# Notes

## REVIVAL OF THE RIGHT TO A FAIR TRIAL— TRADITIONAL MYTHS AND THE NECESSITY OF CRIMINAL DISCOVERY AND DEPOSITIONS UNDER IOWA CRIMINAL LAW

### I. INTRODUCTION

Since 1969 the Supreme Court of Iowa has propounded two major opinions dealing with criminal discovery which have done much to make the right to a fair trial a meaningful one to the criminal defendant. In *State v. Eads*,[1] the Iowa supreme court gave explicit protection to the accused's right to inspect certain types of physical evidence in the hands of the prosecution.[2] In *State v. Peterson*,[3] the court overruled substantial Iowa precedent[4] by granting the accused in criminal cases the right to take discovery depositions of state witnesses.

The rule announced in *Peterson* makes Iowa one of the very few states to allow extensive use of depositions in criminal cases.[5] An analysis of Iowa criminal law, however, will reveal that without depositions, the established right of the accused to adequately prepare for trial[6] was, in some major re-

---

1. 166 N.W.2d 766 (Iowa 1969).

2. *Id.* The specific holdings of *State v. Eads* are as follows: (1) The defendant is entitled to production of physical evidence and scientific reports (collected by the F.B.I.) concerning information obtained from that evidence. (2) The trial court abused its discretion in requiring production by the state of statements of all witnesses expected to testify at trial; a defendant, however, may be entitled to a particular statement if he can show that it is necessary for his defense. (3) The defendant is not entitled to production of police investigatory reports.

3. 219 N.W.2d 665 (Iowa 1974).

4. The first Iowa decision expressly holding that there could be no depositions by defendants in criminal cases, unless the witness would be unavailable at trial time, was *State v. District Court of Iowa In and For Delaware County*, 253 Iowa 903, 114 N.W.2d 317 (1962) [hereinafter cited as *State v. District Court*]. For other cases following *District Court*, see note 48 *infra*.

5. It appears that Vermont is the only other state that allows unlimited use of depositions in criminal cases. *See* State v. Mahoney, 122 Vt. 456, 176 A.2d 747 (1961); Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967). A few other states that have patterned their criminal statutes after the federal rules permit the use of depositions only for the limited purpose of preservation of testimony or only upon a showing of necessity by the defendant. *See, e.g.*, FED. R. CRIM. P. 15, 16. Among these states are Florida, Missouri, New Hampshire and New Jersey. In most jurisdictions, depositions are not permitted as a matter of right, but the trial court has limited discretion to permit depositions in certain rare occasions. *See* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to Discovery and Procedure Before Trial*, at 86 (Tent. Draft. 1969) [hereinafter cited as A.B.A. MINIMUM STANDARDS]; Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865 (1968); *cf.* State v. Eads, 166 N.W.2d 766, 773 (Iowa 1969); Annot., 5 A.L.R.3d 819 (1966).

6. *State v. Eads*, 166 N.W.2d 766 (Iowa 1969), noted that the question of pretrial discovery presented "constitutional grounds close to the surface." *Id.* at 769. *Eads* also recognized that "we are obligated to afford a person charged with commission of a crime

spects, severely restricted despite the disclosure rights made explicit in *State v. Eads*.[7]

It is the purpose of this Note not only to show that the *Peterson* decision is a necessary corollary to *Eads*, but also to present the theoretical, statutory, and historical context from which *Peterson* arose. Such an analysis should familiarize the reader with the available discovery tools for the criminal defendant and the practical difficulties that may arise in the application of the *Peterson* rule.

## II. General Background of Criminal Discovery

The traditional rule of criminal discovery is that a person accused of a criminal offense is not, as a matter of right, entitled to inspection of evidence in the possession of the prosecution.[8] Superimposed upon this archaic general rule is a myriad of statutes, case law, and exceptions which significantly undercut the rule's vitality as a principle of law. Decisions in a given jurisdiction often reach different results on substantially similar fact patterns.[9] The rule often retains its full potency, however, as a tool by which courts can easily rationalize their decisions to deny the accused inspection or disclosure of requested evidence.[10]

Still further eroding the traditional rule's utility as a valid foundation of criminal law is the strong modern tendency of most state courts to relax this general rule whenever the circumstances and justice require. Most jurisdictions have recognized the modern liberal rule that the trial court has wide discretionary power to permit or to deny inspection of evidence in the possession of the prosecution under certain circumstances.[11] Courts have appeared more inclined to grant such inspection when the requested evidence is relevant and material to the case; is favorable to the accused; or where the inspection is necessary for a fair trial or to protect the accused's basic constitutional rights.[12]

### A. *The Eads Decision*

Recent Iowa cases evince that this liberal trend has influenced criminal law in Iowa. The Iowa court also has traditionally recognized as fundamental

---

a fair chance to defend himself" and that the "ultimate test against which our decision must be measured is that of a fair trial." *Id.* at 771. *See also* State v. Miller, 259 Iowa 188, 199, 142 N.W.2d 394, 401 (1966) (dissenting opinion).

7. 166 N.W.2d 766 (Iowa 1969).

8. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969); Annot., 7 A.L.R.3d 8, 19 (1966).

9. Decisions differ both within a single jurisdiction and between different jurisdictions. This may largely be due to the wide discretionary power of the trial court to compel disclosure when necessary. The court's discretion may vary according to relevant state statutes or with the different types of evidence involved. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969); Annot., 7 A.L.R.3d 8 (1966).

10. The most common rationale for refusing discovery is illustrated by *State v. District Court*, 253 Iowa 903, 114 N.W.2d 317 (1962).

11. State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969). *See also* Annot., 7 A.L.R.3d 8, 19 (1966).

12. State v. Eads, 166 N.W.2d 766 (Iowa 1969).

the right of the criminal defendant to adequately prepare for trial.[13] It is precisely at the point where the accused attempts to utilize modern discovery techniques, however, that the spectre of the traditional rule has raised difficult, if not impossible, obstacles in his path.

The most significant Iowa decision in this area had been *State v. Eads*,[14] which explicitly recognized the right of the criminal defendant to inspect physical evidence possessed by the prosecution in certain circumstances.[15] *Eads* also established the policy that "surprise and guile should, as far as possible, be removed from the arena in criminal trials just as it has in civil cases."[16]

Nonetheless, the precise holding of the *Eads* decision is somewhat restrictive in that it is anchored in the traditional notion that "in the absence of suppression of evidence favorable to a defendant, states do not violate due process by denying pre-trial discovery."[17] Thus, while recognizing the liberal modern trend, the *Eads* decision severely limited its application to Iowa law in that the court merely affirmed *State v. Burris*[18] which recognized the inherent discretionary power of the trial court to "require the state, upon application by the defendant, to permit an inspection under proper conditions of any and all exhibits which are used before the grand jury and which are intended to be offered in evidence upon the trial of the case."[19]

In reaching this conclusion, the court in *Eads* reviewed and approved the restrictive Iowa cases dealing with criminal discovery. Thus, in order to be allowed inspection of the state's evidence, it is still necessary for the accused not only to properly assert and vigorously pursue his right to inspect such evidence by timely request and with the proper procedure,[20] but he must often show facts justifying inspection or sufficient reason why inspection should be allowed.[21] A showing of necessity is often required, and inspection merely for exploratory purposes or "fishing expeditions" was not allowed.[22]

Of course, in order to fully comply with these requirements, the accused must request specific evidence.[23] The hard fact, however, is that if the accused is sufficiently informed to request specific evidence, he often does not need to inspect it. Disclosure and inspection of evidence is usually most beneficial to those who do not specifically know of the existence of the evidence or its contents in the first instance.

---

13. *See* note 6 *supra*.
14. 166 N.W.2d 766 (Iowa 1969).
15. *See* note 2 *supra*.
16. State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969).
17. *Id.* at 768.
18. 198 Iowa 1156, 1162, 198 N.W. 82, 85 (1924).
19. State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969).
20. State v. Bittner, 209 Iowa 109, 227 N.W. 601 (1929).
21. State v. Cook, 261 Iowa 1341, 158 N.W.2d 26 (1968); State v. Tharp, 258 Iowa 224, 138 N.W.2d 78 (1965).
22. State v. Eads, 166 N.W.2d 766, 770 (Iowa 1969); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210 (1963); State v. Kelly, 249 Iowa 1219, 91 N.W.2d 562 (1958).
23. State v. Eads, 166 N.W.2d 766, 770 (Iowa 1969); State v. Kelly, 249 Iowa 1219, 91 N.W.2d 562 (1958).

Justice Becker, in his concurrence in *Eads*, recognized the anomaly confronting the criminal defendant as a result of the court's refusal to allow discovery of statements made by witnesses:

> There is a basic inconsistency between recognition of the principle that suppression of evidence favorable to defendant violates due process and a refusal to allow a defendant to discover the evidence uncovered by the State. What we really say is: "The defendant can seek and obtain a new trial *if by accident* he discovers that favorable evidence has been suppressed." It does little good to recognize a right but deny the tools to implement that right.[24]

The necessity of criminal depositions is thus elucidated by the *Eads* decision: in order to be allowed inspection of physical evidence in the hands of the prosecution, the defendant must request specific evidence. In order to request specific evidence, the defendant must have a method by which he can ascertain the evidence that the state has in its possession which is relevant to his case. Until the *Peterson* decision, the criminal defendant had been deprived of any effective method by which he could do this.

Still further illustrating the necessity of criminal depositions to complement the rights of the defendant to inspect evidence explicated by *Eads* is the fact that the trial court's discretion to permit inspection often varies with the different types of evidence involved.[25] Courts in a given jurisdiction may freely allow the inspection of confessions made by the accused, be somewhat restrictive on statements made by witnesses, and yet take a hard stance in refusing discovery of reports made by the police or other investigating officers.[26]

The degree of liberality in allowing inspections by the accused of different types of evidence often varies with the particular circumstances surrounding each case, and consequently the availability of each type of evidence for inspection by the defendant is often difficult to ascertain. In light of the adamant requirement that the accused make a timely and detailed request for disclosure,[27] the practical result is that even the seasoned defense attorney often fails to take advantage of inspections of helpful evidence which may have been allowed. Evidence vital to the defendant may be withheld "at the whim of the state."[28]

### B. *Theoretical Context*

There have been numerous arguments presented against allowing liberal discovery rules in criminal cases.[29] Among the ones most often presented is the argument that it would be unfair to the state to require disclosure by the

---

24. State v. Eads, 166 N.W.2d 766, 775 (Iowa 1969) (concurring opinion) (emphasis in original).

25. *See* note 9 *supra.*

26. These "rules" are offered only for the purpose of illustration, and are not those of any specific jurisdiction. Iowa's rules are similar but no generalization can be made because whether discovery will be allowed depends on many variables. *See* State v. Eads, 166 N.W.2d 766 (Iowa 1969); Annot., 7 A.L.R.3d 8 (1966). *See also* note 2 *supra.*

27. *See* text at notes 19-23 *supra.*

28. State v. Eads, 166 N.W.2d 766, 775 (Iowa 1969) (concurring opinion).

29. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969); State v. District Court, 253

prosecution since the accused is protected against similar disclosure by the privilege against self-incrimination. In addition, criminal cases differ from civil cases in that the state has a much greater burden of proof in establishing the defendant's guilt. Therefore, as the argument concludes, civil rules of discovery cannot be made applicable to criminal cases because it would deny the state a fair trial.[30]

The arguments presented in favor of liberal criminal discovery[31] seem much more persuasive in light of the realities of criminal practice. It has been argued that the present criminal discovery rules greatly favor the prosecution rather than, as traditionally believed, the accused.[32] Combined with the enormous investigatory mechanism of the state, its ample resources, and its statutory power to examine all witnesses before trial,[33] it appears that the state has recouped most, if not all, of the advantage afforded the defendant by his privilege of self-incrimination.[34]

The proponents of liberal criminal discovery also advance concepts of fundamental fairness: that the aim and duty of the prosecutor under the adversary system must be the full disclosure of the truth and not merely conviction;[35] that trial by ambush cannot serve the goals of a modern and enlightened system of justice. There are many other arguments which have been presented both for and against liberal criminal discovery. A detailed analysis of these various theories is beyond the scope of this Note and has been fully developed in other sources.[36]

## III. Traditional Safeguards and the Necessity of Criminal Depositions under Iowa Law

Iowa's stance on criminal discovery and depositions prior to *State v. Peterson*[37] must be considered to determine if the rationale propounded in refusing criminal discovery adequately reflected the realities of criminal law and practice. It will be seen that although the Iowa court had adopted a liberal stance on some types of criminal discovery,[38] the spectre of the traditional and restric-

---

Iowa 903, 114 N.W.2d 317 (1962); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 Cal. L. Rev. 56 (1961); Annot., 7 A.L.R.3d 8 (1966).

30. *See* State v. District Court, 253 Iowa 903, 114 N.W.2d 317 (1962).

31. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969); A.B.A. Minimum Standards, *supra* note 5; Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 Cal. L. Rev. 56 (1961); Moore, *Criminal Discovery*, 19 Hastings L.J. 865 (1965); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437 (1972); 19 Drake L. Rev. 164 (1969); Annot., 7 A.L.R.3d 8 (1966).

32. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960).

33. Iowa Code § 769.19 (1973).

34. The recent Iowa decisions seem to adopt this view. *See, e.g.*, State v. Peterson, 219 N.W.2d 665, 669 (Iowa 1974); State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969).

35. *See* State v. Niccum, 190 N.W.2d 815 (Iowa 1971); State v. Comes, 245 Iowa 485, 62 N.W.2d 753 (1954); A.B.A. Minimum Standards, *supra* note 5, at 53, 73.

36. *See* notes 29 & 31 *supra*.

37. 219 N.W.2d 665 (Iowa 1974).

38. *See* State v. Eads, 166 N.W.2d 766 (Iowa 1969).

tive rule haunted a very large segment of Iowa law. In some crucial areas, the Iowa court still appeared willing to sacrifice the rights of the accused in order to pay homage to the image of the efficient administration of justice.[39] Hopefully, the *Peterson* decision has put an end to this unfortunate judicial predisposition.

### A. *Depositions in Iowa Criminal Cases*

#### 1. *The District Court Decision*

Section 781.10[40] of the *Iowa Code* provides that: "A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions."[41] In *State v. District Court of Iowa In and For Delaware County*,[42] the Supreme Court of Iowa held that this statute does not make discovery deposition procedure applicable to criminal cases. In a strained effort to avoid the express language of the statute, the court resorted to legislative intent and theoretical distinctions between civil and criminal law. The court also drew strength from the traditional arguments that liberal criminal discovery would result in unfairness to the state:

> [A]n analysis of the statutes and rules [of civil procedure] makes evident the intent of the legislature that the discovery deposition procedure applies only to civil cases. It is true the legislature did not express this intent in so many words; but there are many indicia which can lead to no other conclusion . . . .
>
> . . . .
>
> Running all through the discovery deposition procedures is the apparent intent that they be used by either party . . . but the State may not avail itself of it in a criminal case.[43]

The court suggested that "[a]n attempt to make complex Rules of Civil Procedure applicable by rule of thumb in criminal cases because of a supposed adopting statute is almost certain to lead to awkwardness and grave doubt."[44] While this argument remains academically interesting, the developments of the law in this area indicate that the court's interpretation, which effectively rendered section 781.10 of the *Iowa Code*[45] nugatory, may have generated even more confusion and uncertainty, at least for the criminal defendant, than would a literal interpretation of that statute.[46]

Most important for the purposes of this Note is the court's reflection upon the alleged "protective mechanisms" which the court felt adequately protected the accused and made criminal discovery superfluous:

---

39. *See* State v. Miller, 259 Iowa 188, 204, 142 N.W.2d 394, 404 (1966) (dissenting opinion).
40. IOWA CODE § 781.10 (1973).
41. *Id.*
42. 253 Iowa 903, 114 N.W.2d 317 (1962).
43. *Id.* at 908, 909, 114 N.W.2d at 320, 321.
44. *Id.* at 910, 114 N.W.2d at 321.
45. IOWA CODE § 781.10 (1973).
46. *Cf.* State v. Peterson, 219 N.W.2d 665 (Iowa 1974). *See also* note 31 *supra*.

> [Criminal depositions are] unnecessary for the protection of the accused, unfortunate and undesirable . . . . [A] defendant in a criminal case has had all the protection that can be legitimately needed or afforded by discovery. He is furnished with a copy of the indictment; the names of the prosecution's witnesses must be furnished him . . . [t]he minutes of the testimony before the grand jury, or the substance of the proposed testimony of each witness if the cause is prosecuted by true information, must be furnished him.[47]

Subsequent Iowa cases[48] that have dealt with criminal discovery depositions have simply relied upon *District Court* as authority for the proposition that the rules governing discovery depositions in civil cases are not applicable to criminal cases in spite of the express language of section 781.10 of the *Iowa Code*.[49] These decisions have interpreted this statute as giving the criminal defendant a right to take the deposition of a witness only when it appears that the witness may be unavailable at the time of trial.

In denying the right of an accused to take depositions, these decisions have also emphasized the same procedural safeguards afforded the accused which allegedly make criminal discovery unnecessary and undesirable as hypothecated in *District Court*. Two questions which are presented by this rationale but which have not been examined by the courts until recently are: (1) whether these "safeguards" are as effective in protecting the accused as the courts have assumed; and (2) assuming they are effective in providing the minimum protection required by due process,[50] do the liberal discovery rules present any substantive dangers to the state which outweigh the advantages they afford to the criminal defendant? As previously mentioned, this latter question will not be entertained in detail by this Note,[51] although the Iowa court has recently recognized that the arguments presented in favor of liberal criminal discovery are more persuasive than those raised against it.[52] The effectiveness of these "protective mechanisms" will be examined in detail later in this Note.

2. *The Peterson Decision*

In *State v. Peterson*[53] the Supreme Court of Iowa departed from

47. State v. District Court, 253 Iowa 903, 911, 114 N.W.2d 317, 322 (1962).

48. *See, e.g.*, State v. Rankin, 181 N.W.2d 169 (Iowa 1970); State v. Eads, 166 N.W. 2d 766 (Iowa 1969); State v. Gates, 260 Iowa 772, 150 N.W.2d 617 (1967); State v. McClain, 256 Iowa 175, 125 N.W.2d 764 (1964). *Contra* State v. Cowman, 212 N.W.2d 420 (Iowa 1973) where the court totally ignored this precedent and held that "[a] defendant in a criminal action may depose witnesses on notice or commission in the same manner as in civil cases. Section 781.10, The Code." *Id.* at 423. *Cowman* was not heavily relied upon in *Peterson*, where the court reached the same conclusion only after a discussion of *District Court* and its progeny.

49. IOWA CODE § 781.10 (1973).

50. *State v. Eads*, 166 N.W.2d 766 (Iowa 1969) affirmed the principle that "in the absence of suppression of evidence favorable to a defendant, states do not violate due process by denying pre-trial discovery." *Id.* at 768. *See* Giles v. Maryland, 386 U.S. 66 (1966); Brady v. Maryland, 373 U.S. 83 (1963); State v. Tharp, 258 Iowa 224, 138 N.W.2d 78 (1965).

51. *See* text at note 36 *supra*.

52. *Cf.* State v. Peterson, 219 N.W.2d 665 (Iowa 1974); State v. Eads, 166 N.W.2d 766 (Iowa 1969).

53. 219 N.W.2d 665 (Iowa 1974).

the anachronistic rule which dominated Iowa criminal law since its origin in the *District Court* decision. The supreme court succinctly held that "[w]e overrule *State v. District Court* (Delaware County) and now hold a defendant, by the authority of §781.10, the *Code*, may take discovery depositions of State's witnesses. The denial of defendant's application to take discovery was [reversible] error."[54]

In reaching this decision, the court first noted that section 781.11 of the *Iowa Code*[55] has provided the defendant with the right to perpetuate testimony. "[T]he right to perpetuate testimony under § 781.11 arises when one becomes apprehensive of possible prosecution. But the right does not terminate with the bringing of an action . . . . It is apparent our interpretation of §781.10 renders it a useless restatement of the section that follows it."[56]

The court then rejected the arguments presented in *District Court* which denied criminal depositions. Noting that *District Court* relied heavily on legislative intent to limit the operation of discovery rules[57] to civil cases (e.g., the fact that such discovery cannot be entirely reciprocal since the defendant cannot be deposed by virtue of his privilege of self-incrimination), the court stated that:

> One might challenge whether legislative intent is involved at all. Under § 684.19, The Code, the legislature is given a veto and right to amend our changes in procedural rules. Rule changes might well be said to reflect judicial rather than legislative intent. In any event, § 781.10 *expressly* applies only to criminal defendants.[58]

Furthermore, with regard to the state's ability to procure extensive criminal discovery in spite of the defendant's privilege of self-incrimination, the court severed its umbilication with the traditional and unrealistic notion that the state is at a disadvantage:

> Except as to the defendant himself the State does have an effective means of obtaining discovery over defense witnesses. § 769.19, The Code, directs the clerk of district court to ". . . issue subpoenas for such witnesses as the county attorney may require, and in such subpoenas shall direct the appearance of said witnesses before the county attorney at a specified time and place . . ." for the purpose of examination by the State . . . .[59]

Undoubtedly, the state's ability to examine witnesses under the *Iowa Code*,[60] together with its investigatory mechanisms, had previously given the state an enormous advantage in uncovering evidence for trial preparation.[61] Allowing the criminal defendant the same privilege of examining witnesses before trial

54. *Id.* at 669.
55. IOWA CODE § 781.11 (1973).
56. State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974).
57. IOWA R. CIV. P. 140 *et seq.*
58. State v. Peterson, 219 N.W.2d 665, 669 (Iowa 1974) (emphasis added).
59. *Id.* at 669.
60. IOWA CODE § 769.19 (1973).
61. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

should do much to equalize this unjustified imbalance. It should also do much to give substance to the fundamental right of the criminal defendant to adequately prepare for trial.[62]

The court in *Peterson* next addressed the argument presented by *District Court* that "the information to be sought by way of discovery for a criminal defendant is otherwise available to him in our criminal procedures, particularly in the minutes of testimony attached to the indictment or county attorney's information."[63] *Peterson* implicitly recognized the ineffectiveness of these other safeguards when the court stated: "To prohibit discovery because of the minutes of testimony seems bitter irony to the defendant. We have consistently refused to reverse a conviction for allowing testimony beyond the minutes."[64]

### B. *Effectiveness of Traditional Safeguards*

In order to fully appreciate the necessity of criminal depositions under present Iowa law, it is necessary to scrutinize the effectiveness of these "other safeguards"[65] which were relied upon in *District Court* and countless other Iowa criminal decisions[66] to protect the rights of the defendant. An analysis of these safeguards will show that the Iowa decisions not only invalidly assumed their effectiveness, but also ignored the numerous practical difficulties confronting the accused when he attempted to utilize them in his defense. Since *District Court* and its progeny relied heavily on the effectiveness of these safeguards as justification for refusing criminal depositions, a showing that their reliance was largely misplaced would seem to compel the recognition by the courts that depositions are required to be furnished the criminal defendant under existing Iowa statutes.[67]

#### 1. *Statutory Notice to the Defendant of Witnesses' Testimony*

Section 780.10 of the *Iowa Code*[68] provides as follows:

> The county attorney . . . shall not be permitted to introduce any witness who was not examined before a committing magistrate or grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant . . . a notice in writing stating the name . . . of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial.[69]

Thus, the accused is supposedly furnished with the substance of the witnesses' testimony either by the indictment or information, or the notice of ad-

---

62. *See* note 6 *supra.*
63. State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974).
64. *Id.* at 668, 669. The defendant in *Peterson* had also raised the issue on appeal that it was reversible error for the trial court to allow testimony beyond the minutes of testimony. *See* text at note 68 *infra.*
65. *See* text at note 47 *supra.*
66. *See* cases cited in note 48 *supra.*
67. *Cf.* State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974); State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969).
68. IOWA CODE § 780.10 (1973).
69. *Id.*

ditional testimony pursuant to the statute.[70] It must be remembered, however, that the common law rule was that there may be no depositions in criminal cases,[71] and any attempt by the defendant to question the listed witnesses before trial would have been viewed with disfavor by the court.[72] The effectiveness of section 780.10[73] and its related privileges[74] as a safeguard to the accused is severely hampered by the limited scope given them by the Iowa court. In *State v. Bennet*[75] it was held that section 780.10[76] does not require that letters to be introduced in evidence be referred to in the grand jury minutes attached to the indictment, nor that notice that they would be introduced in evidence be served on the defendant. Similarly, in *State v. Drosos*,[77] the court held that spent bullets which were discovered at the scene of the crime were admissible although not mentioned in the notice of additional testimony.

*State v. Schlater*[78] held that the refusal of the trial court to order the county attorney to produce a statement made by a person before the grand jury so it might be offered in evidence by the defendant did not amount to suppression of evidence which denied defendant a fair trial, where such statement was not presented to the grand jury in support of the indictment, and where it contained no exculpatory evidence to the defense except such as it tended to show an alibi. In addition, *State v. Frommelt*[79] held that a defendant is not entitled to a copy of grand jury minutes of a witness called by the defense since the witnesses' testimony at trial was substantially the same as that given before the grand jury.

Further discrediting the Iowa court's reliance on the protection afforded a criminal defendant by the "safeguard" is its interpretation of the express language of section 780.10.[80] The court has generally agreed that the purpose of the statute is to secure the accused such knowledge of the evidence which will be given against him, as well as enable him to make preparation to contradict or explain it. The court has also agreed that the accused must be informed with sufficient certainty as to the witness who will testify against him, and the substance and effect of his evidence.[81]

In spite of this interpretation of the purpose of section 780.10,[82] the Iowa

70. *Id.*
71. *See* State v. Eads, 166 N.W.2d 766, 773 (Iowa 1969).
72. The common law rule, however, had been modified in Iowa, as in many jurisdictions, by the modern trend which allowed the trial court, in its discretion, to permit discovery of statements made by witnesses to the prosecution under certain circumstances. *See* State v. Eads, 166 N.W.2d 766 (Iowa 1969); Annot., 7 A.L.R.3d 8 (1966). There is some authority for the proposition that the defendant in a criminal case may freely interview a witness before trial if the witness consents. *See* 48 IOWA L. REV. 696, 698 & n.9 (1963).
73. IOWA CODE § 780.10 (1973).
74. *See* text at note 47 *supra.*
75. 137 Iowa 427, 110 N.W. 150 (1908).
76. IOWA CODE § 780.10 (1973).
77. 253 Iowa 1152, 114 N.W.2d 526 (1962).
78. 170 N.W.2d 601 (Iowa 1969).
79. 159 N.W.2d 532 (Iowa 1968).
80. IOWA CODE § 780.10 (1973).
81. *See* State v. Miller, 259 Iowa 188, 199, 142 N.W.2d 394, 403 (1966) (dissenting opinion); State v. Rainsbarger, 74 Iowa 196, 37 N.W. 153 (1888).
82. IOWA CODE § 780.10 (1973).

court has consistently held that prosecution witnesses, whose grand jury testimony was attached to the indictment, may testify at the trial to matters not testified to before the grand jury, without notice to the accused of such additional testimony.[83] Similarly, the prevailing view in Iowa has consistently been that the testimony of a witness need not be limited to the subject matter of the notice.[84] This interpretation of section 780.10,[85] however, has remained an unsettled area of criminal law and had never been unanimously accepted until the *Peterson* decision.[86]

Iowa courts which had followed this general rule had tempered their decisions by the recognition of their inherent power to reverse decisions which have improperly allowed such testimony not listed in the indictment or notice of additional testimony.[87] However, the Iowa supreme court would usually refuse to reverse because the defendant did not raise the objection in the trial court;[88] because the additional testimony did not vary substantially from that contained in the minutes attached to the indictment or notice;[89] or because the noncompliance with section 780.10[90] did not affect the substantial rights of the defendant.[91]

The majority had often reminded the prosecution that by timely filing the minutes of the additional testimony, the state will follow the "safer, better, and fairer practice."[92] In dealing with section 780.10,[93] however, the Iowa courts prior to *Peterson* had conveniently forgotten the importance they had placed on this statute as a safeguard to a criminal accused's ability to prepare for trial in *District Court* and its progeny.[94] The only protection that the majority has ever given to the right afforded the criminal accused under the statute is the reminder to the prosecution in *State v. Miller*[95] that "[w]e suggest to prosecutors that from abundance of caution, and so there can be no claim of unfairness, the substance of what the state expects to prove by the respective witnesses be furnished."[96]

The dissent in *Miller* criticizes the majority's interpretation at length and urges the court to recognize the importance of the statute in criminal cases. The dissent states that the precedent in this area "recognizes the purpose and object of the statute but refuses to enforce it 'in order that the administration of justice

83. State v. Thom, 236 Iowa 129, 17 N.W.2d 96 (1945); State v. Boggs, 166 Iowa 452, 147 N.W. 934 (1914); State v. Bowers, 17 Iowa 46 (1864).
84. State v. Peterson, 219 N.W.2d 665 (Iowa 1974); State v. Powell, 237 Iowa 1227, 24 N.W.2d 769 (1946); State v. Yetzer, 97 Iowa 423, 66 N.W. 737 (1896).
85. Iowa Code § 780.10 (1973).
86. State v. Peterson, 219 N.W.2d 665 (Iowa 1974).
87. *See, e.g.*, State v. Miller, 259 Iowa 188, 196, 142 N.W.2d 394, 399 (1966).
88. State v. Bruno, 204 N.W.2d 879, 886 (Iowa 1973).
89. *See* State v. Miller, 259 Iowa 188, 196, 142 N.W.2d 394, 399 (1966).
90. Iowa Code § 780.10 (1973).
91. State v. Miller, 259 Iowa 188, 196, 142 N.W.2d 394, 399 (1966); State v. Rainsbarger, 74 Iowa 196, 37 N.W. 153 (1888).
92. State v. Salter, 162 N.W.2d 427, 431 (Iowa 1968).
93. Iowa Code § 780.10 (1973).
94. *See* note 48 *supra*.
95. 259 Iowa 188, 142 N.W.2d 394 (1966).
96. *Id.* at 196, 142 N.W.2d at 400.

might be maintained and not defeated' . . . . Notice need not be given as to *important matters* lest failure to give notice in *unimportant matters* 'defeat justice.' "[97]

The *Miller* dissent cites *State v. Harlan*[98] in stressing that the requirements of section 780.10[99] "are for the purpose of imparting to the accused such knowledge of the evidence which will be given against him as will enable him to make proper preparation to contradict or explain it. . . ."[100] The dissent in *Miller* also cites *State v. Bowers*[101] for the proposition that the effect of allowing a witness to testify to new substantive matters not contained in the indictment is that "[t]he object of requiring the testimony to be returned with the indictment, would thus in very many instances, be practically defeated."[102]

Finally, the *Miller* dissent summarizes the importance which should be given to the statutory rights granted the accused by Iowa law:

> Admission of [such] testimony . . . violates the statute; just as the admission of evidence secured by illegal search and seizure violates the constitution. The difference is that the latter protection is afforded by the Federal Constitution and the United States Supreme Court could, and finally did, do something about it. Here the right (and protection) is afforded by the legislature of the State of Iowa . . . . [T]his court must recognize its own responsibility to follow a constitutionally valid statute . . . .
>
> . . . .
>
> We function under an adversary system. Failure to abide by procedural rules reasonably promulgated by statute can only mar the tradition of fair jury trials.[103]

This characterization of the importance of criminal procedural rules in protecting the rights of the accused retains its vitality as an argument in favor of liberal discovery and depositions in criminal cases. Both *Eads* and *Peterson* echoed the necessity of viewing the procedural rights of the accused as intimately related to fundamental rights.[104]

As discussed above, the reliance of *District Court* and its progeny on these particular safeguards which the court had assumed adequately protected the rights of the accused is unjustified. The restrictive interpretation given these safeguards by the court had either rendered these devices nugatory or placed such a heavy burden on the accused that the safeguards were made practically ineffective. *State v. Eads*[105] recognized the problem created by the court's

---

97. *Id.* at 204, 142 N.W.2d at 404 (dissenting opinion) (emphasis in original).
98. 98 Iowa 458, 67 N.W. 381 (1896).
99. IOWA CODE § 780.10 (1973).
100. State v. Harlan, 98 Iowa 458, 460, 67 N.W. 381, 382 (1896).
101. 17 Iowa 46 (1864).
102. *Id.* at 51.
103. State v. Miller, 259 Iowa 188, 204, 142 N.W.2d 394, 404 (1966) (dissenting opinion).
104. *See* note 6 *supra.*
105. 166 N.W.2d 766 (Iowa 1969).

traditional passive reliance on these alleged protective mechanisms: "The State cannot discharge its duty to give the defendant a fair trial simply by extending 'safeguards' with one hand and withdrawing them with another."[106]

The Iowa supreme court in *State v. Peterson*,[107] however, unanimously followed the rule that state witnesses may testify to matters not contained in the indictment. Of course, by recognizing the right of a criminal defendant to depose state witnesses, strict adherence to the express language of section 780.10[108] is not essential for adequate trial preparation by the defense. Section 780.10[109] will continue to serve the important function of generally informing the accused of the substance of each witness' testimony, thereby eliminating the necessity for the defendant to depose each and every witness before trial. If the prosecution or the courts become dilatory in complying with the notice requirements of section 780.10,[110] the result may be unnecessary delay and expense for both litigants.

2. *Other Safeguards*

In addition to the safeguards traditionally relied upon to protect the accused, other developments in criminal law may be said to have afforded the accused a greater measure of access to information in the possession of the state. Among these are the right of the defendant to obtain the disclosure of exculpatory evidence, the right of the defendant to conduct his own investigation, and also the recognized discretion of the trial court to allow the accused inspection of certain types of evidence in the possession of the prosecution.

An analysis of these developments will reveal that although they afford the accused a greater amount of protection, they alone by no means afford definitive access to information on which the accused may rely. These other devices may become subjected to the same restrictive interpretation and unfavorable judicial attitude as did the traditional protective mechanisms espoused in *District Court*. Because these devices depend almost entirely upon the complete discretion of the court, or upon the good faith of the prosecution, and because they vary greatly with the type of evidence sought and the circumstances of each case, they cannot be relied upon as justification for denying the accused the right to take criminal depositions as expressly provided by section 781.10[111] of the *Iowa Code*.

a. *Right of the Defendant to Conduct An Investigation*

It has been asserted that the defendant has the same opportunity to uncover the facts of a given case as does the state, and therefore discovery in

106. *Id.* at 771.
107. 219 N.W.2d 665, 674 (1974).
108. IOWA CODE § 780.10 (1973).
109. *Id.*
110. *Id.*
111. IOWA CODE § 781.10 (1973).

criminal cases is unnecessary.[112] *State v. Eads*[113] rejected this argument in toto, recognizing that the state not only has unlimited manpower and resources, but is able to investigate immediately after the occurrence, while the trail is still fresh. The accused, on the other hand

> is frequently in custody; more often than not he is without funds; and seldom has he any opportunity to make an investigation or to engage in the fact-finding process so vital to his later defense. . . . If perchance the defendant should be able to conduct his own investigation, the trail is often cold when he starts after his evidence and ordinary sources of information have dried up. The argument has been made he already knows most of these things, and this is true if he is guilty. *But at this point he is presumed to be innocent.*
>
> If this presumption is anything other than meaningless maxim, we are obligated to afford a person charged with commission of a crime a fair chance to defend himself . . . . He cannot adequately defend himself if he is denied access to the facts. . . .[114]

It is in this light that the necessity of criminal depositions becomes most apparent. The state need not put on the accused's case, but the accused should have sufficient access to the facts of the case in order that he be able to present an adequate defense, and not be forced to fight in the dark.[115]

In any event, refusal to permit criminal discovery or depositions often has the practical result of concealing the facts of the case from the defendant when the state has had complete access to every possible informative source with the exception of the criminal defendant. In addition, it results in unnecessary expense and often futile duplicative investigatory effort on the part of the accused, and places on him an unwarranted and heavy burden.[116] The Iowa court in *Peterson* has taken the initial step in eliminating that unjustified burden by allowing depositions of state witnesses by the defendant in criminal cases.

b. *Right of the Accused to Obtain Disclosure of Exculpatory Evidence*

In *Moore v. Illinois*,[117] the United States Supreme Court enumerated three elements which compose the rule of *Brady v. Maryland*.[118] *Brady* held that the United States Constitution required the states to disclose exculpatory evidence to criminal defendants in certain circumstances. The Court in *Moore* said that:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where

112. *See* State v. White, 260 Iowa 1000, 151 N.W.2d 552 (1967); State v. Tharp, 258 Iowa 224, 138 N.W.2d 78 (1965).
113. 166 N.W.2d 766, 771 (Iowa 1969).
114. *Id.* at 771 (emphasis in original).
115. State v. Peterson, 219 N.W.2d 665 (Iowa 1974); State v. Eads, 166 N.W.2d 766 (Iowa 1969).
116. *Cf.* State v. Peterson, 219 N.W.2d 665, 669 (Iowa 1974); State v. Eads, 166 N.W. 2d 766, 771 (Iowa 1969).
117. 408 U.S. 786 (1972).
118. 373 U.S. 83 (1963).

> the evidence is favorable to the accused and is material either to guilt or to punishment. Important then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct . . . is to be measured. . . .
>
> We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.[119]

The good or bad faith of the prosecution in withholding the exculpatory evidence is not a factor.[120]

The Supreme Court of Iowa has held that, in order to fulfill the requirements of *Brady* and *Moore* and thereby be entitled to disclosure of exculpatory evidence, the defendant must request specific evidence. A general request for all exculpatory evidence in the possession of the police or prosecution will usually not suffice.[121] There is Iowa authority, however, for the proposition that it is reversible error for the prosecution to withhold materially exculpatory evidence in the absence of a specific request or even when the defendant fails to make a request at all.[122] *State v. McClain*[123] imposes an affirmative duty on the prosecutor "to see that a person charged with a crime has a fair trial. Under no circumstances would we condone suppression of important evidence."[124]

A few Iowa decisions[125] subsequent to *McClain* have continued to stress that suppression of important evidence may be reversible error although these cases do not mention the requirement that the defendant make a specific request as demanded by *State v. Aossey*.[126] It appears that the distinction between these two lines of cases, if there is one, is between the suppression by the state of highly exculpatory evidence as opposed to other evidence that may be only slightly helpful to the defendant.

*State v. Peterson*[127] is the first Iowa decision in which a ground for reversal was the failure of the prosecution to disclose exculpatory evidence upon defendant's general request for "any exculpatory evidence known to the State."[128] In *Peterson* it appears, in light of the circumstances of the case, that the evidence withheld could have been materially exculpatory to the defend-

---

119. Moore v. Illinois, 408 U.S. 786, 794-95 (1972).
120. Brady v. Maryland, 373 U.S. 83, 87 (1963).
121. *Cf.* State v. Houston, 209 N.W.2d 42, 46 (Iowa 1973); State v. Aossey, 201 N.W. 2d 731, 734 (Iowa 1972); State v. Galloway, 167 N.W.2d 89, 92 (Iowa 1969); State v. Eads, 166 N.W.2d 766, 770 (Iowa 1969); State v. McClain, 256 Iowa 175, 181, 125 N.W.2d 764, 767 (1964).
122. *Cf.* State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974); State v. Houston, 209 N.W.2d 42, 47 (Iowa 1973); State v. Niccum, 190 N.W.2d 815 (Iowa 1971); State v. Eads, 166 N.W.2d 766 (Iowa 1969).
123. 256 Iowa 175, 125 N.W.2d 764 (1964).
124. *Id.* at 184, 125 N.W.2d at 769 (1964).
125. *See* cases cited note 122 *supra.*
126. 201 N.W.2d 731 (Iowa 1972). *See also* cases cited note 121 *supra.*
127. 219 N.W.2d 665 (Iowa 1974).
128. *Id.* at 674.

ant.[129] In addition, the conduct of the prosecution seemed to be questionable.[130] The *Peterson* decision did not explicitly make the above distinctions, but instead used unqualified language in reversing defendant's conviction:

> Prosecutors are also cautioned that suppression of exculpatory material is reversible error. . . . Under our cases the defense was entitled to the exculpatory evidence in order to investigate it and to use it both in trial preparation and in the trial itself. It is no answer that the State does not believe the evidence to be true or believes it could object to it when offered. The failure to furnish this information to the defendant constituted grounds which demanded the sustaining of defendant's motion for a new trial.[131]

It must be remembered that *Peterson* also overruled substantial Iowa precedent that held there could be no depositions of state witnesses in criminal cases. Prior to *Peterson*, although the policy of the court may have been that the defendant is entitled to disclosure of exculpatory evidence, the court consistently refused him the tools by which he could implement this policy.[132] Under previous decisions, the defendant could not obtain disclosure of exculpatory evidence unless (1) he discovered by accident that the state possessed exculpatory evidence or (2) he had made a timely and specific request for such evidence or (3) the prosecution decided that the evidence was sufficiently exculpatory to warrant disclosure.[133]

In this light, the importance of criminal depositions as a tool to implement the policy succinctly stated in *Peterson* becomes readily apparent. A system of justice that leaves the defendant's fundamental right of a fair trial[134] to chance or at the mercy of the prosecution's discretion would be contrary to the basic tenets of the adversary system. It would also appear to be violative of the due process clause of both the United States Constitution[135] and the Iowa constitution.[136] Allowing the defendant to take depositions in criminal cases is a necessary and effective method under existing Iowa law to insure his right of access to exculpatory and other relevant evidence. Such access is vital to

---

129. The defendant in *Peterson* established that another person made self-incriminating statements to a gas station attendant who worked near the scene of the crime. The statements were made only a few hours after the murder and before it had been discovered. The defendant uncovered this evidence only after the trial was completed. State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974).

130. The state, although it had taken statements from the gas station attendant and had investigated the person in question, resisted defendant's motion for a bill of particulars on the ground that it knew of no exculpatory evidence. State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974).

131. *Id.*

132. *See* State v. Miller, 259 Iowa 188, 199, 142 N.W.2d 394, 401 (1966) (dissenting opinion).

133. *Cf.* State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974).

134. The right to a fair trial is considered by Iowa decisions to include the right of the defendant to adequately prepare for trial. *See* note 6 *supra*.

135. U.S. CONST. AMEND. XIV. For a discussion of the constitutional issues related to criminal discovery, see Nakell, *Criminal Discovery for the Defense and the Prosecution —The Developing Constitutional Considerations*, 50 N.C. L. REV. 437 (1972).

136. IOWA CONST. art. I, § 9.

the defendant's ability to adequately prepare his defense. Without either, the right to a fair trial is subject to compromise.

c. *Defendant's Right to Inspect Certain Types of Evidence in the Hands of the Prosecution*

It is possible to make the argument that the modern rules of criminal discovery allow liberal inspection to the defendant and therefore make criminal depositions unnecessary in Iowa. But, as discussed earlier in this Note, the difficulty with the rules of criminal discovery in Iowa and most states is that (1) discovery is discretionary with the trial court;[137] (2) the availability of discovery depends upon the type of evidence requested and the facts of each case;[138] and (3) the rules are consequently difficult to ascertain. These characteristics of the discovery rules in themselves indicate that criminal depositions are necessary as a complement to the existing Iowa discovery rules rather than as an undesirable and unnecessary alternative to them.

## IV. Conclusion

The principles relating to criminal depositions announced in *State v. Peterson*[139] are in many ways a departure from Iowa precedent. Nonetheless, they are in harmony with the current Iowa criminal statutes, the modern trend of criminal discovery, and the basic principles underlying the adversary system.

When viewed in context, *Peterson* makes three propositions evident. First, liberal criminal discovery has won judicial acceptance in Iowa. The traditional notions espoused by *District Court* pertaining to the effectiveness of the other "safeguards" in protecting the accused and the undesirability of criminal discovery have been shown by experience to be invalid. Secondly, criminal depositions are necessary under current Iowa law in order to protect the fundamental rights of the accused. Finally, there is a desperate need for re-evaluation and legislation in this area because "[t]he decisional method is not well suited for use in embarking upon a new criminal discovery system."[140]

A provision for unlimited depositions is not absolutely necessary to protect the rights of the accused in every system of criminal justice.[141] Under current Iowa law, depositions are necessary because the accused has no other effective method to safeguard his right to a fair trial. Before the use of criminal depo-

137. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969).
138. *Id. See also* Dunahoo, *Iowa Criminal Law, Survey of Iowa Law*, 23 Drake L. Rev. 55, 101 (1973); 19 Drake L. Rev. 164 (1969); Annot., 7 A.L.R.3d 8 (1966).
139. 219 N.W.2d 665 (Iowa 1974).
140. *Id.* at 675 (dissenting opinion).
141. Neither the *Federal Rules of Criminal Procedure* nor the *A.B.A.'s Minimum Standards for Criminal Justice* include provisions for unlimited use of criminal depositions. *See* Fed. R. Crim. P. 15(a); A.B.A. Minimum Standards, *supra* note 5, at 86. However, both the Federal rules and A.B.A. standards, unlike Iowa criminal law, have provided comprehensive statutory schemes incorporating liberal criminal discovery rules. *See* Fed. R. Crim. P. 15 & 16; A.B.A. Minimum Standards, *supra* note 5.

sitions can be retained or rejected in any system of criminal justice, the question that must be asked is whether, under that particular system, the disadvantages presented by the liberal use of criminal depositions outweigh the degree of protection that they afford the defendant.[142]

JACK L. BROOKS

142. The adverse consequences allegedly resulting from liberal criminal depositions are actually less dramatic than those hypothecated in *District Court*. In fact, Vermont's experience with unlimited depositions has shown that they have facilitated rather than impeded Vermont's criminal justice system. The only rational basis on which to exclude extensive depositions, therefore, may be "[t]he belief that depositions in addition to the disclosures otherwise required by . . . [the comprehensive statutory scheme] will not be necessary in most criminal cases." A.B.A. MINIMUM STANDARDS, *supra* note 5, at 87. *See also* Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).