violations, and to misdemeanor cases in the district and justice courts. Automatic, mandatory disclosure does not appear to be warranted in these cases, because of the large number of traffic and petty offenses which may be more expeditiously processed without mandatory pre-trial procedures. However, section 1 does permit a defendant to

invoke the Article by service of a written notice on the district attorney prior to trial. The service of such a notice requires disclosure both by the prosecution and by the defendant.

The term "District Attorney," as used throughout the Article, includes a city attorney as prosecuting officer in the case of municipal ordinance violations, and the attorney general in those criminal prosecutions within his jurisdiction.

B. Derivation

Section 1 is derived from the American Bar Association Standards Relating to Discovery and Procedure Before Trial, s. 1.5 (Approved Draft, 1970) which provides:

> "These standards should be applied in all serious criminal cases."

C. Relationship to Existing Law

The relationship of the provisions of this Article to present Oregon law is discussed in the commentary to subsequent sections.

Section 2. Disclosure to defendant. Except as otherwise provided in sections 6 and 8 of this Article, the district attorney shall disclose to the defendant the following material and information within his possession or control:

(1) The names and addresses of persons whom he intends to call as witnesses at the trial, together with their relevant written or recorded statements or memoranda of any oral statements of such persons;

(2) Any written or recorded statements or memoranda of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(3) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons [which the district attorney intends to offer in evidence at the trial] ;

(4) Any books, papers, documents, photographs or tangible objects:

(a) Which the district attorney intends to offer in evidence at the trial; or

(b) Which were obtained from or belong to the defendant;

(5) If actually known to the district attorney, any record of prior criminal convictions of persons whom the district attorney intends to call as witnesses at the trial.

COMMENTARY

A. Summary

Section 2 requires the district attorney to disclose to the defendant all of the enumerated material and information in any case in which the provisions of the Article apply. The enumeration is of material the pre-trial disclosure of

which is calculated to minimize surprise, avoid unnecessary prolonged trials and provide adequate information for informed pleas and evaluation of cases before trial. The Article does not purport to include all information which the district attorney may be required, as a matter of due process, to disclose prior to the submission of the case to the jury. For instance, section 2 does not include all information which must be disclosed under Brady v. Maryland, 373 US 83 (1963) because the information is exculpatory or may tend to mitigate punishment. Disclosure under this Article occurs as soon as practicable following the filing of charges against the defendant. The Article does not endeavor to fix the time at which exculpatory information, not specifically covered by section 2, must be disclosed. Neither does the Article eliminate the Brady requirement that prior demand be made for disclosure of other exculpatory evidence. See Moore v. Illinois, 40 L.W. 5071 (June 27, 1972).

The subcommittee submits for the consideration of the Commission the question whether statements and reports of experts and the results of examinations and tests, which are required to be disclosed pre-trial, should include all such material known to the state, or whether the provision for disclosure of this information should be parallel to that required to be disclosed by the defense, namely, that information which the party intends to offer in evidence at the trial. The optional language is placed in brackets in subsection (3).

Subsection (5) requires the disclosure to the defendant of prior criminal convictions known to the prosecution of witnesses whom the prosecution intends to call as witnesses. The district attorney would not be required to obtain routine record checks of prosecution witnesses, nor does this provision require the district attorney to obtain prior record data on request of the defendant.

B. Derivation

This section is generally derived from more extensive provisions of the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) Section 2.1.

Unlike the ABA draft, however, this section does not require disclosure of (1) grand jury minutes of recorded testimony, excluded under section 6 (c); (2) Information regarding electronic surveillance; and (3) Information tending to negate guilt of the accused or tending to reduce punishment therefor, except to the extent that such information is of the

type specifically subject to disclosure. Other exculpatory or mitigating information would remain subject to disclosure under Brady v. Maryland, supra, and Moore v. Illinois, supra.

C. Relationship to Existing Law

The proposed section substantially increases the scope of discovery in Oregon in criminal cases. Discovery is presently limited to the following:

1. ORS 133.755, which includes only the defendant's statements covered in subsection (2) and property obtained from or belonging to the defendant, covered in subsection (4) (b) of this Article.

2. ORS 483.646 (2), permitting certified copies of the report of chemical analysis of breath, blood, urine or saliva for alcoholic content.

3. ORS 137.075 (2), providing for service on the convicted person of diagnostic examination in connection with sentencing.

4. ORS 137.113, providing for service of a copy of a report of a psychiatric examination.

5. ORS 135.875, providing for notice by the defendant of intention to rely on alibi defense and service of names of witnesses on whom defendant intends to rely. The proposed Article would require notice by the state of witnesses who might be called as rebuttal witnesses. The constitutionality of ORS 135.875, to the extent that it presently requires disclosure by the defense but not by the state was challenged in State v. Wardius, 93 Adv Sh 147, ___ Or App ___, 487 P2d 1380 (1971), and the Supreme Court of the United States has granted a writ of certiorari to consider the question.

The section would also modify the time at which notice of prior statements of witnesses must be given. See State v. Foster, 242 Or 101, 407 P2d 901 (1965).

Section 3. Other disclosure to defendant; special conditions.

(1) Except as otherwise provided in sections 6 and 8 of this Article, the district attorney shall disclose to the defendant:

(a) The occurrence of a search or seizure, and upon written request by the defendant, any relevant material or information obtained thereby; and

(b) The acquisition of specified statements from the defendant.

(2) As used in this section, "disclose" means to afford the defendant an opportunity to inspect or copy the material.

COMMENTARY

A. Summary

This section requires disclosure by the district attorney of the occurrence of a search and seizure relevant to a pending prosecution. Defendant may thereupon request more detailed information regarding the search or seizure. In addition, the section requires the prosecution to disclose information regarding the circumstances of the acquisition of statements from the defendant.

The subcommittee considered, but did not formally add, the requirement of disclosure of information regarding the identity of the defendant, such as pre-trial lineups, examination of photographs by witnesses and the like.

The purpose of subsection (1) is to require disclosure of information which may be the basis for a motion to suppress evidence based on alleged violations of the Fourth or Fifth Amendment. Present practice does not require such disclosure, and constitutional challenges are generally based on defendant's personal knowledge of the facts, or information obtained from documents relative to the issuance of a search warrant.

This section endeavors to provide an opportunity to raise Fourth and Fifth Amendment questions in the trial court. Under state law, such motions must generally be made on trial, or even pre-trial, or they are waived. However, under Fay v. Noia, 372 US 391 (1963), alleged deprivation of constitutional rights in state criminal proceedings may be asserted in federal habeas corpus, even though not raised in state court, unless there has

been a deliberate bypass of state procedures for litigating the issue. Expanded pre-trial discovery on Fourth and Fifth Amendment questions may serve to maximize the opportunity of the state trial court to rule on constitutional challenges in a timely and orderly manner.

Subsection (2) provides a rather general definition of disclosure, and permits copying or photographing, as well as bare inspection, of disclosure material. Section 5 (1) permits the court to supervise the exercise of discovery to the extent necessary to insure that it proceeds properly and expeditiously. The Article is designed to require and permit discovery to proceed without the necessity of obtaining routine orders of the court with respect to discovery. If the parties are unable to agree as to the opportunity and manner of inspecting and copying material, or the extent to which experts may be permitted to examine and test the disclosure material, the court may prescribe terms and conditions with respect to discovery.

Section 4. Disclosure to the state. Except as otherwise provided in sections 6 and 8 of this Article, the defendant shall disclose to the district attorney the following material and information within his possession or control:

(1) The names and addresses of persons whom he intends to call as witnesses at the trial, together with their relevant written or recorded statements or memoranda of any oral statements of such persons;

(2) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to offer in evidence at the trial;

(3) Any books, papers, documents, photographs or tangible objects which the defendant intends to offer in evidence at the trial.

COMMENTARY

A. Summary

This section provides for mandatory disclosure by the defendant to the prosecution of specified materials and information which the defendant intends to present as evidence at the trial. Discovery is not reciprocal in the sense that the parties elect, or elect not to, disclose information. Nevertheless, and with an important limitation, all of the evidence which the defense must disclose to the prosecution is evidence of the type which the prosecution must, for their part, disclose to the defense prior to trial. The rationale of these parallel discovery provisions was described by Chief Justice Traynor in discussing Jones v. Superior Court, 58 Cal 2d 56, 376 P2d 919, 22 Cal Rep 879 (1962), as follows:

> "Since the defendant could not be compelled to testify or produce private documents in his possession, we recognized that ordinarily the prosecution could not require him to reveal his knowledge of the existence of possible witnesses and the existence of reports and X-rays for the purpose of preparing its case against him. Did

> it therefore follow that the defendant could not be required to reveal in advance the witnesses he intended to call at the trial and the evidence he intended to produce? A number of states by statute require a defendant specifically to plead certain defenses such as insanity or alibi and to reveal in advance of trial the names of the witnesses who will be called in support of such defenses. These statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal." Traynor, "Ground Lost and Found in Criminal Discovery," 39 NYUL Rev 228, 247 (1964).

Unlike disclosure by the district attorney, disclosure by the defense is limited to evidence which the defendant intends to offer in evidence at the trial. While the prosecution might be required to disclose to the defense information which it does not intend to use on trial, it is doubtful that a discovery statute could constitutionally require the defendant to disclose incriminating evidence which he does not intend to use as evidence.

B. Derivation

Enumeration of the items required to be disclosed from the defendant is adapted from Rule 16, Federal Rules of Criminal Procedure and New Jersey Criminal Practice Rule 3:13-3 (d). Both of these provisions provide for reciprocal discovery on motion of the defendant. The proposed Article makes disclosure mandatory both on the part of the prosecution and the defense, without being triggered by motion.

C. Relationship to Existing Law

Presently, the only provisions for disclosure by the defense to the district attorney are contained in: 1) ORS 135.875, which requires notice of intent to present alibi testimony, together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence, and 2) ORS 161.055 (3), which requires notice of intention to rely on affirmative defenses.

Section 5. Time of disclosure. (1) The obligations to disclose shall be performed as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint charging a misdemeanor or violation of a city ordinance. The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously.

(2) If, after complying with the provisions of this Article, a party finds, either before or during trial, additional material or information which is subject to or covered by this Article, he must promptly notify the other party of the existence thereof.

COMMENTARY

A. Summary

Section 5 specifies the time and manner in which a discovery is to occur, and provides for disclosure of evidence which is later discovered and which is subject to the Article.

Section 5 also permits the court to supervise discovery by rule or order, to the extent necessary to insure compliance with the Article.

B. Derivation

Subsection (1). No parallel provisions have been found in the codes of other states or model codes.

Subsection (2). Similar provisions appear in Federal Rule 16, the ABA Standards, and the New York, New Jersey and Florida discovery rules.

C. Relationship to Existing Law

The provision is new.

Section 6. Property not subject to discovery. (1) The following material and information shall not be subject to discovery under this Article:

(a) Work product, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorneys or members of their legal staffs.

(b) The identity of a confidential informant where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. Except as provided in section 8 of this Article, disclosure shall not be denied hereunder of the identity of witnesses to be produced at trial.

(c) Transcripts or recordings of testimony of witnesses before the grand jury.

(2) When some parts of certain material are discoverable under this Article, and other parts not discoverable, as much of the material shall be disclosed as is consistent with the provisions of this Article.

COMMENTARY

A. Summary

Subsection (1) of section 6 excludes from discovery:

(a) The work products of attorneys and members of the legal staffs to the extent that they contain opinions, theories or conclusions about the case. The exclusion does not exempt from discovery relevant information possessed by the attorneys or their staffs, to the extent that such evidence is otherwise subject to disclosure.

(b) The identity of a confidential informant whose sole connection with the case is the giving of information providing probable cause for an arrest or a search need not be disclosed. However, if the prosecution intends to produce the witness at trial, the identity of the witness must be disclosed, unless a protective order is issued under section 8.

(c) Nondisclosure of proceedings before the grand jury, prescribed by ORS 132.220, is retained.

To the extent that material discoverable is intermingled with material not subject to discovery, subsection (2) permits the excision of nondiscoverable material, and disclosure of the remainder.

B. Derivation

Subsection (1) is generally derived from American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) s. 2.6. However, s. 2.6 (c) of the ABA draft, exempting information relating to national security is not included in the proposed Article. Subsection (1) (c) is based upon the present secrecy of grand jury proceedings, as prescribed in ORS 132.220.

Subsection (2) is based generally on s. 4.5 of the ABA draft.

C. Relationship to Existing Law

The provision is new.

Section 7. Effect of failure to comply with discovery requirements. Upon being apprised of any breach of the duty imposed by the provisions of this Article, the court may order the violating party to permit inspection of the material, or grant a continuance, or refuse to permit the witness to testify, or refuse to receive in evidence the material not disclosed, or enter such other order as it considers appropriate.

COMMENTARY

A. Summary

Because the Article requires the party possessing it to disclose predominantly information which the party intends to introduce into evidence, the initial enforcement of discovery requirements will necessarily come through orders directing discovery, granting continuances, or rejecting the nondisclosed information as evidence. Should the court find that nondisclosure is willful, the court could consider that the withholding of evidence is contumacious, and the offending party might be punished for contempt.

B. Derivation

This section is derived from ABA draft, s. 4.7.

C. Relationship to Existing Law

The provision is new.

Section 8. Protective orders. (1) Upon a showing of cause, the court may at any time order that specified disclosures be denied, restricted or deferred, or make such other order as is appropriate.

(2) Upon request of any party, the court may permit a showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings.

(3) If the court enters an order granting relief following a showing in camera, the entire record of the showing 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. The trial court, in its discretion, may, after trial and conviction, unseal for defendant matters previously sealed.

COMMENTARY

A. Summary

This section gives the court authority to deny, restrict, defer or otherwise limit discovery based on sufficient showing of cause. This permits the court to control or prevent possible abuses of expanded discovery privileges authorized by the Article.

Among the considerations to be taken into account by the court would be the safety of witnesses and others, or a particular danger of perjury or witness intimidation. In states allowing discovery, protective orders are usually sought by the prosecution to protect certain witnesses prior to trial.

This section provides a procedure whereby the showing of cause is made, in whole or in part, in a written statement to be inspected by the court, without disclosure to the adverse party of the facts forming the basis for the motion or the evidence sought to be protected from disclosure. Such a revelation would, of course, defeat the purpose of the protective order.

If the court grants relief based upon the showing made, the record of the showing is to be sealed and preserved in the records of the court. If the defendant is convicted, and the need for secrecy is passed, the record of the showing may be unsealed, in the court's discretion.

The protective order applies only to eliminate the requirement of pre-trial disclosure under the Article.

B. Derivation

The section is drawn from New York Criminal Procedural Law, section 240.20 (subdivision 5). Federal Rule 16 (e) is almost identical. Florida and New Jersey rules also provide for a "protective order" under similar circumstances. The ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) provide for protective orders "provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof." (Section 4.4).

C. Relationship to Existing Law

The provision is new.