COMMENTS

Criminal Discovery: The Use of Notices to Produce

In a case decided in 1975, *Chenault v. State*,[1] the Georgia Supreme Court stated: "There is no Georgia statute or rule of practice which allows discovery in criminal cases."[2] Later in 1975, this statement was qualified by *Jarrell v. State*,[3] in which the court said: "[T]here is no statute or rule of procedure in force in Georgia governing *pre-trial* discovery in criminal cases."[4]

At the present time there is some confusion about what material is required to be produced by the State in criminal cases under a notice to produce. This comment relates what the Georgia courts have held and the direction which future decisions may take.

During 1976, in *Brown v. State*,[5] the Georgia Supreme Court held that title 38, section 801(g) of the Georgia Code[6] could be used by a defendant in a criminal trial to compel the State to produce books, writings, documents, or tangible objects at trial. Section 801(g) provides:

> Notice to Produce - Where a party desires to compel production of books, writings or other documents or tangible things in the possession, custody or control of another party, in lieu of serving a subpoena under this section, the party desiring such production may serve a notice to produce upon counsel for such other party. . . . The notice shall be in writing, signed by the party seeking production of the evidence, or his attorney and be directed to the opposite party or his attorney.

Section 38-801(g) is made applicable to criminal trials by §38-802,[7] which provides that "[s]ection 38-801 shall apply to all civil cases, and, insofar as consistent with the Constitution, to all criminal cases."

In *Brown*, the defendants filed a motion for disclosure pursuant to *Brady v. Maryland*,[8] as well as notice to produce under §38-801(g). The State contended that the defendants were limited to obtaining exculpatory material and that the defendants must show that they were prejudiced by denial of the material. The court in *Brown* stated that these requirements arose from *Brady* and that the notice to produce provision of the Georgia

1. 234 Ga. 216, 215 S.E.2d 223 (1975).
2. *Id.* at 221, 215 S.E.2d at 227.
3. 234 Ga. 410, 216 S.E.2d 258 (1975).
4. *Id.* at 418, 216 S.E.2d at 266 (emphasis added).
5. 238 Ga. 98, 231 S.E.2d 65 (1976).
6. GA. CODE ANN. §38-801(g) (1974).
7. GA. CODE ANN. §38-802 (1974).
8. 373 U.S. 83 (1963).

Code does not require that the material be exculpatory, nor that there be a showing of prejudice by a denial of the material sought.[9] The State also contended that §38-801(g) is limited to obtaining a copy of the accusation and a list of witnesses. The court refused to so limit §38-801(g) because the notice to produce would be unnecessary since the defendant already has a right to obtain a copy of the accusation and a list of witnesses.[10]

The court specifically declined to decide which books, writings, documents, or tangible objects are required to be produced. The case was remanded to the trial court to determine whether production should have been required and, if so, whether a new trial was justified.

Since the *Brown* decision, the lower courts have been grappling with the questions of what is required and when. In *Pless v. State,*[11] the trial court had denied a pre-trial notice to produce. The notice requested "copies of all statements of witnesses, scientific data, a list of items seized, and a list of all persons who had knowledge, information or records concerning the instant case."[12] The Georgia Court of Appeals held that under *Brown,* §38-801(g) applies only to the production of documents *at trial.* Furthermore, there was no abuse of discretion under *Brady* because the items did not exculpate the defendant.

In *Haynie v. State,*[13] the court of appeals held that upon a notice to produce the State had to produce a bullet lodged in the back of a victim. The defendant hoped to show that the bullet had not been fired from a pistol which the defendant had turned in to the police. However, the Georgia Supreme Court reversed, holding that the removal of the bullet from the victim would be an unreasonable search that violated the victim's fourth amendment rights.[14] As Justice Hall said in a concurring opinion,[15] the majority's approach could not be squared with *Creamer v. State.*[16]

The court in *Creamer* held that it was not violative of the Fourth Amendment to require an accused to submit to surgery in order to obtain a bullet fired by a victim. A better rationale for the decision in *Haynie* would have been that surgery should be required only where a strong showing of relevance is made. In *Haynie,* the production of the bullet would have proved very little because the gun was turned in by the defendant and may or may not have had any connection with the crime. Also preferable to the fourth amendment basis of the majority's opinion would

9. 238 Ga. at 100, 231 S.E.2d at 67 (1976).

10. GA. CODE ANN. §27-1403 (1978) provides: "Every person charged with an offense against the laws shall be furnished, on demand, previously to his arraignment, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded."

11. 142 Ga. App. 594, 236 S.E.2d 842 (1977).

12. *Id.* at 595, 236 S.E.2d at 843.

13. 141 Ga. App. 688, 234 S.E.2d 406 (1977).

14. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978).

15. *Id.* at 873 (Hall, J., concurring).

16. 229 Ga. 511, 192 S.E.2d 350 (1972).

have been a holding that the victim was not a party to the criminal action and that since §38-801(g) applies only to parties, the State can not be required to produce the bullet. By basing the decision on one of the above grounds, the court could have avoided creating a barrier in the path of any future attempts by the legislature to expand Georgia's criminal discovery law.

There is also some confusion in the cases about whether §38-801(g) may be used to compel the State to produce prior statements of the State's witnesses. Such statements may be valuable to the defense for purposes of impeachment. During the September, 1977 term, the court of appeals stated that the proper way to obtain these statements was by a motion to produce. In *James v. State,*[17] the defendant's attorney had orally requested during trial that he be allowed to examine a witness' statement. The court stated that technically there was no notice to produce since the request was oral and came during trial. However, since at the time of trial *Brown* had not been decided and because the trial court had not examined the statements, the case was affirmed with the direction that the trial court examine *in camera* the statements and order a new trial if anything exculpatory or of an impeaching nature was found. Later during the same term, in *Barker v. State,*[18] the same court interpreted *Brown* as not requiring the State to turn over the statements of a witness. However, in *Barker* the items requested were summaries of verbal statements given to the police, and the trial judge agreed to keep them before him and to notify defense counsel of any discrepancies between the statements and the testimony. After *James* and *Barker,* written statements of witnesses should be produced by the State, but summaries of verbal statements need not be produced if the judge agrees to keep them before him and to disclose any discrepancies.

Another potentially valuable defense tool which might be reached by a notice to produce is a copy of a defendant's incriminating statement or confession. In *Ervin v. State,*[19] the defense attorney requested that he be allowed to see a copy of the defendant's statement to the police so that he could better cross-examine a Georgia Bureau of Investigation agent during a *Jackson-Denno* hearing and during subsequent testimony before the jury. On appeal, the court indicated that the request was not sufficient as a notice to produce because the request was oral and because it occurred during the course of the trial. The court declined to decide whether the statement should have been given to the attorney upon a timely filing of a notice to produce.[20]

Additional guidance has come in a 1978 case. In *Phillips v. State,*[21] the

17. 143 Ga. App. 696, 240 S.E.2d 194 (1977).
18. 144 Ga. App. 339, 241 S.E.2d 11 (1977).
19. 144 Ga. App. 504, 241 S.E.2d 650 (1978).
20. *Id.* at 508, 241 S.E.2d at 653.
21. 146 Ga. App. 423, 246 S.E.2d 438 (1978).

defendant filed a notice to produce "various writings, statements, memoranda, stenographic recordings or transcriptions of statements of the defendant, prior criminal records of the state's witnesses, reports of any law enforcement agencies relating to this offense, and reports of any scientific or other test, experiments or study made in connection with [the] case."[22] As in *Brown*, the court declined to decide what items are discoverable under the statute. Instead, the case was remanded to the trial court to determine whether some of the material should have been produced and, if so, whether the absence of the material justified a retrial. As guidance, the court suggested that the lower courts examine the ABA Standards on Discovery and Procedure Before Trial[23] and the Federal Rules of Criminal Procedure.[24]

Information subject to disclosure under Rule 16 of the federal rules includes the defendant's statement, his prior record, certain documents and tangible objects, and the reports of examinations and tests.[25]

The ABA Standards require the prosecution to disclose:

1. The names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;[26]

2. Written or oral statements made by the defendant or by a co-defendant if there is to be a joint trial;[27]

3. Those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons that the State intends to call as witnesses at the hearing or trial;[28]

4. Any prior criminal convictions of persons whom the State intends to call as witnesses at the hearing or trial.[29]

In addition, under the ABA Standards, the State must inform the defendant if an informant has been used, whether there is relevant grand jury testimony which was not transcribed, and whether there has been any electronic surveillance of the defendants.[30]

There is dictum in *Phillips* suggesting that §38-801(g) may be used by the State as well as by the defendant. The court stated that the section is a double-edged sword applying "not only to the obligation of the [S]tate to produce certain items, but also to 'a party [who] desires to compel production of books, writings or other documents or tangible things in the possession, custody or control of another party.' "[31] The court's statement

22. *Id.* at 425, 246 S.E.2d at 440.

23. ABA STANDARDS, *Discovery and Procedure Before Trial* (1974) (hereinafter ABA STANDARDS).

24. FED. R. CRIM. P. 16.

25. *Id.*

26. ABA STANDARDS, *supra* note 22 at §2.1(a)(i).

27. *Id.* at §2.1(a)(ii).

28. *Id.* at §2.1(a)(iii).

29. *Id.* at §2.1(a)(vi).

30. *Id.* at §2.1(b).

31. 146 Ga. App. at 426, 246 S.E.2d at 441.

is ambiguous in that it may be read to apply only when the defendant "desires to compel the production of books . . ." or it may mean that the State, since it is a party, may also utilize the section at any time. The federal rules require the defendant to disclose evidence to the government only when he requests discovery, and even then he is required to produce only evidence which he intends to introduce at trial.[32]

The problem in allowing the State to use the notice to produce provision is that the defendant's privilege against self-incrimination may be violated. As pointed out in *Brown,* the words "insofar as consistent with the Constitution" contained in §38-802 are a limitation on the State's use of §38-801(g). Under the U.S. Constitution, the fifth amendment privilege against self-incrimination applies only where the defendant is compelled to produce evidence which is testimonial or communicative in nature.[33]

The Georgia courts have granted more protection to its citizens from compelled self-incrimination than have the federal courts.[34] The Georgia Constitution states: "No person shall be compelled to give testimony tending in any manner to criminate himself."[35] In Georgia, the courts have held that the word "testimony" means all types of evidence.[36] The test seems to be whether the defendant has produced the evidence, and, if he has, whether he was compelled to do so. In *Day v. State,*[37] the defendant's foot was forcibly placed in tracks near the scene of a burglary. The court held that this was compelling him to give evidence and that the evidence could not be used. In *Johns v. State,*[38] a shoe was removed from the defendant's foot and compared with footprints. This evidence was admissible because the defendant performed no act himself. In *Creamer v. State,*[39] the defendant was forced to undergo surgery for the removal of a bullet lodged in his chest which he had allegedly acquired in the course of a robbery and murder. In holding that this would not violate the defendant's privilege against self-incrimination, the court emphasized that the surgery did not compel the defendant to perform any act. Certainly the defendant felt otherwise. In *Aldrich v. State,*[40] the defendant was fined for refusing to drive his truck onto the scales at a state weighing station. The court held that the fine could not be imposed without constituting "compulsion" in violation of the privilege. Similarly, in *Walter v. State,*[41] the court held that the defendant could not be made to furnish allegedly obscene material on pain of contempt. The court stated:

32. FED. R. CRIM. P. 16(b).
33. *See* Schmerber v. California, 384 U.S. 757 (1966); Fisher v. United States, 425 U.S. 391 (1976); Andresen v. Maryland, 427 U.S. 463 (1976).
34. Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972).
35. GA. CONST. art. I, §1, ¶ XIII, GA. CODE ANN. §2-113 (1977).
36. Creamer v. State, 229 Ga. at 516, 192 S.E.2d at 353.
37. 63 Ga. 668 (1879).
38. 180 Ga. 187, 178 S.E. 707 (1935).
39. 229 Ga. 511, 192 S.E.2d 350 (1972).
40. 220 Ga. 132, 137 S.E.2d 463 (1964).
41. 131 Ga. App. 667, 206 S.E.2d 662 (1974).

> There is a vast difference between searching the premises of one suspected of crime and seizing any evidence of guilt, and compelling the person under suspicion to himself produce the evidence upon which he could be convicted. The criterion is, who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible.[42]

Thus, the defendant may be forced to submit to examination so that evidence may be obtained from him in many types of situations: fingerprinting, photographing, line-ups, blood samples, or removing bullets. He may not, however, be required to do an act which will incriminate him, such as placing his foot in a shoe track, driving a truck onto scales, or producing obscene material. Allowing the State to use §38-801(g) would often violate these principles unless the use was limited, as the federal rules are, to evidence which the defendant intends to introduce at trial.

The remedies which have been granted upon the State's failure to produce have been inadequate and are almost indistinguishable from those granted for a violation of *Brady*. The courts have been instructed to review the material, and if production should have been required, to decide whether the failure to do so justifies a new trial. Unfortunately, no standards are given on what justifies a new trial. The court in *Brown* stated that the movant was not limited to obtaining exculpatory material and that prejudice need not be shown. However, unless the court enunciates a per se rule granting a new trial when material is improperly withheld, the denial of material which is not exculpatory will be harmless error if the defendant cannot show prejudice. Thus, the defendant is in a Catch 22 situation. The State should have produced the mateial, but may fail to do so and a new trial will not be ordered unless the material is exculpatory or the defendant can show that he was prejudiced.

The use of notice to produce is a step toward ending "trial by ambush" in Georgia; however, unless expanded so that it can be used *before* trial, the principal value of the notice to produce will not be in lessening surprise but will be in its use for impeachment purposes. Although it is clear that at the present time §38-801(g) applies only at trial, little else is clear. Despite the confusion in the court of appeals' cases, it seems that the written statement of a witness should be produced as well as any statement or confession of the defendant. Support for the production of these items is found in *Phillips*, which refers the trial courts to the ABA Standards and to Rule 16, both of which require that the defendant's statement be produced; in addition the ABA Standards require the production of witnesses' statements. Under some circumstances, the State may also use §801(g), but this will be limited by the defendant's right against self-incrimintion. The section does not apply where the items sought are not in the possession or control of the State, or where their removal would be an unreasonable search and seizure.

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42. *Id.* at 674, 206 S.E.2d at 667.

The courts have been extremely hesitant to specify which items should be produced. This reluctance may reflect a deference to the legislature in matters concerning criminal discovery. If the legislature does not move soon to provide for more discovery in criminal cases, the courts can be expected to become more specific about what items should be produced. However, §38-801(g) is ill-suited as a vehicle to expand criminal discovery in Georgia as long as it is limited to the production *at trial* of the requested items.

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