Florida State University Law Review

Volume 2 | Issue 3 Article 11

Summer 1974

State v. Latimore, 284 So. 2d 423 (Fla. 3d Dist. Ct. App. 1973), cert. denied, 291 So. 2d 7 (Fla. 1974)

Florida State University Law Review

duty of care upon a social host.[53] This alteration of traditional tort doctrine means that a family extending its hospitality gratuitously may now be liable for unknown dangers which pose as great a threat to the host family as to its guests.[54] Moreover, relatives residing apart from the host household now enjoy a privileged status denied residents of the household.[55] By making hosts as liable to their social guests as merchants are to their customers, *Wood* pits guest against host (or, more likely, both against an insurance company), while putting uninvited visitors at their peril.

Criminal Law—FLORIDA RULES OF CRIMINAL PROCEDURE—INVESTIGATIVE REPORTS NEITHER SIGNED BY NOR DIRECTLY QUOTING A DECLARANT ARE NOT DISCOVERABLE "STATEMENTS" WITHIN RULE 3.220.—*State v. Latimore,* 284 So. 2d 423 (Fla. 3d Dist. Ct. App. 1973), *cert. denied,* 291 So. 2d 7 (Fla. 1974).

One week after James Latimore was charged with second degree murder, his defense counsel filed a motion for pretrial discovery of all police reports compiled in connection with the charge. In its order granting the motion and compelling discovery, the trial court ruled that "all police reports are 'statements' within the meaning of Rule 3.220(a)(l)(ii), Florida Rules of Criminal Procedure."[1] Rather than comply with this order, the State sought review by writ of certiorari to the Third District Court of Appeal. The Third District granted the State's petition and quashed the trial court's order, holding that

---

53. *See* 284 So. 2d at 696. *See also* Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973).

54. In Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972), the head of a household, his young daughter and her young house guest all died in their sleep from carbon monoxide poisoning resulting from failure to maintain a gas refrigerator line. The estate of the house guest was allowed recovery from the estate of the head of the household.

55. In Phillips v. Phillips, 287 So. 2d 149 (Fla. 1st Dist. Ct. App. 1973), the court, following *Wood,* ruled that a seven-year-old boy was an invited social guest upon the premises of his grandfather and hence an invitee. *Cf.* Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972), where the daughter's house guest had a cause of action against the father but the daughter presumably did not.

1. The trial court's ruling is stated in State v. Latimore, 284 So. 2d 423 (Fla. 3d Dist. Ct. App. 1973), *cert. denied,* 291 So. 2d 7 (Fla. 1974).

> police and other investigation reports which do not quote a person . . . directly and never are signed or shown to that person are not statements within [Florida Rule of Criminal Procedure 3.220 (a)(l)(ii)] and thus are not subject to discovery thereunder.[2]

Florida Rule of Criminal Procedure 3.220(a) provides that the prosecution must disclose to the defense the "statements" of any person "known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto."[3] The rule then defines "statement" as

> a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . . .[4]

In *State v. Latimore*[5] the Third District became the first Florida appellate court to interpret this definition as applied to police reports.[6]

The court undertook a three part analysis in interpreting the rule.

---

2. 284 So. 2d at 425.

3. FLA. R. CRIM. P. 3.220(a) provides in part:

(l) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement, provided, however, if the court determines in camera [*sic*] proceedings as provided in subsection (i) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure. The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

4. FLA. R. CRIM. P. 3.220(a)(l)(ii).

5. 284 So. 2d 423 (Fla. 3d Dist. Ct. App. 1973), *cert. denied*, 291 So. 2d 7 (Fla. 1974).

6. *Id.* at 424. The present Florida Rules of Criminal Procedure were adopted by the Florida Supreme Court on December 6, 1972, and became effective February 1, 1973. *See In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972).

An inquiry into legislative history revealed that the rule's definition of "statement" was derived from the Jencks Act.[7] The court therefore looked to federal court decisions interpreting that Act,[8] and concluded that the Jencks Act definition of statement generally had been interpreted to mean "those statements which are a substantial [*sic*] verbatim recital of the witness' own words."[9]

Next the court reviewed "available Florida law" on the issue of discovery of police reports.[10] The court noted that prior to the adoption of rule 3.220 defendants had been denied access to police reports

---

7. 284 So. 2d at 424. The Jencks Act provides in part:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a) (1970). For further discussion of the Jencks Act see notes 15-21, 25, 33 and accompanying text *infra*.

The court stated that the rule itself, rather than only the definition of "statement," was derived from the Jencks Act. This seems erroneous. The 1972 Committee Note to the rule indicates that it was taken substantially from Standard 2.1 of ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Tent. Draft, May 1969) [hereinafter cited as ABA STANDARDS]; only the definition of "statement" came from the Jencks Act. *See* SPECIAL ADVISORY COMMITTEE OF THE FLORIDA SUPREME COURT, PROPOSED REVISION OF FLORIDA CRIMINAL PROCEDURE RULES at 67-69 (1972) [hereinafter cited as PROPOSED REVISION].

8. *See* 284 So. 2d at 424. One of the United States Supreme Court decisions considered by the court was Palermo v. United States, 360 U.S. 343 (1959), the first Supreme Court determination of the scope and meaning of the Jencks Act. In *Palermo* a Government agent had prepared a memorandum of a conference with a Government witness. After that witness testified at trial, the defense sought disclosure of the agent's memorandum under the Jencks Act. All nine members of the Court agreed that the memorandum did not meet the Act's definition of a statement. The Court stressed that

> [i]t is clear that Congress [in enacting the Jencks Act] was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment.

360 U.S. at 352. The Court went on to state that

> summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.

360 U.S. at 352-53.

9. 284 So. 2d at 424. The court's conclusion is supported by the authority it cites. *See, e.g.*, Palermo v. United States, 360 U.S. 343, 352 (1959) (discussing congressional emphasis on "substantially verbatim" requirement); United States v. Graves, 428 F.2d 196, 200 (5th Cir. 1970) (must be substantially verbatim recital of witness' oral statements made to a Government agent which are recorded contemporaneously with the making of the statement). However, the court failed to consider those federal decisions holding that the report itself may be a Jencks Act "statement" of the agent/officer who compiled the report. *See* notes 28-29 and accompanying text *infra*. *See generally* Annot., 5 A.L.R.3d 763 (1966).

10. *See* 284 So. 2d at 424.

both on policy grounds[11] and because such reports were held to constitute work product of the prosecution.[12]

11. *Id.* The court cited Scott v. State, 207 So. 2d 493 (Fla. 2d Dist. Ct. App. 1968), as authority for the proposition that defendants are not entitled to the production of police reports. In *Scott* the defendant had moved for production of police reports containing the statements of a State witness which allegedly could have been used for impeachment purposes. The trial court denied the motion, and on appeal the Second District dismissed the issue with the statement that "[t]he withholding of production to defense counsel of the police report has been settled adversely to defendant in several cases." *Id.* at 498.

Scott relied upon prior decisions denying the defendant the right to discovery. In the first of these, McAden v. State, 21 So. 2d 33 (Fla. 1945), the defense had moved that a subpoena duces tecum issue to a court reporter and several State Attorneys, requiring them to produce the testimony and notes taken at all hearings and investigations concerning the offense charged. The defense particularly desired access to transcripts of testimony taken at certain hearings, which were alleged to contain contradictory testimony given by several witnesses. The trial court overruled the motion, and on appeal the supreme court affirmed:

> The courts of last resort of other States have ruled on similar questions in the absence of a controlling statute. Search of the authorities . . . has been made and the cases generally hold that defendant's counsel in a criminal case is not entitled to a transcript of testimony of State witnesses taken before a prosecuting officer preparatory to trial.

21 So. 2d at 36. In State v. Lampp, 155 So. 2d 10 (Fla. 2d Dist. Ct. App. 1963), the trial court had ordered that a subpoena ad testificandum issue to State witnesses compelling them to appear before defense counsel and be deposed. On appeal, the Second District recognized that "the purpose of taking the depositions . . . was to obtain pre-trial discovery as in civil actions," and quashed the trial court's order on the ground that "[t]he order . . . depart[ed] . . . from the established practice and the public policy of the State . . . ." 155 So. 2d at 14. The rationale of *McAden* and *Lampp* was followed in State v. McCall, 186 So. 2d 324 (Fla. 3d Dist. Ct. App. 1966), wherein the court held that the defendant was not entitled to the production of transcribed statements made by State witnesses prior to trial.

The Florida Supreme Court recently relied upon *Scott* in denying access to police reports. *See* Williams v. State, 285 So. 2d 13, 16 (Fla. 1973). However, just one week later in State v. Johnson, 284 So. 2d 198 (Fla. 1973), the supreme court rejected what it termed the "total refusal to produce [police reports] for *any* purpose in *Scott*," and held that under certain circumstances such reports must be produced at trial for use by the defense in impeaching State witnesses. 284 So. 2d at 201. Although *Scott* was not expressly overruled, it no longer stands for the proposition stated in *Latimore*. *See* notes 37-45 and accompanying text *infra*, discussing the impact of *Williams* and *Johnson* on the *Latimore* decision.

Application of rule 3.220 to the factual situations presented in *McAden*, *Lampp* and *McCall* should result in compelling discovery of the information denied to the defendants in those cases. Even under the *Latimore* interpretation of the rule's definition of "statement," the transcribed testimony of State witnesses in *McAden* and the statements in *McCall* should be discoverable under subsection (a)(1)(ii). Subsection (d), which grants the defense the right to depose "any person who may have information relevant to the offense charged," is in direct conflict with the decision in *Lampp*. This brief analysis of the effect of the rule on these decisions raises the question of how much influence prior case law should have had on the court's interpretation of rule 3.220.

12. 284 So. 2d at 424-25. In suggesting that police reports may not be discoverable because they are protected by the "work product" doctrine, *Latimore* relied upon Darrigo v. State, 243 So. 2d 171 (Fla. 2d Dist. Ct. App. 1971), and State v. Gillespie, 227 So. 2d

Finally, the court turned to the rule itself and concluded that the meaning of "statement" was clear from its language.[13] The court read the rule's definition of "statement" literally and held that "statements" includes only: (1) those statements that are written and signed by the person who made the statement; or (2) those oral statements that are made to an officer or agent of the State and which are recorded by him in substantially verbatim form contemporaneously with the making of the statement.[14]

By interpreting the definition of "statement" in rule 3.220 as federal courts have interpreted that definition in the Jencks Act, the court ignored the major distinction between the Act and the rule. The Jencks Act was the congressional response to *Jencks v. United States*,[15] in which the United States Supreme Court held that the defendant in a federal criminal prosecution was entitled to inspect statements made by Government witnesses to Government agents.[16] The Act was enacted[17] to

---

550 (Fla. 2d Dist. Ct. App. 1969). *Gillespie* viewed the reports of agents of the prosecution as "examples of 'work product' in its purest and narrowest sense, to which the accused is not ordinarily entitled." 227 So. 2d at 557. However, the court went on to suggest that the Jencks Act might require that the reports be "made available to the accused at trial for purposes of effective cross-examination within the scope of the right of confrontation." *Id.* The court later recognized that, in a case where the Jencks Act would compel disclosure of the report at trial, "it is well within the court's discretion to compel inspection thereof *before* trial if it appears that by doing so both time and effort would be conserved to the advantage of the court and all concerned." 227 So. 2d at 559. It seems that under the rationale in *Gillespie*, the *Latimore* court's discussion of the "work product" doctrine was irrelevant since it is recognized that if a report is otherwise subject to disclosure under the Jencks Act, the fact that it may be considered "work product" does not prevent disclosure. *See* United States v. Hilbrich, 341 F.2d 555, 557 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965); Saunders v. United States, 316 F.2d 346, 349-50 (D.C. Cir. 1963).

An apparent limitation on the scope of the "work product" doctrine is found in subsection (c)(1) of rule 3.220, which provides:

> Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

This provision seems to exclude police reports from the category of "work product" protected by the rule.

In *Darrigo* the Second District approved the trial court's refusal to compel disclosure of police officers' informal notes regarding certain statements against interest made by the defendant on the ground that the notes were "work product." 243 So. 2d at 173. Subsection (a)(1)(iii) of rule 3.220, which provides that the prosecution must disclose "the substance of any oral statements made by the accused and known to the prosecutor," should result in discovery under these same facts.

13. 284 So. 2d at 425.

14. *Id.*

15. 353 U.S. 657 (1957).

16. *Id.* The Government witnesses were paid informants who had made periodic reports of the defendant's activities to the FBI. After the witnesses had testified, the defense moved for an order compelling the Government to produce the reports for in-

allay fears that this decision would pose a threat to national security by allowing inspection of confidential information and vital state secrets.[18] The stated purposes of the Act are to preserve the defendant's right to due process of law, and "to guard the files of the Government against a fishing expedition, against the examination in the hope of finding something of an impeachable nature against the revelation of matters dealing with other cases, which are not relevant to the case at issue."[19] In order to accomplish these objectives, discovery is limited to those statements which can be used for impeachment purposes.[20] Therefore, only those statements which relate to the subject matter of the witness' testimony on direct examination are subject to discovery under the Jencks Act.[21]

In contrast, the purpose of rule 3.220 is to provide for pretrial discovery by both the prosecution and the defense.[22] The rule emphasizes

---

spection and use on cross-examination. The Supreme Court rejected the prior rule that the trial court had discretion to deny inspection if the reports were not used in court by the witness, and held:

> [T]he petitioner was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

Id. at 668-69 (footnote omitted).

17. The day after *Jencks* was decided, legislation designed to combat the "Jencks problem" was introduced in the House of Representatives. *See* 103 CONG. REC. 8327 (1957). The Jencks Act was approved Sept. 2, 1957. *See* Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500 (1970)).

18. Mr. Justice Clark's dissent in *Jencks* called attention to this "problem":

> Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.

353 U.S. at 681-82. *See also* Palermo v. United States, 360 U.S. 343, 346 (1959); 103 CONG. REC. 8290 (1957) (remarks of Representative Keating).

19. 103 CONG. REC. 15782 (1957) (remarks of Senator O'Mahoney).

20. The legislative history shows that this was the intent of Congress. *See* 103 CONG. REC. 15,782 (1957) (remarks of Senators Ervin and O'Mahoney). Federal case law has given effect to this intent. *See, e.g.*, Palermo v. United States, 360 U.S. 343 (1959); United States v. Harris, 458 F.2d 670 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972); United States v. Graves, 428 F.2d 196 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

21. The "related to the subject matter" requirement is stated in subsection (b) of the Jencks Act. *See* note 33 *infra*.

22. The present Florida Rules of Criminal Procedure are the result of the recommendations of a special advisory committee formed pursuant to an order of the Florida Supreme Court of March 23, 1970. The purpose of the committee was to review the

facilitation, rather than limitation, of discovery and is structured to permit discovery at any time after the filing of the indictment or information.[23] By providing for in camera proceedings in which the court can prohibit or partially restrict disclosure of irrelevant or sensitive information,[24] the rule avoids the problem that the Jencks Act attempted to resolve. Thus, there is no apparent necessity for limiting discovery under rule 3.220 to only those "statements" which would be subject to disclosure under the Jencks Act.

Subsection (e) of the Jencks Act defines a witness's "statement" as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.[25]

The definition of "statement" in rule 3.220 is essentially the same but does not include grand jury testimony and is not subdivided.[26] The federal courts often refer to "(e)(1)" or "(e)(2)" Jencks Act statements.[27] *Holmes v. United States*,[28] a Fourth Circuit decision involving "(e)(1)" statements, illustrates the significance of this distinction. In *Holmes* an FBI agent had testified at trial as a witness for the Government. In holding that the defendant was entitled to all memoranda and reports

---

Florida criminal procedure rules and make recommendations for their revision. The order directed the committee to give careful consideration to ABA STANDARDS with a view toward implementation of the Project's suggestions. The 1972 Committee Note to rule 3.220 acknowledges that the committee approved the substance of the philosophy behind the ABA standards, a philosophy which resulted in the proposal of "more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States." ABA STANDARDS 1. The discussion of the origin of the rules was taken from PROPOSED REVISION 7.

23. *See* FLA. R. CRIM. P. 3.220(a)(1).

24. *See* FLA. R. CRIM. P. 3.220(a)(1)(ii). FLA. R. CRIM. P. 3.220(*i*) provides in part: "Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made *in camera*."

25. 18 U.S.C. § 3500(e) (1970). Subsection (3) was added in 1970.

26. *Compare* FLA. R. CRIM. P. 3.220(a)(1)(ii) *with* 18 U.S.C. § 3500(e) (1970). Note that the statements of *any person* who has information that may be relevant to the offense charged are discoverable under rule 3.220, whereas only the statements of *witnesses* are subject to disclosure under the Jencks Act. *See* note 3 *supra*.

27. *See, e.g.*, United States v. Graves, 428 F.2d 196, 199 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

28. 271 F.2d 635 (4th Cir. 1959).

that the agent had compiled during his investigation of the case, the court observed that

> [t]he written report of the agent . . . is just as much *a verbatim statement of the agent, who prepares it,* as a written statement of an informer, incorporated in the report, is the statement of the informer. It is a statement within the literal and evident meaning of . . . the Act.[29]

Holmes indicates that all police reports are potentially "(e)(l)" statements under the Jencks Act.

Implicit in the *Latimore* court's finding that all police reports are not "statements" within the meaning of rule 3.220 is the view that a police report can never be considered the "statement" of the police officer who authors the report.[30] This view is expressed in the court's holding that those police reports which do not directly quote a "person" under rule 3.220 are not statements within the meaning of that rule. Applying the *Holmes* rationale, however, any police officer who has information that may be relevant to the offense charged is a "person" whose "statement" must be furnished by the prosecutor upon the written demand of the defense.[31] Since a police report is a "written statement" made by the officer and "signed or otherwise adopted or approved by him,"[32] it comes within a literal reading of the rule's definition of "statement." The court's more restrictive interpretation results from its failure to recognize that the report itself, as well as the statement of a third person, can be an "(e)(l)" statement under federal case law.[33] *Holmes* points up this basic weakness in the court's analysis

---

29. *Id.* at 638 (emphasis added). For discussion of other cases dealing with the statements of a Government agent see United States v. Berry, 277 F.2d 826, 829-30 (7th Cir. 1960); Annot., 5 A.L.R.3d 763, 787-91 (1966).

30. *See* 284 So. 2d at 425.

31. *See* FLA. R. CRIM. P. 3.220(a)(l)-(l)(i).

32. *See* FLA. R. CRIM. P. 3.220(a)(l)(ii).

33. Only one of the federal cases considered by the *Latimore* court involved "(e)(l)" statements: United States v. Graves, 428 F.2d 196 (5th Cir.), *cert. denied,* 400 U.S. 960 (1970). The court cited *Graves* to support the proposition that "reports which do not quote a witness directly and never signed [*sic*] nor shown to that witness are not subject to discovery under" the Jencks Act. 284 So. 2d at 424. *Graves* recognized that an agent's report may be an "(e)(l)" statement but refused disclosure on the ground that the statement was not "directly related" to the subject matter to which the agent testified on direct examination. 428 F.2d at 199-200. As an additional requirement for disclosure under the Jencks Act, subsection (b) of the Act provides in part:

> After a witness called by the United States has testified on *direct examination,* the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which *relates to the subject matter* as to which the witness has testified.

18 U.S.C. § 3500(b) (1970) (emphasis added).

and demonstrates that, even if it is assumed that the definition of "statement" in rule 3.220 should be given the same interpretation as that given to the Jencks Act definition, the result reached in *Latimore* still might not be warranted.

By using Florida case law established prior to adoption of rule 3.220 as persuasive authority for its narrow interpretation, the court seemed to overlook the purpose of the rule. While it is true that Florida courts have held that the defendant is not entitled to discovery of police reports,[34] those decisions should have little relevance to an interpretation of the current rule. Since rule 3.220 embodies significant changes in the prior criminal discovery rule,[35] it is only appropriate that its interpretation be based upon the policy behind these changes,[36] rather than upon the concept of discovery as it existed prior to the new rule's adoption. The *Latimore* court's interpretation represents the least possible departure from earlier Florida case law that is consistent with the language of rule 3.220, and demonstrates the court's reluctance to move toward the more liberal criminal discovery contemplated by the rule.

Two Florida Supreme Court decisions subsequent to the Third District's decision in *Latimore* are relevant to a discussion of the issue of discovery of police reports and cast doubt on the court's interpretation of rule 3.220. In *Williams v. State*[37] the trial court denied a motion for production of the prior statement of a State witness, for impeachment purposes, after she had testified on direct examination. The supreme court held that the trial court did not commit reversible error by denying defendant's motion because the statement "was available to the defendant as a *public record* and, because the defendant made no reasonable effort to procure [it] from the police . . . ."[38] The court's conclusion that police reports are public records was based on *Mahone v. State*,[39] a Third District decision holding that police reports are public records.[40]

---

34. *See* note 12 *supra*.

35. *See* 1972 Committee Note to FLA. R. CRIM. P. 3.220, in PROPOSED REVISION 67-69.

36. The Special Advisory Committee Report to the Florida Supreme Court indicates that the purpose for the rule change was to "improve the administration of criminal justice." PROPOSED REVISION 8. *See* notes 60-66 and accompanying text *infra*.

37. 285 So. 2d 13 (Fla. 1973).

38. *Id.* at 16 (emphasis added).

39. 222 So. 2d 769 (Fla. 3d Dist. Ct. App. 1969).

40. In *Mahone* the defendant had moved for pretrial discovery of the report of the arresting officer, the police record and certain FBI records. His motion was granted only in part, and on appeal he asserted that he was entitled to all of the records. The court dismissed this point with the statement that

> [i]t has been held that the items mentioned in the argument under this point are *public records* and that an appellant may not claim error in the absence of a show-

While *Williams* did not involve pretrial discovery under rule 3.220, the supreme court's adoption of the *Mahone* holding seems more consistent with a liberal view of discovery than the restrictive approach taken by the *Latimore* court. The fact that *Mahone* was a Third District decision raises the question of why the same court that held police reports to be public records would deny discovery of police reports under rule 3.220. Indeed, in *Latimore* itself the Third District referred to the reports in question as "public records."[41]

---

ing that he made a reasonable effort and was unable to procure the records.

Id. at 772.

The *Mahone* court referred to Florida's public records statute, which provides in part:

> All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.

FLA. STAT. § 119.01 (1973). "Public records" is defined as "all documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency," FLA. STAT. § 119.011(1) (1973), and "agency" is defined as "any state, county or municipal officer, department or division . . . or other separate unit of government created or established by law." FLA. STAT. § 119.011(2) (1973). A literal reading of these sections would include police reports in the definition of public records and subject them to personal inspection by any Florida citizen. Certain public records, however, are exempted from public inspection:

> All public records which presently are deemed *by law* to be confidential or which are prohibited from being inspected by the public, whether provided by general or special acts of the legislature or which may hereafter be so provided, shall be exempt from the provisions of this section.

FLA. STAT. § 119.07(2)(a) (1973) (emphasis added). Although there is no statute that specifically exempts police reports from inspection, the Florida Attorney General has taken the position that "certain police records are exempt from public inspection because they have been deemed by the *common law* to be records that must be kept secret, and thus 'presently are deemed by law to be confidential.'" 1972 FLA. ATT'Y GEN. OP. 072-168, at 281 (emphasis added). The Attorney General's opinion was based in part on Lee v. Beach Publishing Co., 173 So. 440 (Fla. 1937), in which the Florida Supreme Court stated:

> "The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example as diplomatic correspondence and letters and dispatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals."

173 So. at 442, *quoting from* 23 R.C.L. *Records* at 161 (1929). The Attorney General has distinguished between "[i]nvestigative police reports and records made in connection with an official police investigation of a suspected violation of the law, or otherwise relating to the detection, apprehension or prosecution of criminals," and "such matters as a police officer's accident report, records of arrest (excluding those relating to juvenile offenses), and business records of a municipal police department." 1972 FLA. ATT'Y GEN. OP. 072-168, at 280. For other statements of the Attorney General's position on this issue see 1973 FLA. ATT'Y GEN. OP. 073-166 (confirming the position taken in 1972 FLA. ATT'Y GEN. OP. 072-168 but noting that the police report exception to the public records statute is a narrow one); 1957 FLA. ATT'Y GEN. OP. 057-157 (sheriff's investigative files and complaint records not open to public inspection).

41. 284 So. 2d at 423.

In the more recent decision of *State v. Johnson*,[42] the defendant had been denied access to a police report sought for use in impeaching a State witness.[43] The supreme court affirmed reversal by the First District and recognized that the defendant has the right to production of police reports at trial in certain limited circumstances.[44] The supreme court specifically rejected the prior case law relied upon by *Latimore*, which had held that the defendants were not entitled to the production of police reports.[45] Thus, although *Johnson* did not involve pretrial discovery under the rule, its recognition of the defendant's limited right to production of police reports further weakens the *Latimore* court's analysis.

The issues of admissibility and discovery are separate and distinct.[46]

---

42. 284 So. 2d 198 (Fla. 1973).

43. Johnson's defense counsel had caused a subpoena duces tecum to issue, compelling the police officer to produce his report at trial. After the officer testified on direct, defense counsel asked to examine the report. The trial court ruled that the report was "not amenable to subpoena" and could not be used for purposes of impeachment. *Id.* at 199.

44. The supreme court set out the requirements for the "production and use in evidence of police reports and statements for impeachment purposes by way of cross examination or by placing in evidence." First, the "mere negative use" of a police report normally should not be allowed. By "negative use" the court was referring to questions as to why certain information stated in the officer's testimony was not included in his report. An exception to this rule occurs when "some singular importance attach[es] to the point in question, which goes to a material and critical fact in serious contention in the trial." The general requirement is that

> [t]he inquiry must be upon a crucial point and preferably upon a positive statement in such a report, which the witness at trial flatly refutes, thus placing his credibility and the point involved in vital focus so that it becomes critical to the defense.

284 So. 2d at 200.

Johnson equated the issue of production of the report at trial with that of admissibility. While it may seem logical to limit production at trial to information that would be admissible, it is apparent that the defense must initially have access to the report in order to meet the requirements of *Johnson*. The court sanctioned the use of in camera proceedings in order to determine if the requirements are met and to protect sensitive and irrelevant information. If the defense is to be denied access to the report until it has been established that these requirements are met, the trial court will have the burden of examining the report in camera to determine whether it is to be produced. This is precisely the situation the United States Supreme Court sought to avoid in Jencks v. United States, 353 U.S. 657 (1957). *See* note 16 *supra*. The federal cases interpreting the Jencks Act have recognized that the scope of disclosure is not limited by a determination that the information is admissible for purposes of impeachment, but that the decision of whether a statement is useful for purposes of impeachment rests with the defendant. *See, e.g.*, United States v. Meisch, 370 F.2d 768, 772 (3d Cir. 1966). As a result of the difficulty in meeting these restrictive requirements, *Johnson* may be limited to the appeal stage, when the defense contends that the trial judge abused his discretion by denying production of a report.

45. 284 So. 2d at 201. *See* note 12 *supra*.

46. Federal cases interpreting the Jencks Act have recognized that the production of

Limitations on admissibility for impeachment purposes, recognized by the *Johnson* court and the Jencks Act, should not be determinative when discovery is at issue. Once a trial is commenced the scope of production is reasonably limited to potentially admissible evidence, since the discovery stage has been left behind.[47] However, when the question of pretrial discovery arises at an early stage in the proceedings, such as in *Latimore,* there is no reason to limit the scope of discovery to that information which would be admissible at trial, since the purpose of discovery at that point is to gather all information relevant to the case regardless of whether it would be admissible. *Latimore*'s reliance on the Jencks Act resulted in an unwarranted restriction of the scope of pretrial criminal discovery.

Debate concerning criminal discovery traditionally has been framed in terms of "what should fairly, and could safely, be given to the defense as an aid to preparing for trial."[48] In keeping with this principle, discovery of police reports either has been totally denied or severely restricted[49] in most jurisdictions. There are three traditional arguments against broad pretrial criminal discovery: (1) discovery will lead to perjury and the suppression of evidence; (2) it would be unfair to require the prosecution to disclose information when the defendant's privilege against self-incrimination would preclude imposing a requirement of reciprocity; (3) a trial is an adversary proceeding and discovery would upset the balance in favor of the defense.[50]

In the past the Florida Supreme Court has inclined toward the traditional, restrictive view of pretrial criminal discovery. That view was reflected in *State v. Crawford,*[51] quoted with approval by the *Latimore* court:

> "On the other hand, the prosecuting attorney should not be required to actively assist defendant's attorney in the investigation of the case.

---

statements and their admissibility are closely related but are separate questions. *See, e.g.,* Campbell v. United States, 373 U.S. 487, 493 n.7 (1963).

47. Although the scope of production at trial is necessarily limited, the defendant must be afforded the opportunity to examine potentially admissible information in order to determine its usefulness. *See* note 44 *supra.* An additional consideration arises, however, when the defendant waits until trial to request discovery; the prosecution may be deprived of certain reciprocal discovery rights granted by FLA. R. CRIM. P. 3.220(b)(4).

48. ABA STANDARDS 1.

49. *See* 14 ST. LOUIS U.L.J. 310-11 (1969).

50. *See* State v. Tune, 98 A.2d 881, 884-85 (N.J. 1953). *See also* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923); State v. Rhoads, 91 N.E. 186 (Ohio 1910); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279, 289-90; Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CAL. L. REV. 56, 57-58 (1961).

51. 257 So. 2d 898 (Fla. 1972).

> Discovery in criminal cases has tended to be heavily weighed in favor of the defendant, and it would be contrary to the general principle of advocacy, as well as fairness itself, to require the prosecuting attorney to perform any duties on behalf of the defendant in the preparation of the case."[52]

Crawford, however, was decided prior to the adoption of the present discovery rule. In the recent decision of *State v. Coney,*[53] the supreme court indicated that its position may have become more progressive in recognition of the purpose behind the new criminal discovery rules. While adhering to its view that " 'the whole idea of criminal pre-trial discovery . . . is fairness,' "[54] the court recognized that the Florida Rules of Criminal Procedure are more "effective" than the Federal Rules of Criminal Procedure, and implied that interpretation of the Florida rules should not be limited by analogy to the federal rules.[55] This decision casts further doubt on the Third District's use of the Jencks Act in its interpretation of rule 3.220.

The traditional arguments against criminal discovery have been rejected by a number of writers;[56] moreover, those arguments concern problems that can be dealt with in a more appropriate manner than by denying the right of discovery to all defendants. The provisions of rule 3.220 protect against the possible abuses of pretrial discovery that underlie these arguments[57] and at the same time preserve the de-

---

52. 284 So. 2d at 425, *quoting from* 257 So. 2d at 900.

53. 294 So. 2d 82 (Fla. 1973).

54. *Id.* at 87, *quoting from* State v. Coney, 272 So. 2d 550, 553 (Fla. 1st Dist. Ct. App. 1973) (emphasis omitted).

55. *See* 294 So. 2d at 86-87.

56. *See, e.g.,* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 NEB. L. REV. 127 (1962); Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CAL. L. REV. 56 (1961); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 228 (1964). *See also* Cash v. Superior Court, 346 P.2d 407, 408-09 (Cal. 1959); State v. Tune, 98 A.2d 881, 894 (N.J. 1953) (Brennan, J., dissenting); ABA STANDARDS 1-3.

57. For example, subsection (a)(4) of rule 3.220 provides that the court may deny or partially restrict disclosure of information if it finds there is a substantial risk that disclosure will result in perjury, bribery, harassment, intimidation or physical harm to any person. This provision could be used in those few situations where there is danger of perjury or suppression of evidence due to bribery or harassment of witnesses. Subsection (b) requires the defendant to make certain accommodations to the prosecution, *e.g.,* to be available for appearances in lineups and for reasonable physical examinations. The defendant also may be required to disclose the names of witnesses that are expected to be called and make other disclosures *if* the defense has demanded discovery under other specified sections of rule 3.220. *See* FLA. R. CRIM. P. 3.220(b)(4). Furthermore, rule 3.200 requires the defendant, upon demand by the prosecution, to give notice of any intention to claim an alibi as a defense and the specific information by which he proposes

fendant's right to discovery. In addition, the argument that discovery would tilt the balance of criminal proceedings in favor of the defendant has lost persuasiveness as the superior resources available to the prosecution for investigation have become apparent.[58]

If the position is taken that the purpose of rule 3.220 is to provide for broad pretrial discovery, subject only to the restrictions imposed by the rule itself, it may be argued that all reports compiled by police officers which are relevant to the offense charged should be discoverable under the rule. This liberal interpretation is consistent with both the language and the purpose of the rule. In addition, such an interpretation is supported by constitutional considerations posed by the proponents of more liberal discovery of police reports[59] and the policies behind the broadening of criminal discovery in general.

The modern approach to the question of the scope of criminal discovery would focus not on the issue of fairness to the accused but rather on the necessity for changes in criminal procedure. This is the approach taken by the American Bar Association Advisory Committee on Pretrial Proceedings.[60] The Advisory Committee recognized the need for changes in criminal procedure in order to "lend more finality to criminal dispositions, to speed up and simplify the process, and to make more economical use of resources."[61] The committee concluded that,

> [i]n order to bring potential constitutional issues to the fore at the earliest practical time and to make for appropriate and enduring dispositions, it seem[s] essential that defense counsel receive as much information about the case as feasible before trial or other disposition.[62]

---

to establish his alibi. From the foregoing, it is apparent that substantial reciprocity is built into the rule.

58. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-73, 1192 (1960).

59. It has been suggested that the equal protection clause may require that an indigent criminal defendant be afforded discovery of police reports in order to provide the investigative aid necessary to adequately prepare his defense. *See* 14 ST. LOUIS U.L.J. 310, 316-20 (1969). Similarly, the due process clause has been said to require such discovery in order to satisfy the requirement of "fundamental fairness." *Id.* at 320. Closely associated with these contentions is the suggestion that the sixth amendment right to counsel requires more than mere appointment of counsel; adequate investigative aid is also required in order to render that right meaningful. Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963); 14 ST. LOUIS U.L.J. 310, 320-22 (1969). These arguments recognize that the indigent defendant has a need for investigative aid and that this need can be substantially satisfied by allowing the defendant to review the police reports compiled in connection with the offense charged.

60. *See* ABA STANDARDS 1-3.

61. *See* ABA STANDARDS 2.

62. *Id.*

There are three considerations underlying the committee's statements that seem to compel the broadening of pretrial criminal discovery. First, because of the widespread use of plea bargaining, which now accounts for the majority of criminal dispositions,[63] it may be constitutionally required that the defendant have access to all information relevant to the offense charged to enable him to intelligently enter a plea.[64] Secondly, in view of the general expansion of post-conviction remedies,[65] potential issues that could result in reversal or modification on appeal should be presented and resolved at an early stage in the criminal process in order to lend finality to criminal dispositions. Finally, the economic realities involved in providing an indigent defendant with effective legal counsel should be considered. It is far less costly to provide the defendant with the reports compiled in the State's investigation than to staff and fund the public defender's office to the extent necessary to provide for adequate investigation. Thus, in order to promote judicial efficiency and to provide effective counsel, with the least expense, the defendant should be granted broad pretrial criminal discovery rights. As stated by the Advisory Committee: "[B]road pretrial disclosure of the prosecution's case [is] the key to satisfying procedural objectives of overriding significance to criminal justice."[66]

In view of the most recent Florida Supreme Court pronouncements on the availability of police reports to defendants, the changes in the discovery rule and the policies supporting those changes, the *Latimore* court's approach to the issue of pretrial discovery of police reports clearly is retrogressive. At its next opportunity the supreme court should consider the modern approach to pretrial criminal discovery, and should effectuate fully the policies behind the new discovery rule through an interpretation of "statement" that includes all police reports.

---

63. *Id. See also* Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 316-19 (1960).

64. *See* Fletcher, *supra* note 63, at 316.

65. *See* ABA STANDARDS 2.

66. *Id.*