PHILADELPHIA COURT OF COMMON PLEAS
MANAGEMENT, EVALUATION & PLANNING UNIT
EXEMPLARY COURT PROJECT

EXAMINATION OF
THE CONTROL HEARING TECHNIQUE

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Prepared By:
Patricia Knopic
Court Program Analyst
Management Unit
Dr. Dennis Metrick,
Director

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INTRODUCTION

"Standards and Goals". Even when applied to the criminal justice system, the words are not new and the concept is not new. Innovation, however, lies in the approach provided by the National Advisory Commission (NAC) reports on Criminal Justice Standards and Goals.

Armed with the fruits of the task force reports of the President's Commission on Law Enforcement and Administration of Justice as well as the American Bar Association's standards for the criminal justice system, the NAC reports offer specific and quantitative recommendations for:

1. fundamental reform in the management and operation of the criminal justice system and,
2. efficient mobilization of criminal justice resources.[1/]

The NAC standards and goals were analyzed, defined and compared against the operation of the Philadelphia Court of Common Pleas and Municipal Court.

The Philadelphia Standards and Goals, Exemplary Court Project, was devised as a program of specific solutions to satisfy problem areas where the City's criminal justice system did not meet or exceed the NAC standards. This project was made possible by federal discretionary funds from the Law Enforcement Assistance Administration (L.E.A.A.).

One of the ten sub-projects operational under the Exemplary Court Project is the Management and Evaluation of the Plan and of the Courts. Under this sub-project a management team is responsible for developing detailed recommendations for bringing court operations in agreement with the NAC standards and goals.

This unit is expected to implement these recommendations if found appropriate. One area under specific examination concerns pre-trial motions in the Court of Common

1. Report on Courts, National Advisory Commission on Criminal Justice Standards and Goals, Washington, D.C. 1973 p.x.

Pleas. The NAC suggests the omnibus hearing technique as a means to expeditiously dispose of pre-trial matters in its Report on Courts: Standard 4.10.

This report analyzes NAC Standard 4.10 (Pretrial Motions and Conference). It examines the components of the omnibus hearing process and compares existing Philadelphia court operations against what is recommended by the NAC.

OMNIBUS - "embracing the whole of a complex subject matter by uniting all parties in interest having adverse or conflicting claims, thereby avoiding circuity or multiplicity of action"

BLACK'S LAW DICTIONARY

PART I DEFINING "OMNIBUS"

Standard 4.10 - Pretrial Motions and Conference

All pretrial motions should be filed within 15 days of the preliminary hearing, the waiver of the preliminary hearing, or apprehension of service of summons following indictment, whichever form the initiation of prosecution has taken in the case. A hearing should be held on such motions within 5 days of the filing of the motions. The court should rule on such motions within 72 hours of the close of the hearing.

At this hearing, the court should utilize a checklist to insure that all appropriate motions have been filed and all necessary issues raised. All issues raised should be resolved at this point; reserved ruling on motions should be avoided.

Failure to raise any issue concerning the admissibility of evidence or any other matter appropriately raised before trial in accordance with this procedure should preclude a defendant from otherwise raising the issue, unless the defense establishes that the information essential to raising the issue was not reasonably available at the time when this procedure required that the issue be raised.

No case should proceed to trial until a pretrial conference has been held, unless the trial judge determines that such a conference would serve no useful purpose. If pretrial motions have been made, the conference should not be held until the issues raised by these motions have been resolved. At this conference, maximum effort should be made to narrow the issues to be litigated at the trial.

Where possible, this conference should be held immediately following and as a part of the motion hearing. In any event, it should be held within 5 days of the motion hearing.

The intention of this standard is to:

1) Set up a procedural time frame for early filing and disposition of pre-trial motions,

2) resolve all pre-trial matters in a timely fashion in the course of a proceeding termed the "omnibus hearing" and,

3) set the final stage for trial by means of a pre-trial conference at which time issues are narrowed thus providing a more orderly trial.[2/]

2. Ibid pp 93-94

The origin of the omnibus hearing principle may be traced to the American Bar Association who in 1970 approved a series of reports which promulgated standards for the criminal justice system. One such report, Standards Relating to Discovery and Procedure Before Trial, called for the implementation of an innovative procedure - the omnibus hearing.

As stated by the American Bar Association (ABA), the omnibus proceeding provides "an opportunity for pre-trial motions and other requests to be considered by the court at one proceeding with a minimum of formality and filing". The mechanics of this proceeding as outlined by the American Bar Association are as follows:

(a) "At the Omnibus Hearing, the trial court on its own initiative, utilizing the appropriate checklist form should:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in sections 2.1 and 2.3, and if not, make orders appropriate to expedite completion.[3/]

(iii) ascertain whether there are requests for additional disclosures under sections 2.4, 2.5 and 3.2;

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set

3. For explanation of A.B.A. sections 2.1, 2.3, 2.4, 2.5, and 3.2, see Appendix I.

a time for a Pretrial Conference; and

(vii) upon the accused's request, permit him to change his pleas.

(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Checklist forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearings, or formal presentation is necessary for a fair and orderly determination of any issues, the Omnibus Hearing should be continued from time to time until all matters raised are properly disposed of.

(d) A verbatim record should be made of all proceedings at the hearing.

(e) Stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the court in the interest of justice.

(f) At the conclusion of the hearing, a summary memorandum should be made (dictated into the record or written on an appropriate court-established form) indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.[4/]

According to the ABA commentary following this standard, there are four aspects which set apart the Omnibus Hearing from ordinary pre-trial practices and procedures:

4. American Bar Association Project on Standards Relating to Discovery and Procedure Before Trial. Approved Draft, 1970 p. 114-115.

1) "its attempt to bring together at one court appearance as much as possible of the court actions required prior to trial, thus saving all persons concerned time, energy and other resources;

2) its requirement of routine trial court exploration of the claims customarily available to the accused, utilizing a checklist to insure insofar as possible that none remain unexplored, unnecesssarily subjecting the proceediings to subsequent invalidation.

3) its requirement that these customary claims be raised and considered insofar as possible without the preparation and filing of papers which so frequently perform no useful functions in the proceedings.

4) its requirement that claims which are avilable for assertion at this time be waived if not asserted." 5/

The overall benefits resulting from this procedure are as follows:

1) Issues in the area of discovery are narrowed down,

2) it allows for a "more logical and congent case presentation",

3) minimizes speedy trial deprivations,

4) permits the defendant to make a more enlightened and intelligent plea. 6/

The Omnibus technique is mainly operational in federal court districts, modified in some instances to fit the particular needs of the justice system. State courts are encouraged to borrow from the federal courts' experience and experiment with the Omnibus concept. 7/ To date a limited number of states have implemented this proceeding. Because variation exists in adoption of the Omnibus Hearing, it is important to describe the essential elements composing this procedure:

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5. Ibid p. 117

6. Myers, J. Michael. "The Omnibus Proceeding. Clarification of Discovery in the Federal Courts and Other Benefits". St. Mary's Law Journal, Vol. 6:386, 1974 p. 387

7. Clark, Tom C. "The Omnibus Hearing in State and Federal Courts." Cornell Law Review. Vol. 59, June 1974, p. 768-769.

1) The first critical element associated with the Omnibus technique is comprehensive pretrial discovery. This occurs informally and/or under court supervision. ABA Standards 5.1 urges counsel to initiate informal pre-trial discovery during "dead time" without court supervision. This is referred to as the "exploratory stage" by the ABA.

2) The second critical element is the actual Omnibus Hearing. The purpose of this proceeding is to expeditiously resolve any additional discovery matters as well as other typical requests by counsel.

Herein, the Omnibus Hearing is defined by the above features. Operations in Philadelphia's Court of Common Pleas were compared against this definition. Thus, in the following sections these factors (comprehensive pretrial discovery and the Omnibus Hearing) are separately considered.

PART II PRETRIAL DISCOVERY

To best illustrate what pre-trial discovery involves, the Minnesota State Rules of Criminal Procedure for discovery are described below as these rules typify reform in the area by providing for a comprehensive method of discovery.[8]

When requested by either side, the prosecution and the defendant must reveal "paralle information without order of the court. This information consists of the following:

1. Documents and tangible objects to be introduced at trial. (The prosecution must also disclose any object [etc.] obtained from or belonging to the defendant.) Results from reports of physical or mental examinations, scientific tests, or experiments must be made available for counsel to inspect or reproduce. (However, defense counsel reveals only that information intended to be offered at trial.)
3. Names and addresses of persons to be called as witnesses at trial as well as their written or recorded statements and written summaries of oral statements. Also, counsel must disclose witnesses' prior record of convictions.
4. Prosecution will disclose the defendant's record of prior convictions as long as defense counsel informs the prosecuting attorney of the defendant's record known to the defendant.[9]

There are other required disclosures. For example, the prosecution must reveal any exculpatory information or material related to the defendant.[10] In addition, defense counsel may inspect or reproduce "any relevant written or recorded statements made by defendants and accomplices" within the possession of the prosecutor regardless if the statements will be introduced by the prosecution as evidence.[11] Also, the prosecutor is required to disclose "the substance of any oral statements made by the defendants

8. State of Minnesota Rules of Criminal Procedure, Rules 9.01 - 9.02(c). Discovery in Felony and Gross Misdemeanor Cases
9. State of Minnesota Rules of Criminal Procedure. Rule 9 Comment, p. 51
10. Ct. Brady v. Maryland, 373 U.S. 83 (1963)
11. Ibid Rule 9.01, page 41

and accomplices, whether before or after arrest, if he intends to offer in evidence at trial."[12]

Furthermore, the trial court may require disclosure by the prosecution of any relevant materials and information not within the scope of disclosure without order of the court. Defense counsel must, however, show that the information which it seeks relates to the guilt or innocence of the defendant.

Other matters subject to disclosure by the defendant (without order of the court) are as such:

1. He/she must give "written notice of any defense other than not guilty on which the defendant intends to rely on at trial, as well as the names and addresses of witneses the defendant intends to call at trial..."[13] (This rule, however, does not require the defendant to state what witnesses will be called in support of each defense except where there is an alibi defense involved.)
2. "If the defendant gives notice of his intention to rely on the defense of mental illness or mental deficiency, he must notify the prosecution whether he also intends to rely on the defense of not guilty".[14]

In addition, the defendant may be ordered by the court to "personally submit to non-testimonial identification and other procedures".[15] This might include:

- fingerprinting or appearance in a line-up,
- speaking for identification by witnesses,
- providing specimens of his handwriting (etc.) or allowing body measurements to be taken.

Minnesota's provisions for informal comprehensive discovery are not without safeguards as certain categories of information are classified as "non-discoverable". The areas involved are:

12. Ibid, page 41
13. Comment on Rule 9.02 subd. 1(3)(a) and Rule 9.02 subd. 1(3)(c), page 51 Minnesota Rules of Criminal Procedure
14. Rule 9.02 subd. 2, page 51 Minnesota Rules of Criminal Procedure
15. Ibid Rule 9.02 sub. 2

1. Work product - This pertains to "legal research, records, correspondence (etc.) to the effect of containing opinions, theories or conclusions of the prosecutor or his staff assistance."[16] Also included are reports or such developed by the prosecution or staff assistance as part of the investigation or prosecutic of the case. A parallel rule protects the work product of the defense counsel.

2. Prosecution Witnesses Under Prosecuting Attorney's Certificate - If the prosecuting attorney files a certificate with the trial court that disclosure of information relative to witnesses may cause such persons physical harm or coercion, no disclosure of such information will be made.

These categories of restricted information are modeled after the ABA Standard 2.6, (Relating to Discovery and Procedure Before Trial). ABA Standard 2.6 stipulates three basic areas not subject to disclosure:

1. work product (as described above),
2. informant's identity,
3. information which may involve a "substantial risk of grave prejudice to national security" where the defendant's constitutional rights are not infringed.[17]

In comparing the ABA's position on pretrial matters to that of the NAC, we find that NAC Standard 4.9 - Pretrial Discovery, calls for greater prosecution disclosure. Also, the ABA places the responsibility of continuing disclosure on both parties, if additional information is acquired, whereas this responsibility clearly lies with the prosecutor according to the NAC.

Another critical difference between the Commissions involves disclosure of work product. As stated above, the ABA plainly considers the work product of the prosecution to be non-discoverable. In this area, the NAC appears "inexact" as there are "no expresse exceptions to disclosure".[18] This means that the prosecutor's work product is not totally

16. Minnesota Rules of Criminal Procedure, Rule 9.01 subd. 3(1)A
17. Standards for Criminal Justice of the American Bar Association, Standard 2.6, Matters Not Subject to Disclosure
18. American Criminal Law Revice. Vol. 1. 1974, p. 372.

exempt from disclosure. Basically, the NAC appears to lack detailed standards as to "what specific type of information may be legitmately withheld from the defendant by the prosecution."[19] The position of the NAC is that the work product is exempt from disclosure only if it is not intended to be introduced at trial. In addition, this information is exempted only if it is not exculpatory in nature or if it does not "lead to exculpatory evidence".[20] Overall, states having a liberal discovery process provide protection of counsels' work products.

Comprehension Pretrial Discovery - Pros, Cons and the Miscellaneous

Advocates and opponents of pretrial discovery have advanced multiple arguments on this topic. Still, there are no hard and fast answers available to end the dilemma. Thus, the debate over pretrial discovery persists.

The arguments offered by each side may at this point be termed "classical". As such opponents of discovery contend:

1. that liberalized discovery may increase the occurance of perjury or result in the suppression of evidence,[21]
2. that incidents of witness intimidation or elimination will rise,
3. that it is defense oriented, lacking the right of reciprocal discovery by the prosecution,
4. that the prosecutor may be required to disclose its "priviledged work product".

One problem in this area is that although today's literature contains numerous articles related to the revisement of state pretrial discovery rules, it is less insight as to the sucess or failure experienced by states who have expanded discovery practices. In a broad sense, this means that the outcome of the above predictions remain basically unknown. Accordingly, Paul J. Rice states that "none of these claims have been empirically tested. Rather, they appear to rest upon misconceived intuitive concepts of the

19. Ibid
20. NAC Report on Courts - Standard 4.9, Pretrial Discovery - Commentary p. 90. 1973
21. State v. Tune, 13 N.J. 203, 210, 98A. 2d 881, 884 (1953).

'normal' conduct of all criminal defendants and upon an unenlightened gamesmanship theory of criminal justice."[22/]

It appears that those opposed to greater discovery base their position primarily on "forecasts". Undoubtably in some instances these fears are borne out. However, proponents argue that:

1. The actual committing of perjury or suppression of evidence is a live concern only in a minority of cases. Indeed, formal and informal experiments (i.e., open-file policies maintained by prosecutor's offices) reveal that contrary to what might have been expected, the results prove highly favorable. Discovery reduced the "likelihood of trial".[23/] It decreased the necessity for committing perjury "because defendants were able to find from knowledge rather than conjecture what the state's case consisted of, thereby removing the element of bluffing and encouraging both sides to bargain for a satisfactory solution".[24/] In addition, experience with civil discovery completely erodes any arguement involving "that old hobgoblin, perjury".[25/]

This does not mean that we can entirely dismiss the claim by opponents that the incidence of perjury will rise due to liberal discovery practices. Indeed, some increase might rationally be expected. To date, there are no means to predict what the effects of greater discovery will be, especially

22. Rice, Paul A. "Criminal Defense Discovery, A Prelude to Justice or an Interlude to Abuse?" Mississippi Law Journal. p. 896. Vol. 45, 1974
23. For a discussion on formal discovery experiments see: Langrock, "Vermont's Experience in Criminal Discovery" 53 A.B.A.J. 732 (1967); Miller, "The Omnibus Hearing - An Experiment in Federal Criminal Discovery" 5 San Diego Law Review 293 (1968).
For discussion on informal disclosure practices see Discovery in Criminal Cases - A Panel Discussion, 44 F.R.D. 481, 497-98 (1968), Discovery in Federal Criminal Cases - A Symposium, 33 F.R.D. 47,85,94 (1963); Osburn, "Pretrial Discovery Under the Oregon Criminal Procedure Code", Williamette Law Journal, 10:145-166, Spring 1974.
24. Rice, Mississippi Law Journal. p. 898.
25. State v. Tune, 13 N.J. 203, 277, 98A. 2d 881, 895 (1953 - dissenting opinion of Brennan, J.)

in relation to perjury or the suppression of evidence. As stated ealier, we are largely dealing with predictions that have at best only been partially substantiated.

2. Opponents believe that the disclosure of state witness names and their statement will result in witness intimidation or failure to appear. This position is perhaps best expressed by Justice Vanderbilt in the case of State v. Tune:

> "The criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of crime." 26/

This quote becomes critically important when viewed in terms of today's urban society, a society experiencing a rising crime rate and a growing disenchantment towards the criminal justice system.

A witness's encounter with the justice system is often a major ordeal, therefore, witnesses should be guarded from any unnecessary inconvenience.[27/] Opponents argue that broad discovery will be to the serious disadvantage of prosecution witnesses. However, the argument of witness intimidation is not substantiated. Rebuttal to this claim is likewise not supported by research.

It can be reasoned that if witness intimidation was a serious problem, it would be reported not only in legal periodicals but also by the mass media. In addition, at least one writer queries whether more than

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26. State V. Tune, 13 N.J. 203, 210, 98A 2d 881, 884 (1953)
27. NOTE: In Philadelphia specific programs have been implemented to alleviate this problem. Under the Witness Utilization Project an Information Unit provides interested parties with bilingual information about the court system and/or specific cases. In addition, a telephone alert system advises prosecution witnesses of the scheduled time for their appearance in court. Also a Victim Counseling Program acts as a clearinghouse for victims of crime by providing the following types of services: educational, counselling, legal and referals.

a handful of today's lay witnesses really believe that their identity will remain anonymous until trial.[28]

It is thought that disclosure of witnesses' names and statements may cause the public to evade contact with the criminal justice system due to a fear of reprissal. Again, no research has been conducted in this area. However, we can perhaps gain some insight on this matter by examining the results of a study involving the nations' five (5) largest cities, one of which was Philadelphia. This study was directed by the Law Enforcement Assistance Administration (L.E.A.A.) to determine what amount of crime is not reported to the police and why this occurs.[29]

Among the reasons advanced to explain why crime goes unreported was fear of reprisal. The survey indicates that given the many instances in which a crime was not reported "fear of reprisal" was a factor in only one or two percent of these cases.

In conclusion, advocates maintain that evidence of witnesses intimidation is lacking. Due to the many jurisdictions having provisions for witness discovery we might expect to learn of any serious abusement of this practice.

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28. Rice, Mississippi Law Journal. p. 902-903.

29. Law Enforcement Assistance Administration, U.S. Department of Justice, Advance Report of Crime in the Nation's Five Largest Cities, National Crime Panel Surveys of Chicago, Detroit, Los Angeles, New York and Philadelphia 5 (1974).

The following is a percentage distribution of reasons advanced for not reporting personal and household victimizations:

	Personal	Household
Nothing could be done; lack of proof	34 percent	37 percent
Not important enough	28	31
Police would not want to be bothered	8	9
Too inconvenient	5	4
Private or personal matter	4	3
Afraid of reprisal	2	1
Reported to someone else	7	3
Other or not available	12	12

Thus, in keeping with the philosophy that the innocent must be able to "effectively confront and cross-examine their accusers" it seems the claim of witness intimidation is not significant enough to bar a general expansion of criminal discovery.[30]

This is not to ignore the fact that instances of witness intimidation do arise. One remedy to this problem is to allow the state to show cause why discovery should be limited in this area. However, Jon O. Newman at the Judicial Conference of the Second Circuit in 1967, aptly described the difficulties inherent in this solution:

> "Arguing the issue to the judge poses problems because it is precisely in a case where you fear witness intimidation that you are most reluctant to come into court and argue the point - because to explain why you are fearful is very likely to disclose the very information that will subject your witness to danger" [31]

In such instances this problem can effectively be resolved "in camera".

If a backlash to witness discovery has occurred, it is not been reported in the literature. Given its highly sensitive nature we would expect adverse effects to be reported. Instead, the focus of attention is on treatment of witnesses in the criminal justice system. Specific programs aimed at maximizing the time and comfort of witnesses are now flourishing.

3. Unlike the civil side, the criminal justice system involves a "one party" search for truth. Because of this, it is contended that the defendant has a basic advantage in the criminal process. Prosecutors have long maintained that "as representatives of the state only they are committed to a search for truth".[32] Hence, criminal discovery is seen as defense oriented, fortifying the defendant's advantagous position. This sentiment was clearly expressed by Judge Learned Hand:

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30. See note 21 supra
31. Discovery in Criminal Cases - A Panel Discussion, 44 F.R.DD. 481, 499, (1968)
32. Katz, Lewis R. Justice Is the Crime. Case Western Reserve University, Cleveland. (1972). p. 182.

> "Under our criminal procedure, the accused has every advantage while the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune to question or comment on his silence, he cannot be convicted where there is the least doubt in the mind of anyone of the twelve. 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..." 33/

The thrust of Judge Hand's argument has been undermined by recent case rulings, most notably, Jones v. Superior Court.[34] In this case, the California Superior Court held that the defendant could be required to disclose the names and addresses of witnesses he intend to call at trial as well as x-rays and reports he intended to introduce in support of his claim of impotence. The reasoning behind this case is quite plain. It was maintained that discovery by the prosecutor is not a violation of self-incrimination because that information will eventually be introduced at trial. Thus, only the timing of release of this information is affected. In addition, the court held that disclosure by the defendant promotes "the orderly acertainment of truth".[35]

The advantage that the defendant is supposed to monopolize in the criminal justice system is not absolute. Action by the courts indicate that defendants can be required to disclose information ordinarily thought non-discoverable. Thus, whatever imbalance existed, it has been neutralized in the area of discovery by the courts recognition of reciprocal discovery. The Minnesota Rules of Criminal Procedure exemplify this approach.[36]

4. Opponents contend that discovery would force prosecutors to disclose work-products. In the preceeding pages, it was stated in the ABA Standards

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33. United States v. Gursson, 291, F. 646, 649 (2d Civ. 1923)
34. 58 CAL 2d 56, 372 p. 2d 919, 22 Cal. Rptr. 879 (1962)
35. Ad at 58 372 2d at 291, 22 CAL Rptr. (at 880)
36. See also, Osburn, John W. "Pretrial Discovery Under the Oregon Criminal Procedure Code" Williamette Law Journal 10:145-66, Spring 1974.

relating to criminal justice discovery and procedure that counsel's work product should not be revealed. The policies adopted by courts generally protect the work-product of each party. Thus, the threat posed to work-product disclosure is not a real one. Perhaps a more basic threat is that counsel may substitute discovery practices for their own investigation.

SUMMARY

This section provides a general overview of the leading objections to comprehensive pretrial discovery. Likewise, counter arguements were set forth.

We believe that the opposing arguments to criminal discovery are not sufficiently substantiated to reject pretrial discovery as an effective mechanism to produce greater judicial efficency and fairness.

PENNSYLVANIA IN PERSPECTIVE

Early in the 1960's Justice Brennan commended Pennsylvania's efforts in updating the state rules of criminal procedure on pretrial discovery.[37] Today, though, Pennsylvania is not considered progressive in this area. No major revision of the rules has occurred since 1965. Meanwhile, discovery practices have been drastically overhauled by numerous states. The trend is plainly toward expansion of discovery.

Rule 310 (Pretrial Discovery and Inspection) of the Pennsylvania Rules of Criminal Procedure states:

> "All applications of a defendant for pretrial discovery and inspection shall be made not less than five days prior to the scheduled date of trial. The court may order the attorney for the Commonwealth to permit the defendant or his attorney, and such persons as are necessary to assist him, to inspect and copy or photograph any written confessions and written statements made by the defendant. No other discovery or inspection shall be ordered except upon proof by the defendant, after hearing, of exceptional circumstances and compelling

37 Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth?". 1963 Washington University Law Quarterly, 290.

> reasons. The order shall specify the time, place and manner of making discovery or inspection and may prescribe such terms and conditions as are necessary and proper. In no event, however, shall the court order pretrial discovery or inspection of written statements of witnesses in the possession of the Commonwealth."

Under Rule 310, it is within the courts' discretion to decide whether or not the defendant receives his/her own written statements prior to trial. Further, unless the defendant can prove that "exceptional circumstances and compelling reasons" exist, he/she is not entitled to any information except that which is exculpatory in nature.

In Philadelphia, the handicaps created by Rule 310 are often eased via the District Attorney's open-file policy. This system allows defense counsel to evaluate the strength of the prosecution's case prior to trial. One result of this policy is that guilty pleas may be entered, thus reducing the number of cases to be tried. This policy of "informal" discovery, however, is not uniformily applied. Discovery will vary depending upon the assigned assistant district attorney or the circumstances of the case.

Accordingly, it is recommended that this method of discovery be formalized. This means that the Pennsylvania State Rules of Criminal Procedure governing pretrial discovery need substantial revisement. Again, the main reasoning behind this recommendation is that the alleged jeopardies attributed to pretrial discovery lack sufficient evidence to foreclose expansion of the rules. Also, it is believed that greater fairness can be best achieved by well informed counsel, reducing the element of surprise and averting what is termed "trial by ambush", leading to more speedy trials and a general reduction in court backlog.[38]

Part I of this report named two components essential to the omnibus technique (pretrial discovery and the omnibus hearing). It will be shown in Part III that success of the "omnibus method" depends primarily upon a liberal method of discovery.

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38. Spears, Adrian A., Harrison, Reese L. and Gillespie, James R. "Why the Omnibus Hearing?" A Panel Discussion. 55 Judicature, Number 9, May 1972. p. 379

PART III THE OMINIBUS PROCEEDING

As previously mentioned, implementation of the omnibus procedure has predominately occurred on the federal court level.[39] Statistical information concerning the success or failure of these programs is scarce. The available literature describes the omnibus procedure on an overal basis (i.e., how it was initiated, anticipated gains and operation, etc.). Raymond Nimmer has conducted the most comprehensive study in this area involving the Federal District Court for California (San Diego) and the Federal District Court for the Western District of Texas (San Antonio).[40] The study provides an extremely valuable critique of the omnibus proceeding because of the aggregate time periods examined. In our opinion the San Antonio experiment indicates the effect of the omnibus procedure in the long run, unlike most other literature which generally describes the hearing's operation after a relatively short period of implementation. Key results of the omnibus experience in San Antonio will be highlighted in this section. (Data was collected during two separate time periods: Phase I, 1967-1969; Phase II, 1971. We will concentrate on the latter phase analysis because it provides the best information on the affects of implementing the ominibus of hearing.)

During phase I of the San Antonio experiment the omnibus hearing's format was identical to that proposed by the ABA. A formal hearing was held lasting usually one hour. The judge thoroughly reviewed the case with counsel. Where discovery was not completed, it was ordered by the court. In addition, the omnibus motion checklist was inspected (see Appendix II). This form indicates what motions defense counsel intendes to file. At the hearing counsel was expected to state its position on issues raised on the motion checklist. This enabled the judge to use the omnibus

39. Note: Recently LEAA awarded the American Bar Association's Criminal Justice System $188,000 to study the effect of the omnibus hearings in state level courts. The study will answer such questions as, does the time from filing to disposition decrease by using this technique.

40. Nimmer, Raymond T., The Omnibus Hearing in Two Courts. American Bar Foundation, Chicago. 1975

hearing as a means of reducing the filing of formal papers.[41] Again, the overall purpose of this hearing was to identify issues early and to insure full compliance with discovery. In the majority of hearings, no other issues were disposed (i.e., miscellaneous or suppression motions) as indicated on the checklist.

After implementation of the omnibus hearing the filing of written motions and briefs declined, while routine discovery procedures were established. Occasionally, as a result of the hearing defense counsel was convinced that filing a motion would be unneccessary or for the prosecutor to concede the motion ruling would be in defense counsel's favor.

By 1971 a formal hearing was considered unnecessary primarily because counsel now routinely completed discovery. The vital concern of the court--that discovery had properly been conducted—was no longer a problem. Richard Nimmer noted that:

> "Increasingly the judge's role during the hearing focused on discussion of motions that would be filed and on establishing a date for the next appearance in the case." 42/

If disclosure was incomplete, it was due to the unavailability of reports, incomplete witness interviews, or lack of preparation on defense counsel's part.

During Phase II the actual time devoted to the omnibus hearing decreased from one hour to approximately twenty minutes. Counsel was expected to informally discuss the case one to two weeks following indictment. According to ABA Standard 5.1 this is referred to as the "exploratory stage" - informal pretrial discovery without court supervision. The obligation of disclosure remained with the prosecutor. Defense counsel's willingness to enter into disclosure was a function of the attorney's working relationship with the prosecutor.

41. Nimmer. Prosecutor Disclosure and Judicial Reform. p. 33
42. Ibid p. 38

Two judges of the San Antonio district court were responsible for conducting the omnibus hearing. Generally, motions requiring a hearing (as indicated on the omnibus checklist form) were scheduled to be heard at a later time. The court's Chief Judge, who presided over the hearing, eliminated the need to file briefs in 55% of the cases before him, and only one side of counsel was required to submit briefs in an additional 10% of the cases.

The San Antonia study noted the separate effects of omnibus on experienced as compared to less experienced attorneys. During Phase II, experienced attorneys used omnibus as a means to expedite settlement of issues and minimize the need for formal adjudication. For less experienced counsel the inverse was true. The omnibus became an opportunity to challenge charges, causing the number of trials and pretrial hearings to rise. Prior to implementing the omnibus hearing, guilty pleas were the common means of disposition for less experienced counsel. The fact that these attorneys utilized the omnibus hearing as a means to fully explore and challenge the prosecutor's charges is compatible with the purpose of omnibus, although in terms of efficiency, this action lead to an increase in hearings and trials. Such effort on counsel's part signifies a more aggressive handling of the case and ultimately served the client by increasing the quality of representation.

CONCLUSION

The omnibus process is not a strict guarantee for increasing judicial efficiency or effectiveness. Once implemented, it requires concerned attention and monitoring by the court, prosecution and defense bar. In San Antonio a committee composed of these members realized that the omnibus procedure as originally implemented needed modification so that it could further produce prompt case processing while minimizing the number of necessary appearances.

The format and time placement of the omnibus proceeding during Phase II is significant. It is what we might expect the omnibus mechanism to approach: a proceeding where the judge monitors case activity in its entirety, not just issues related to discovery. The initial emphasis on completion of discovery has been eliminated due to voluntary disclosure by the prosecution. Also, the timing of the omnibus hearing is related to the point of indictment.

Finally, the omnibus is not a cure-all. It does not promise that the time frame from filing to case disposition will decrease. It does provide a working format for scheduling future case appearance, and is a technique for insuring proper case management. Implementation of the omnibus hearing can lead to a more disciplined criminal justice system.

The benefits to be achieved from this approach is that court trial time can be saved and the number of appearances are minimized, but only if discovery has occurred. Such discovery allows attorneys to meet prior to arraignment to discuss at length the strength of the prosecutor's case. In fact, the Nimmer study stated that "the conference of counsel was the most important step in the omnibus process".[43/]

The San Antonio experiment reported a decrease "in the mean number of hearings per case in two of the three crimes studied for which sufficient cases are available during Phase II".[44/] This is highly significant because during Phase I the reverse occurred.

It was stated in Part II of this report that the success of the omnibus hearing depends upon a liberal method of discovery. We find the San Antonio experience demonstrates this contention. The San Antonia-San Diego experience is important because no other judicial systems has been studied at such length. Four years of operation have resulted in a shift of emphasis away from a formal judicial hearing process,

43. Nimmer. p. 40
44. Ibid. p. 42

where intense supervising of disclosure occurred, to an informal conference of counsel aimed at identification and resolvement of pretrial issues (with the exception of suppression motions).[45/]

We believe that an omnibus type proceeding is especially beneficial in high volume court systems. It enables the court to more readily manage its case flow. This is highly important where there is an established prompt trial rule, as is the case in Philadelphia.

In summary we find:

1. That the omnibus hearing is necessary and logical in a judicial system where comprehensive discovery exists. It is especially critical when discovery is first introduced to the system. The court's role is to enforce compliance with discovery requirement and to actively manage the case until trial. Again, the result is a more disciplined criminal system.

2. The pattern developed in San Antonio and San Diego was such that disclosure became so accepted that the omnibus format as originally established was no longer valid. Once counsel becomes familiarized with discovery practices and techniques, a change of hearing format should be expected. By anticipating this the court will avoid the danger of letting the omnibus digress to a state of obsolesence.

3. The omnibus technique cannot be accomplished without a liberal method of discovery through which issues can be identified and fully resolved. In other words, a hearing should not be termed "omnibus" unless extensive discovery occurs beforehand. In addition,

45. NOTE: In the Federal District Court for California (San Diego), the omnibus hearing was reduced to the point where it became a mere scheduling point for future action. Again, the omnibus process requires active monitoring for it to be effective.

if the purpose of the hearing is merely to schedule time for a future appearance, whether it is a date for a motion hearing or trial, it should no longer be termed "omnibus". At the omnibus hearing it is expected that issue identification and, where possible, resolvement of any hinderance to trial will occur. Failure to accomplish this goal will totally dilute the intention of the omnibus process.

Pretrial Procedure In The Philadelphia Court of Common Pleas

The omnibus process is compared in this section to pretrial events in Philadelphia Court of Common Pleas. Since the omnibus technique is recommended for complex trial cases, we have coined the expression to denote cases listed for pretrial discussion in our court system. The majority of these cases are homicide or possible felony jury trials. This means that felony waiver cases are exempt from examination since these cases proceed directly to trial without pretrial discussion.

For informational purposes, a description of the case flow in the Court of Common Pleas is given below:

Case Flow

The Court of Common Pleas has jurisdiction over crimes in which the minimum sentence for each offense is five (5) years or more. The court's criminal trial division is divided into three programs:

1. homicide
2. felony jury
3. felony non-jury

Pretrial proceedings include the following steps:

1. preliminary arraignment
2. preliminary hearing
3. arraignment
4. pretrial discussion

The critical period examined in this section is from the point of filing the Criminal Information by the District Attorney's Office to the actual commencement of trial. The Information is usually filed after a case is held for court at the preliminary hearing.

Arraignment follows the preliminary hearing. It acts primarily as a scheduling point for future appearances. Cases are listed for either pretrial discussion or trial. In addition, representation of counsel is verified at this time.

The following types of cases are normally listed for pretrial discussion at arraignment:

1. Cases involving rape offenses (or related charges).
2. Cases involving multiple defendants.
3. Cases designated by the District Attorney as appropriate for pretrial discussion (due to complication or seriousness of the offense).
4. Cases where there is a request for a jury trial.

Arraignment has been eliminated as a formal step in the judicial process for homicide offenses. When a homicide case is held for court at the preliminary hearing, it is scheduled directly for case discussion.

The homicide and felony jury programs are each managed by a calendar judge. The calendar judge acts as the directing agent in pretrial discussion. These discussions serve several purposes:

1. To determine if the case involves a possible guilty plea or non-trial disposition.
2. To ascertain what impediments to trial might exist (e.g., due to the unavailability of witnesses or counsel awaiting the notes of testimony from the preliminary hearing).

In addition, it affords counsel the opportunity to candidly discuss matters related to case readiness.

Normally, it is necessary that more than one pretrial discussion be scheduled. The main purpose of the first listing for discussion is to identify the temper of the ca and to arrive at a decision or at least an indication of the type of trial desired.

Homicide Program

In the homicide program defense counsel should be ready at the first listing to file pretrial motions. The calendar judge hears all pretrial motions, such as pretrial discovery applications, motions to appoint an investigator or any other appropriate motions filed at this time. However, motions to suppress evidence or statements are given a separate hearing date by the Homicide Calendar Judge. In order to minimize the number of appearances requiring witnesses, motions to suppress identification are heard prior to the commencement of trial.

Motions involving suppression of evidence or statements are listed before judges of the homicide program who mainly conduct waiver trials. A separate suppression hearing is necessary because often substantial legal argument is involved and/or the matter requires more than a day's hearing time. By utilizing several judges to adjudicate suppression motions, no one judge is severely burdened with this responsibility. Also, it is believed that this method lessens the chance of a case being unduly delayed.

Following a motion hearing the case returns for discussion to the Calendar Room. If all issues have been reasonably resolved and outstanding motions have been disposed, the case is ready to be listed in "backup status". Under the backup system, as one case is adjudicated, another automatically moves forward on the trial list. Defense counsel with cases listed in backup status must be prepared to proceed to trial on twenty-four (24) hours notice.

A board is maintained in the Calendar Room showing what cases are assigned to an individual judge, the type of trial desired, and the Rule 1100 run date. The calendar judge must continuously monitor the progress of these cases. When cases are approaching trial more rapidly than expected (i.e., due to entrance of guilty pleas), it may be necessary for the judge to redirect cases. The calendar judge has the latitude to shift the order of cases when hinderances (or conversely unexpected rapid turnovers) occur in the system.

Thus, the basic role of the calendar judge is to closely monitor the status of a case, insuring that it will not be lost or misdirected in the system. In addition, the calendar judge insures that a case is sufficiently prepred for trial. Active involvement by the court conveys to counsel the court's desire to fairly and swiftly process cases. This is a crucial concern of the court in light of Rule 1100 (Prompt Trial Rule) which states that a case must be tried wthin 180 days following arrest.

Felony Jury Program

Basically, the type of case which is directed to the felony jury calendar room is one which requires pretrial discussion.

The Felony Jury Calendar Judge similarily lists jury cases in "backup" status to each judge serving this program. Once an assignment is made, the individual judge assumes management of the case until it is disposed. The exception to this practice is a situation where it is necessary for the calendar judge to assign a case immediately to trial or to "on-trial" status usually in order to comply with Rule 1100. Otherwise, each judge maintains an individual calendar and will set the date of trial. In addition, the trial judge usually assumes responsibility for adjudicating remaining pretrial motions filed in a case.

Prior to the commencement of any trial the defendant is formally arraigned. If the defendant requests a jury trial and the case is listed in a non-jury room, it is immediately sent to the felony jury Calendar room for discussion and possible listing for trial.

Thus, the function of the Felony Jury Calendar Room is identical to that of the homicide program with the exception of "calendaring". The calendar judge conducts informal discussions, hears pretrial motions and guilty pleas. Suppression motions are scheduled for a separate hearing date or are heard prior to commencement of trial.

Conclusion:

The omnibus process does not formally exist in the Philadelphia Court of Common Pleas. However, the functions performed by the calendar judges are basically identical to that of the judge directing the omnibus hearing, minus the element of comprehensive discovery.

We believe that the omnibus hearing process offers a feasible and expeditious method to resolve pretrial matters, especially in relation to discovery. The current practices in the Court of Common Pleas resemble the omnibus process. We recommend serious expansion of the Pennsylvania Rules of Pretrial discovery and inspection, since we find that comprehensive discovery is compatible with the goals of the criminal justice system. Also, we recommend the omnibus format as an effective method to manage discovery issues, case flow and preparation.

Again, the Philadelphia District Attorney's Office maintains an open file policy, defense counsel and the prosecution are not inclined to be at arms-length during pretrial discussion. The calendar judge, as the overseer, utilizes his/her administrative skills to resolve impediments to trial. The court must depend upon the working relationship of all parties to accomplish this objective. It lacks the authority to compel counsel to disclose information normally exchanged in other jurisdictions.

PART IV SUMMARY

This report has provided an appraisal of the omnibus process, as defined by the following elements:

1. Comprehensive Pretrial Discovery

We find that a liberal method of discovery is feasible even though it appears contrary to the philosophy of the adversary system.

The federal district court located in San Antonio, examined in Part III, required disclosure from the prosecutor only. Recent court rulings indicate however, that the defendant can be required to disclose similar information as long asd fifth amendment rights are not in violation. We believe the rules of discovery should reflect this position of the courts.

2. Omnibus Hearing

The omnibus hearing process calls for aggressive leadership by the court. Its purpose is to promote early resolution of matters impeding trial and to avoid formal adjudication of issues where possible. It is counter to traditional case scheduling practices because it requires systematic case evaluation early in the judicial process.

The omnibus procedure has the potentially for producing an efficient usage of judicial time and personnel. It assumes that counsel has informally entered into discussion for the purpose of identifying issues and exploring the possibility of a guilty plea. Thus, counsel is expected to exchange broad information. The purpose of the hearing is to closely monitor discovery (where it has not occurred) and to insure that all issues have been raised. Rulings on discovery items are made at this time. Counsel submits a motion checklist which specifies what action needs to be taken. The motion checklist can serve to eliminate the need to file written motions. Usually if counsel indicates by this form that suppression motions are to be filed, a separate hearing date is given. We recommend usage of this checklist at the omnibus hearing as it insures that all proper trial issues are raised. Also, it acts as a

record "that the defendant was given the opportunity to raise issues and failed to do so".[37]

We have defined the omnibus process and compared it against the pretrial discussion stage in the Philadelphia Court of Common Pleas. In essence, adaptation of the Omnibus Hearing Process in Philadelphia would mean an expansion of what now occurs at the pretrial discussion level. What remains to be answered is how does this analysis relate to NAC Standard 4.9 - Pretrial Motions and Conference (see Part I, Page 1.).

According to the NAC "all pretrial motions should be filed within fifteen (15) days of the preliminary hearing (or its waiver, etc.). A hearing should be held on such motions within five (5) days of the filing of the motions."[38] The NAC views the omnibus hearing as a consolidated motion hearing. We find the omnibus hearing not so much to be a unified motion procedure, but a mechanism to systematically conduct discovery, or to assure that it has been completed prior to the hearing.

A "consolidated motion hearing" is a very tempting concept. Such a hearing must come at a select point in the trial process where it is assumed that all matters have been properly raised and/or investigated by counsel. It is a delicate point since complex trial cases present a dynamic situation. These cases often cannot be handled in the same manner as a less serious or complicated case.

We believe that a consolidated motion hearing may be feasible for the less complex trial case. In Philadelphia this type of case is generally tried under the felony waiver program. Due to the circumstance and nature of the offense these case do not usually require pretrial discussion. Also, the quantity of pretrial motions filed in these cases is less than felony jury or homicide cases thus not warranting a special motion hearing. In felony waiver cases judicial time is maximized by simply scheduling pretrial motions prior to the actual commencement of trial. In

37. Weininger, Robert A., "Criminal Discovery and Omnibus Process In a Federal Court A Defense View". Southern California Law Review. Vol. 49. p.521, March 1976.
38. National Advisory Commission, Report on Courts. p.93

a sense, this is a consolidated motion hearing, since motions are heard at one point. However, this is not what the NAC invisions by Standard 4.9. It suggests a unified motion hearing early in the judicial process. For complex trial cases the timing of this hearing is critical, since motions sometimes arise out of the results of other motions. Therefore, in the Court of Common Pleas motions are not heard at any single point for felony jury or homicide cases. Also, we showed that it is more effective to schedule a separate hearing for suppression motions. It was also noted that motions to suppress identification are heard prior to commencement of trial in order to reduce witness appearance. Separate suppression hearings were also scheduled in the federal district court (San Antonio) where the omnibus hearing was operational. It was believed that the savings of judicial time could be realized through early identification of impediments to trial. This was achieveable through broad disclosure by the prosecutor. Thus, the emphasis is on an exchange of information, not scheduling of motions.

What is there to learn from federal court experience with the omnibus process? We express a concern over the omnibus hearing as it evolved in the Southern District Court of California (San Diego). Three years following implementation the hearing had lost its substance. It was simply a scheduling point for a future action date. This raises another question. Does the purpose of the omnibus hearing fade with time and experience? We think not, but it does require continuous critical evaluation by the court, defense counsel and the prosecution. It also serves as a case tracking mechanism as it allows the court to fairly and swiftly process cases.

The omnibus hearing includes formal as well as informal aspects. Issues related to discovery usually require formaly adjudication. Other impediments to trial may readily be resolved informally. Once discovery becomes an established practice, the hearing shifts to the informal side as formal rulings by the court are less needed.

Finally, the omnibus process can only induce effectiveness and savings of efficiency in a judicial system. It requires ~~skills~~ concerted effort by all parties involved and its success is heavily dependant on the leadership of the court.

APPENDIX I

AMERICAN BAR ASSOCIATION - Standards Relating to Discovery and Procedure Before Trial

Standard:

2.1 Prosecutor's obligations.

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;
(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a codefendant if the trial is to be a joint one;
(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;
(iv) 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;
(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial.

(b) The prosecuting attorney shall inform defense counsel:
(i) whether there is any relevant recorded grand jury testimony which has not been transcribed; and
(ii) whether there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

(c) Except as is otherwise provided as to protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefore.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of memebers of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

2.3 Additional disclosures upon request and specification.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protection orders (section 4.4), the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(a) specified searches and seizures;

(b) the acquisition of specified statements from the accused; and,

(c) the relationship, if any, of specified persons to the prosecuting authority.

2.4 Material held by other governmental personnel.

Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense cousnel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

2.5 Discretionary disclosures.

(a) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4.

(b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweights any usefulness of the disclosure to defense counsel.

3.2 Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph and 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.

APPENDIX II

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA X
V. X CRIMINAL NO. _____
X
_____ DEFENDANT X

INSTRUCTIONS

If an item numbered below is not applicable to this case, then counsel will note the same in the margin opposite the item number with the letters "N.A."

A. DISCOVERY BY DEFENDANT

(Circle Appropriate Response)

1. The defense states it (has) (has not) obtained full discovery and (or) has inspected the government file, (except)
(If government has refused discovery of certain materials, defense counsel shall state nature of material. _____
_____.)

2. The government states it (has) (has not) disclosed all evidence in its possession, favorable to defendant on the issue of guilt. In the event defendant is not satisfied with what has been supplied him in response to questions 1 and 2 above then:

3. The defendant requests and moves for - (Number circled shows motion requested)
   3(a) Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or to third parties and in the possession of the government. (Granted) (Denied)
   3(b) Discovery of the names of government's witnesses and their statements. (Granted) (Denied)
   3(c) Inspection of all physical or documentary evidence in government's possession. (Granted) (Denied)

4. Defendant, having had discovery of Items #2 and #3, (requests and moves) (does not request and move) for discovery and inspection of all further or additional information coming into the government's possession as to Items #2 and #3 between this conference and trial. (Granted) (Denied)

5. The defense moves and requests the following information and the government states - (Circle the appropriate response)
   5(a) The government (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
      (1) Court rules it (may) (may not) be used.
      (2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No).
   5(b) Expert witness (will) (will not) be called.
      (1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.
   5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.

5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.

5(e) Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution - (Circle appropriate response)
(1) obtained from or belonging to the defendant, or
(2) which will be used at the hearing or trial,
(have been) (will be) supplied to defendant.

5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

5(g) Government (will) (will not) use prior felony conviction for impeachment of defendant if he testifies.
Date of conviction _____ Offense _____
(1) Court rules it (may) (may not) be used.
(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information government has, indicating entrapment of defendant (has been) (will be) supplied.

B. MOTIONS REQUIRING SEPARATE HEARING

6. The defense moves - (number circled shows motion requested)

6(a) To suppress physical evidence in plaintiff's possession on the grounds of - (Circle appropriate response)
(1) Illegal search and seizure
(2) Illegal arrest

6(b) Hearing of motion to suppress physical evidence set for _____.
(Defendant will file formal motion accompanied by memorandum brief within _____ days. Government counsel will respond within _____ days thereafter.)

==========

6(c) To suppress admissions or confessions made by defendant on the grounds of - (Circle appropriate response)
(1) Delay in arraignment
(2) Coercion or unlawful inducement
(3) Violation of the Miranda rule
(4) Unlawful arrest
(5) Improper use of lineup (Wade, Gilbert, Stovall decisions)
(6) Improper use of photographs.

6(d) Hearing to suppress admissions, confessions, lineup and photos is set for:
(1) Date of trial, or
(2) _____.
(Defendant will file formal motion accompanied by memorandum brief within _____ days. Government counsel will respond within _____ days thereafter.)

==========

The government to state:

6(e) Proceedings before the grand jury (were) (were not) recorded.

6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied.

6(g) Hearing re supplying transcripts set for _____.

==========

6(h) The government to state:
(1) There (was) (was not) an informer (or lookout) involved;
(2) The informer (will) (will not) be called as a witness at the trial;
(3) It has supplied the name, address and phone number of the informer; or
(4) It will claim privilege of non-disclosure.

6(i) Hearing on privilege set for _____.

==========

6(j) The government to state:
There (has) (has not) been any - (Circle the appropriate response)
(1) Electronic surveillance of the defendant or his premises;
(2) Leads obtained by electronic surveillance of defendant's person or premises;
(3) All material will be supplied, or

6(k) Hearing on disclosure set for _____.

==========

C. MISCELLANEOUS MOTIONS

7. The defense moves - (Number circled shows motion requested)
7(a) To dismiss for failure of the indictment (or information) to state an offense. (Granted) (Denied)
7(b) To dismiss the indictment or information (or court _____ thereof) on the ground of duplicity. (Granted) (Denied)
7(c) To sever case of defendant _____ and for a separate trial. (Granted) (Denied)
7(d) To sever count _____ of the indictment or information and for a separate trial thereon. (Granted) (Denied)
7(e) For a Bill of Particulars. (Granted) (Denied)
7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)
7(h) To dismiss for delay in prosecution. (Granted) (Denied)
7(i) To inquire into the reasonableness of bail. Amount fixed _____.
(Affirmed) (Modified to _____.)

D. DISCOVERY BY THE GOVERNMENT

D.1. Statements by the defense in response to government requests.

8. Competency, Insanity and Diminished Mental Responsibility
8(a) There (is) (is not) any claim of incompentency of defendant to stand trial.
8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense.
If the answer to 8(a) or 8(b) is "will" the
8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;
8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;
8(e) Defendant (will) (will not) submit to a psychiatric examination by a court appointed doctor on the issue of his sanity at the time of the alleged offense.

9. Alibi

9(a) Defendant (will) (will not) rely on an alibi.

9(b) Defendant (will) (will not) furnish a list of his alibi witnesses (but desire to be present during any interview).

10. Scientific Testing

10(a) Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.

10(b) Defendant (will) (will not) provide the government with all records and memoranda constituting documentary evidence in his possession or under his control or (will) (will not) disclose the whereabouts of said material. If said documentary evidence is not available but destroyed, the defense (will) (will not) state the time, place and date of said destruction and the location of reports, if any, concerning said destruction.

11. Nature of the Defense

11(a) Defense counsel states that the general nature of defense is - (Circle appropriate response)

(1) Lack of knowledge of contraband
(2) Lack of specific intent
(3) Diminished mental responsibility
(4) Entrapment
(5) General denial. Put government to proof, but (will) (may) offer evidence after government rests.
(6) General denial. Put government to proof, but (will) (may) offer no evidence after government rests.

11(b) Defense counsel states it (will) (will not) waive husband and wife privilege.

11(c) Defense (will) (may) (will not) testify.

11(d) Defendant (will) (may) (will not) call additional witnesses.

11(e) Character witnesses (will) (may) (will not) be called.

11(f) Defense counsel will supply government names, addresses and phone number of additional witnesses for defendant _____ days before trial.

D. 2. Rulings on government request and motion

12. Government moves for the defendant -

12(a) to appear in a lineup. (Granted) (Denied)

12(b) to speak for voice identification by witness (Granted) (Denied)

12(c) to be finger printed. (Granted) (Denied)

12(d) to pose for photographs. (not involving a re-enactment of the crime) (Granted) (Denied)

12(e) to try on articles of clothing. (Granted) (Denied)

12(f) Surrender clothing or shoes for experimental comparison. (Granted) (Denied)

12(g) to permit taking of speciments of material under fingernails. (Granted) (Denied)

12(h) to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion. (Granted) (Denied)

12(i) to provide samples of his handwriting. (Granted) (Denied)

12(j) to submit to a physical external inspection of his body. (Granted) (Denied

E. STIPULATIONS

If the stipulation form will not cover sufficiently the area agreed upon, it is recommended that the original be attached hereto and filed at the omnibus hearing.

(All stipulations must be signed by the defendant and his attorney, as required by Rule 17.1, F.R.Cr.P.)

13. It is stipulated between the parties:

13(a) That if _____ was called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen and that he never gave the defendant or any other person permission to take the motor vehicle.

_____ _____
Attorney for Defendant Defendant

13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information)

_____ _____
Attorney for Defendant Defendant

13(c) That if _____ the official government chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or information) has been chemically tested and is _____ and the weight is _____.

_____ _____
Attorney for Defendant Defendant

13(d) That there has been a continuous chain of custody in government agents from the time of the seizure of the contraband to the time of the trial.

_____ _____
Attorney for Defendant Defendant

13(e) Miscelaneous stipulations:

_____

_____

_____

_____

_____

_____

_____ _____
Attorney for Defendant Defendant

F. CONCLUSION

14. Defense counsel states:
    14(a) That defense counsel as of the date of this conference of counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal search and seizure or arrest, or any other constitutional problem, except as set forth above. (Agree) (Disagree)
    14(b) That defense counsel has inspected the check list on this OH-3 Action Taken Form, and knows of no other motion, proceeding or request which he desire to press, other than those checked thereon. (Agree) (Disagree)

15. Defense counsel states:
    15(a) There (is) (is not) (may be) a probility of a disposition without trial.
    15(b) Defendnt (will) (will not) waive a jury and ask for a court trial.
    15(c) That an Omnibus Hearing (is) (is not) desired, and government counsel (Agree) (Disagree).
    15(d) If all counsel conclude after conferring, that no motions will be urged, that an Omnibus Hearing is not desired, they may complete, approve and have the defendant sign (where indicated) Form OH-3, and submit it to the Court not later than five (5) days prior to the date set for the Omnibus Hearing, in which event no hearing will be held unless other wise directed by the Court.
    15(e) If a hearing is desired, all counsel shall advise the Court in writing not later than five (5) days prior to the date set for the Omnibus Hearing whether or not they will be ready for such hearing on the date set in the Order Setting Conference of Counsel and Omnibus Hearing.

APPROVED: Dated: _____

_____
Attorney for the United States

SO ORDERED:

_____
Attorney for Defendant

_____
United States District Judge

_____
Defendant

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SOURCE: Nimmer, Raymond T., Prosecutor Disclosure and Judicial Reform. (The Omnibus Hearing In Two Courts). American Bar Foundation, Chicago. 1975.

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END