

"WORK PRODUCT" IN CRIMINAL DISCOVERY

The rights of the accused to pre-trial discovery of material in the possession of the state are expanding rapidly in many jurisdictions. This expansion has been one of the most remarkable and remarked upon aspects of the current revolution in criminal procedure.¹ It is all the more remarkable in that it has been given its greatest impetus by a number of states rather than by the federal courts.² The extent of discovery rights in most jurisdictions is in a state of flux. Through an interaction of the statutes, court rules, and decisional law within each state, hardly any two states have taken the same approach to the problem of discovery in criminal cases.³ Despite the growth of discovery rights in some states, in others almost nothing in the hands of the prosecutor is discoverable.⁴ Further compounding the diversity of approaches is the fact that in practice there is often little uniformity even within a single jurisdiction because of the broad discretion allowed the trial

1. See, e.g., Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Fontana, *Discovery in Criminal Cases—A Survey of the Proposed Rule Changes*, 25 MD. L. REV. 212 (1965); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957); 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 CALIF. L. REV. 56 (1961); Tessmer, *Discovery in Texas Criminal Courts*, 28 TEX. B.J. 855 (1965); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Symposium, 33 F.R.D. 47 (1963); Note, 34 GEO. WASH. L. REV. 92 (1965); Comment, 39 WASH. L. REV. 853 (1964).

2. See Krantz, *supra* note 1, at 140-44. Compare, e.g., DEL. SUPER. CT. (CRIM.) R. 16(b) (effective as amended Jan. 1, 1965), and TEX. CODE CRIM. PROC. art. 39.14 (Supp. 1965), with FED. R. CRIM. P. 16, 17.

3. At least part of this diversity is attributable to the Supreme Court's refusal to hold any denial of discovery a deprivation of due process. See, e.g., *Leland v. Oregon*, 343 U.S. 790 (1952).

4. See *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927); Fletcher, *supra* note 1, at 304-05; Krantz, *supra* note 1, at 146-47.

The common law rule that a defendant is entitled to no discovery whatsoever has generally been relaxed to the extent of allowing the trial court discretion to grant a certain amount of discovery on a proper showing by the defendant. Often, however, the extent of the discovery which might be allowed has never been explored because this showing requirement is quite stringent and because trial courts have simply not exercised their discretion. Fletcher, *supra* note 1, at 304-05; see *People ex rel. Lemon v. Supreme Court*, *supra* at 32-33, 156 N.E. at 86.

court, and because of the prevalence of informal discovery through prosecutors' cooperation with defense attorneys.⁵

Into the turbulent waters of criminal discovery has begun to seep the most muddied stream of civil discovery, the qualified exemption from discovery of an attorney's "work product." Presently, the nature of the work product exemption in criminal discovery is unclear. To examine this growing body of law and to infer what form it might eventually take as criminal discovery becomes more settled, it is necessary to examine the nature of the work product exemption in civil discovery.

I. WORK PRODUCT IN CIVIL PROCEDURE

The pre-trial discovery provisions of the Federal Rules of Civil Procedure⁶ were adopted so that a trial in the federal courts would be "a fair contest with the basic issues and facts disclosed to the fullest practicable extent."⁷ To this end a litigant is entitled to discovery of information, relevant to the subject matter of the action, which is in the possession, custody, or control of the opposition,⁸ unless that information is privileged.⁹ "Relevant" has been construed broadly.¹⁰ Admissibility at trial of the information sought is not required,¹¹ and the restriction as to privileged matters has not been a great hindrance.¹² Thus, the definition of a party's pre-trial discovery rights in terms of relevancy has yielded a broad standard that lower federal courts can apply with relative ease and uniformity.

The concept of attorney work product as a restriction upon discovery rights was imposed upon this scheme in 1947, when the Supreme Court decided the celebrated case of *Hickman v. Taylor*.¹³ In the *Hickman* case, the party defendant and its attorney (who was not a party) refused to answer interrogatories concerning interviews conducted by the attorney with various prospective witnesses. Their refusal was upheld as the Supreme Court found implicit in the rules of civil discovery a qualified exemption for matters, not within the attorney-client privilege, which can fairly be said

5. See 8 MOORE, FEDERAL PRACTICE ¶ 16.02[2] (Cipes 1965); Traynor, *supra* note 1, at 237.

6. FED. R. CIV. P. 26-37.

7. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

8. FED. R. CIV. P. 26(b), 33.

9. *Ibid.* Discovery may also be restricted "to protect the party or witness from annoyance, embarrassment, or oppression." FED. R. CIV. P. 30(b).

10. See 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 641, 647 (Wright ed. 1961).

11. See *id.* § 648.

12. See *id.* § 651.

13. 329 U.S. 495 (1947).

to reflect "an attorney's mental impressions, conclusions, opinions or legal theories."¹⁴ These matters were termed "the work product of the lawyer."¹⁵

This decision opened "a veritable Pandora's Box" in the realm of federal civil discovery.¹⁶ The greatest disagreement has been between supporters of a work product doctrine limited narrowly to fact situations closely analogous to that in *Hickman v. Taylor* and those championing a broader reading of *Hickman*.¹⁷ Undaunted by the difficulties in the federal courts, most states have adopted a work product doctrine;¹⁸ the state cases are in even greater disarray than those which have been decided in the federal courts. The cases disagree on all three aspects of the work product doctrine: (1) the scope of the material protected (2) the effect of a finding that a particular item is work product and (3) the rationale for allowing a work product exemption.

A. *Scope of Work Product*

Only one characteristic of work product in civil cases has been universally accepted as necessary: to be work product, the matter sought must be the result of the preparation of a case for trial.¹⁹

If the preparation for litigation criterion is met, almost anything might be termed work product in some jurisdictions, either by case law or by statutory definition. In the federal courts,²⁰ *Hickman* requires that anything, including a statement made by a potential witness, which reflects the mental

14. *Id.* at 508.

15. *Id.* at 511.

16. *Viront v. Wheeling & L.E. Ry.*, 10 F.D.R. 45, 47 (N.D. Ohio 1950); see Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

17. The first approach will be referred to as a "narrow work product doctrine." This type of doctrine typically includes only the "work product of an attorney." A "broad work product doctrine" is one which protects material because it reflects the thought processes of someone other than an attorney who is connected with a party; the material thus protected is often referred to as the "work product of a party." The federal case formulating the broad doctrine by expanding *Hickman v. Taylor* was *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950). See generally 2A BARRON & HOLTZOFF, *op. cit. supra* note 10, § 652.2; 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8.-1] (1963).

18. See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1045-46 (1961); Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199 (1964).

19. See *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *McManus v. Harkness*, 11 F.R.D. 402 (S.D.N.Y. 1951); *Hayman v. Pullman Co.*, 8 F.R.D. 238 (N.D. Ohio 1948); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1030 (1961).

20. The doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), may cause problems here. See JAMES, CIVIL PROCEDURE 204 (1965).

processes of a party's lawyer be considered work product.²¹ All states which have adopted a work product doctrine have followed *Hickman* at least to the extent of including anything prepared by a party's lawyer as a lawyer.²² Usually included also are those things which have not been produced by the lawyer but nonetheless reflect his thought processes, such as statements made to the lawyer by potential witnesses, reports of experts to the lawyer, and, to a somewhat lesser extent, statements obtained through and reports made by agents of the lawyer.²³

Many, perhaps most, courts have also applied the doctrine to matters which do not reflect the thought processes of a lawyer, but do reflect those of a party or someone connected with a party.²⁴ These courts have gone beyond anything explicit in *Hickman* and adopted this "work product of a party" exemption as to statements of witnesses obtained by a party or by his claim agent or investigator; some have gone so far as to include routine statements taken by a party from employees.²⁵

Since the purpose of civil discovery is the ascertainment of all of the relevant facts by the parties, any work product concept might be thought to include only those things which reflect someone's mental processes, and not purely factual matters. Nonetheless, a list of witnesses to an accident, obtained by a party's agent, has been held to constitute work product

21. 329 U.S. at 511.

22. See JAMES, *op. cit. supra* note 20, at 205; Comment, 62 MICH. L. REV. 1199 (1964).

23. JAMES, *op. cit. supra* note 20, at 208.

24. See 62 MICH. L. REV. 1199, 1205 (1964). This was a position recommended shortly before *Hickman* was decided:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided in Rule 35, the conclusions of an expert. Advisory Committee, *Report of Proposed Amendments*, 5 F.R.D. 433, 456-57 (1946).

The proposal was never adopted except insofar as the *Hickman* case may do so. Compare 2A BARRON & HOLTZOFF, *op. cit. supra* note 10, § 652.2, at 130, with Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 502 (1949).

25. These results have been reached either by legislative adoption of rules similar to those proposed by the Advisory Committee, *supra* note 24, or by following federal cases expanding the rule in *Hickman*, such as *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950). See, e.g., *Seaboard Air Line R. Co. v. Timmons*, 61 So. 2d 426 (Fla. 1952); TEX. R. CIV. P. 167. At least fourteen states have rules of this type. See Comment, 62 MICH. L. REV. 1199, 1205, 1207 (1964).

because it was obtained in anticipation of litigation.²⁶ This decision marks the outer limit of the work product doctrine.

B. *Effect of Classification as Work Product*

Cases which have followed the reasoning of *Hickman v. Taylor* have consistently held that the consequence of finding a particular matter to be work product is merely to give it a *qualified* privilege.²⁷ Thus, matters so classified are still subject to discovery upon a showing of "necessity or justification," which is a more stringent requirement than the generally required "good cause," and which involves a balancing of the need of the party seeking discovery with the extent to which the matter sought constitutes the work product of the resisting attorney (or party).²⁸ For example, a statement taken from a prospective witness who is no longer available may well be found discoverable on a balancing of interests; the legal theories of the opposing attorney may never be.²⁹ Clearly, the balancing of interests requires a great measure of the sound discretion of the trial court. It has been suggested that a mere showing that the material sought will be admissible in evidence at the trial should be sufficient justification.³⁰ On this basis, a party's own statement should always be discoverable as an admission, even if taken by the opposing party's attorney.³¹

A number of other states have enacted statutes giving a qualified privilege to a party's written trial preparations, allowing discovery only if denial would unfairly prejudice the preparations of the party seeking discovery or would cause him undue hardship or injustice; giving an absolute privilege

26. *Ex parte Ladon*, 160 Tex. 7, 325 S.W.2d 121 (1959); see *Gibilterra v. Rosemawr Homes*, 19 N.J. 166, 115 A.2d 553 (1955) (name of expert witness not discoverable).

27. See *JAMES, op. cit. supra* note 20, at 208-13. Compare *Hickman v. Taylor*, 329 U.S. 495 (1947), with Advisory Committee, *Report of Proposed Amendments*, 5 F.R.D. 433 (1946).

28. See *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); 2A BARRON & HOLTZOFF, *op. cit. supra* note 10, § 652.4; 4 MOORE, *op. cit. supra* note 17, ¶ 26.23[8.-2]. The extent of the required showing may vary inversely with the breadth of the exemption recognized in a jurisdiction. Thus, in *Allmont v. United States*, discussed at note 17 *supra*, the requisite showing was held to be merely "good cause" under Rule 34. *Allmont v. United States*, 177 F.2d 971, 975-76 (3rd. Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

29. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *JAMES, op. cit. supra* note 20, at 212, 215-17.

30. *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring); see *JAMES, op. cit. supra* note 20, at 211; 4 MOORE, *op. cit. supra* note 17, ¶ 26.23[8.-4].

31. *Cannon v. Aetna Freight Lines*, 11 F.R.D. 93 (N.D. Ohio 1950); *JAMES, op. cit. supra* note 20, at 212; 4 MOORE, *op. cit. supra* note 17, ¶ 26.23[8.-4]. However, not all the cases have reached this result. See *Safeway Stores, Inc. v. Reynolds*, 176 F.2d 476 (D.C. Cir. 1949).

to any part of a writing that reflects an *attorney's* mental impressions, conclusions, opinions, or legal theories; and giving an absolute privilege to the conclusions of an expert.³²

A few states give an absolute privilege to all trial preparations.³³

C. *Rationale*

Although there is universal agreement that the work product of a lawyer should not be subject to discovery by an opposing party except under the most urgent circumstances, there seems to be no such agreement as to the reasons for this protection. Some of the reasons suggested have been:³⁴ (1) to prevent lazy attorneys from obtaining a free ride from their opponents' diligence;³⁵ (2) to encourage free development of the facts of the case, and of the theories to be applied to those facts, without fear that everything found will be discoverable;³⁶ (3) to protect the traditional privacy of a lawyer's trial preparations;³⁷ and (4) to preserve the integrity of the lawyer as an effective advocate and an officer of the court.³⁸ The first reason and the first half of the second apply with equal force to the work product of a lawyer or a broader "work product of a party." The other reasons support only the narrower doctrine.³⁹

II. THE PRESENT STATUS OF WORK PRODUCT IN CRIMINAL PROCEDURE

The civil work product doctrine (or set of doctrines encompassed by the single term), which was born of a need felt shortly after the Federal Rules of Civil Procedure were put into effect,⁴⁰ was adopted along with those Rules by numerous states. It is now being adopted in criminal cases in a number of jurisdictions having a wide variety of approaches to criminal discovery. In this section the extent of this adoption will be explored,

32. See Comment, 62 MICH. L. REV. 1199, 1205-06 (1964). This is the result called for in Advisory Committee, *Report of Proposed Amendments*, 5 F.R.D. 433, 456-57 (1946).

33. See Comment, 62 MICH. L. REV. 1199, 1207 (1964).

34. See generally JAMES, *op. cit. supra* note 20, at 205-06; *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1029 (1961).

35. See *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring); *Walczak v. Detroit-Pittsburgh Motor Freight, Inc.*, 140 F. Supp. 10 (N.D. Ind. 1956). The fact that discovery is allowed on a sufficient showing of necessity, a factor which relates to the opportunities of the moving party and which, by definition, obviates the factor of laziness, further indicates that this is one of the purposes for the rule.

36. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (as to lawyers).

37. *Id.* at 510-11.

38. *Id.* at 511; *id.* at 516-18 (Jackson, J., concurring).

39. *Cf.* 4 MOORE, *op. cit. supra* note 17, ¶ 26.23[7]-23[8.-1].

40. See JAMES, *op. cit. supra* note 20, at 204; Comment, 62 MICH. L. REV. 1199 (1964).

in the context of the existing state of criminal discovery in the various jurisdictions.⁴¹

A number of states still adhere to the common law rule that a defendant is not entitled to discovery of anything in the hands of the state.⁴² By the simple logic that one cannot exempt something from nothing, the need for a work product doctrine seems here to be non-existent. Nonetheless, the doctrine has been cited in these jurisdictions in support of a denial of discovery. Arkansas, for example, has no criminal discovery statute or rule, refuses to apply civil rules to criminal actions, and will allow a limited discovery only by virtue of the inherent power of the trial court. Its supreme court has still carefully explained that statements given by witnesses to the prosecuting attorney are part of his "work papers."⁴³ The Indiana court has called police reports and statements by witnesses the "working files of the state,"⁴⁴ although physical evidence taken from a defendant has been denied him without the use of this reasoning.⁴⁵

In a number of jurisdictions discovery is left almost entirely to the discretion of the trial court, and a discovery order is extremely difficult to get reversed.⁴⁶ At least in New York, if discovery has been allowed by the trial court, a work product claim appears to be given short shrift on appeal.⁴⁷ California, although giving trial courts considerable discretion, has

41. The study indicates the wide variety of procedural backgrounds into which the work product concept has been introduced, as well as the variety of factual situations to which it has been applied. The state cases expressly or implicitly relying on some sort of work product concept are collected here. Material in the hands of the prosecutor which might have been protected as work product in some jurisdictions has been protected in a large number of other jurisdictions on other grounds. Some of these grounds are more or less related to the work product concept; for example, that such material is not evidence, *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334, *cert. denied*, 377 U.S. 978 (1964); that such material is not a public document, but the prosecutor's quasi private data, *State v. Hill*, 193 Kan. 512, 394 P.2d 106 (1964); or that the state has no reciprocal power to probe the files of defense counsel, *State v. Cocheo*, 24 Conn. Supp. 377, 190 A.2d 916 (App. Div. Cir. Ct. 1962). The first attempt to collect all of the cases has recently been made. Annot., 7 A.L.R.3d 8 (1966); Annot., 7 A.L.R.3d 181 (1966).

42. See authorities cited note 4 *supra*.

43. *Edens v. State*, 235 Ark. 178, 179, 359 S.W.2d 432, 433, *cert. denied*, 371 U.S. 968 (1962).

44. *Anderson v. State*, 239 Ind. 372, 376, 156 N.E.2d 384, 386 (1959); see *Brown v. State*, 241 Ind. 14, 158 N.E.2d 290 (1959).

45. *Lander v. State*, 238 Ind. 680, 154 N.E.2d 507 (1958).

46. See *Krantz*, *supra* note 1, at 149 & n.95, 151-53.

47. See *People v. Horton*, 19 App. Div. 2d 80, 241 N.Y.S.2d 224 (1963); *People v. Hawa*, 15 App. Div. 2d 740, 224 N.Y.S.2d 156, 157 (1962), *aff'd*, 13 N.Y.2d 718, 191 N.E.2d 904, 241 N.Y.S.2d 847 (1963). On the other hand, denial of discovery may be supported on appeal by a work product theory. *People v. Marshall*, 5 App. Div. 2d 352, 172 N.Y.S.2d 237, *aff'd*, 6 N.Y.2d 823, 159 N.E.2d 698, 188 N.Y.S.2d 213 (1958);

guided them toward granting broad discovery rights to defendants.⁴⁸ It was also the only state explicitly rejecting the work product doctrine in civil cases,⁴⁹ but that heresy has now been eradicated.⁵⁰ Finally, California has recently held that civil discovery rules have no application to criminal cases. As a result of these unusual positions, California courts seem to be quietly and successfully avoiding the use of a work product doctrine in criminal cases, by following the same approach they initially took in civil cases, and refusing to be bound by the newly imposed work product exemption in civil cases. In a recent case, the California Court of Appeals denied an interrogation of an assistant district attorney, to interpret his scribbled notes of an interview with a witness, but on the basis of "sound reasons of public policy,"⁵¹ not work product.

Many jurisdictions regulate discovery, to a greater or lesser extent, by statute or court rule. In the federal courts, a need for the work product doctrine seems to have been largely abrogated by the Jencks Act,⁵² which makes much which would otherwise be subject to a claim of work product specifically not discoverable before trial and specifically discoverable—under certain circumstances—at trial.⁵³

People v. Cocoliccio, 40 Misc. 2d 1013, 244 N.Y.S.2d 1018 (S. Ct. 1963) (dictum); *accord*, *Erving v. State*, 174 Neb. 90, 105, 116 N.W.2d 7, 17 (1962).

48. See *Louisell*, *supra* note 1, at 74-86.

49. In 1961, the California Supreme Court, considering work product a "form of federally created privilege," decided to take a fresh approach to the problem in civil cases:

We are therefore inclined to the view that the work product privilege does not exist in this state. This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions, or theories would be against public policy . . . or would be eminently unfair or unjust, or would impose an undue burden. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 401, 364 P.2d 266, 291, 15 Cal. Rptr. 90, 115 (1961).

50. In 1963, the California legislature amended the Code of Civil Procedure to provide that, "The work product of an attorney shall not be discoverable unless . . ." CAL. CIV. PROC. CODE § 2016(b).

51. *People v. Valdez*, 203 Cal. App. 2d 559, 565, 21 Cal. Rptr. 764, 768 (1962). The "sound reasons of public policy" were ascribed, *inter alia*, to *Greyhound Corp. v. Superior Court* and *Hickman v. Taylor*.

52. 18 U.S.C. § 3500 (1964). Under the Jencks Act, a witness's statement in the possession of the government is never discoverable until the witness has testified at trial. Memoranda which summarize a witness's statement are never discoverable.

53. In *United States v. Hillbrich*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965), in which the trial court had held that "handwriting or notes" of government counsel were part of their "work product" and thus need not be delivered in response to defendant's broad motion to produce, the Court of Appeals reversed, stating: "There is no 'work product' exception to the Jencks Act. If a statement taken or recorded by government counsel falls within the definition of the Act, it must be produced." *Id.* at 557.

Rule 16 has just been completely revised to allow the defendant to inspect a number

Other jurisdictions have statutes based on Rule 16 of the Federal Rules of Criminal Procedure, which allows discovery of material "obtained from or belonging to the defendant or obtained from others by seizure or by process." Since this provision has generally been construed narrowly in the federal courts, so as to exclude even a defendant's confession from its ambit,⁵⁴ nothing which might be termed work product is discoverable unless an additional inherent power of the trial court to allow discovery is recognized.

Such an inherent power has been recognized under the Arizona rule, modeled on Federal Rule 16.⁵⁵ In *State ex rel. Polley v. Superior Court*,⁵⁶ the trial court had granted inspection of a transcript of an interrogation of the defendant made while he was recovering from surgery in the hospital shortly after the crime. On review, this statement was held to be outside the scope of the rule, but "the Rule itself does not express a policy prohibiting discovery; hence, the court is free under its residual power to permit broader discovery."⁵⁷ The court was then prepared to consider the claim of a work product exemption. It first suggested that a difficulty with adopting the premise that a defendant's statement taken by a prosecutor is the prosecutor's work product lies in determining how far civil work product extends.⁵⁸ It also recognized that *Hickman v. Taylor* was "a

of items at the discretion of the trial court, including his confession, scientific reports, his grand jury testimony, books, papers, documents, tangible objects, and buildings or places. However, the rule specifically "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case," except for scientific reports. The Jencks Act still controls in the case of statements made by prospective witnesses. The provision for work product, although not explicit, may herald a broad use of a work product exemption in the federal courts, but this remains to be seen.

A further change in Rule 16 allows the government a protective order, on a "sufficient showing." This provision seems to indicate that the work product provisions are to be generally applied, even without any particular showing by the government.

A still further change allows the trial court to condition certain discovery by the defendant on his allowing certain discovery by the government. This provision contains a similar provision for work product. What effect on federal courts' use of the work product doctrine this new mutuality will have also remains to be seen.

54. The Federal Rules, before their amendment, rarely yielded pre-trial inspection of a defendant's statements recorded or written, witnesses' names and addresses, witnesses' statements, co-defendants' statements, or scientific reports. See Symposium, 33 F.R.D. 47, 102 (1963).

55. ARIZ. R. CRIM. PROC. 195 (1956).

56. 81 Ariz. 127, 302 P.2d 263 (1956).

57. *Id.* at 130, 302 P.2d at 265.

58. Finally petitioner urges that the statement in question is part of the "work product" of the county attorney, and, hence, the trial court had no jurisdiction to order a pre-trial inspection. The difficulty with adopting in toto this premise is that we can find no universally accepted definition or meaning of precisely what is embodied within the term "work product." *Id.* at 132, 302 P.2d at 266.

civil case, where, admittedly, different rules apply."⁵⁹ Having thus become the only court to recognize these fundamental problems, it then proceeded to avoid them by quoting Mr. Justice Jackson, concurring in *Hickman*: "It seems clear and has long been recognized that discovery should provide a party access to anything that is evidence in his case."⁶⁰ Because the transcript was previously used at an incomplete trial of the defendant, and seemed certain to be offered in evidence at the coming trial, this use operated "to remove same from the full protection accorded a 'work product,'" and the discovery order was affirmed.⁶¹ This language might mean that material which is admissible in evidence is never to be considered work product, or that, although it is work product, a showing of admissibility is always a sufficient showing of necessity. If the latter interpretation is correct, this is also the first case to allow discovery, in a criminal case, when material has been classified work product.⁶²

Polley seems to set out admissibility in evidence as the sole test of discoverability, outside of its court rule. Thus, in Arizona, when the item sought is not evidence, inspection may be denied on that ground alone,⁶³ but when it is shown to be admissible evidence, a claim of work product protection may be rejected.⁶⁴ However, a vaguely worded subpoena, asking for all "evidence relating to any charge in the complaint," was regarded as "an attempt to go on a 'fishing expedition,' probably in order to obtain the 'work product' of the county attorney."⁶⁵

59. *Id.* at 132, 302 P.2d at 267.

60. *Id.* at 133, 302 P.2d at 267, quoting 329 U.S. at 515. It assumed, apparently, that the same rule was stated for criminal cases in a legal encyclopedia, quoting 17 AM. JUR., *Discovery and Inspection* § 25 (1938):

In no case is there any suggestion that jurisdiction to compel production for inspection of papers or documents can properly be extended to notes or memoranda in possession of the prosecutor which are inadmissible as evidence either for the prosecution or for the defense or of any other papers and documents that are not admissible as evidence in the prosecution of the accused. *State ex rel. Polley v. Superior Court*, 81 Ariz. 127, 133, 302 P.2d 263, 267 (1956).

61. *Ibid.*

62. Some courts have indicated that discovery of material classified work product might have been allowed on a proper showing. *State v. Shouse*, 177 So. 2d 724, 731 (Fla. Dist. Ct. App. 1965); *State v. Aubuchon*, 381 S.W.2d 807, 814 (Mo. 1964).

63. *State v. McGee*, 91 Ariz. 101, 107, 370 P.2d 261, 265 (1962) (lie detector report "was not and could not be evidence in itself").

64. In *State ex rel. Helm v. Superior Court*, 90 Ariz. 133, 138, 367 P.2d 6, 9 (1961), a defendant was allowed discovery of the medical report of a blood alcohol test because "this was not an attempt to discover the 'work product' of the prosecutor."

65. *State v. Colvin*, 81 Ariz. 388, 391-92, 307 P.2d 98, 101 (1957). Another case in which the admissibility test was not applied was *State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 275 P.2d 887 (1956), in which the court said: "[T]he defendant in enumerating the items he wanted to inspect included private memoranda, i.e. the 'work product of the prosecutor', as well as tangible physical objects . . ." *Id.* at 76, 275 P.2d at 888.

New Jersey has a criminal discovery rule modeled upon, but slightly extending, Federal Rule 16.⁶⁶ In *State v. Tune*,⁶⁷ denial of discovery of statements made by the defendant and witnesses was based largely on a civil statute which followed the proposal of the federal Advisory Committee in 1946.⁶⁸ This statute gives work product exemption in civil cases to "any writing obtained or prepared by the adverse party . . . in anticipation of litigation." Even the now famous Brennan dissent conceded that the statements made by witnesses should be protected as work product by analogy to the civil rule.⁶⁹

Before 1964, the Delaware Superior Court denied inspection of witnesses' statements, police investigation reports, polygraph tests, blood tests, or fingerprint examinations held by the attorney general, on the ground that it saw "no sufficient reason" to do otherwise.⁷⁰ When information was gained as the product of a "general investigation of crime," it was generally not discoverable, even though the source was a co-defendant.⁷¹

Against this background of restrictive judicial interpretation, two events in 1964—a Superior Court case and amendments to the discovery rule—provide an interesting study. In *State v. Winsett*,⁷² the Superior Court relaxed slightly the previous approach that all "fruits of detection and collection by police" were not subject to discovery, but still insisted that the "work product of detection," as opposed to the mere gathering or collecting of tangibles, was protected.⁷³ The "work product of detection" was defined as the intangible information which comes into the possession of the police "as the result of analysis, comparison, detection, and the like";⁷⁴ by this criterion an autopsy report was held not discoverable.

When Delaware Rule 16 was amended to liberalize the defendant's opportunities, an inclusive list of scientific reports or examinations (including autopsy reports) and the recorded testimony of the defendant

66. N.J. RULES 3:5-11.

67. 13 N.J. 203, 98 A.2d 881 (1953).

68. See notes 24-25 *supra*.

69. 13 N.J. at 231-32, 98 A.2d at 896. An earlier case had suggested that "confessions, investigation reports and statements of witnesses obtained in a criminal prosecution might well be classed as 'the work product of the prosecutor' and granted protection against inspection by the defense in advance of trial." *State v. Bunk*, 63 A.2d 842, 845 (Essex County [N.J.] Ct. 1949).

70. *State v. Thompson*, 50 Del. 456, 134 A.2d 266 (Super. Ct. 1957).

71. In *State v. Minor*, 54 Del. 1385, 177 A.2d 215 (Super. Ct. 1962), Rule 61 was said to apply "specifically" and not to general information gathered before the police know to what proceeding it might be applied.

72. 200 A.2d 237 (Del. Super. Ct. 1964).

73. *Id.* at 239.

74. *Ibid.*

before the grand jury were made available, in addition to items previously allowed.⁷⁵ Statements and confessions were made discoverable if they were relevant and in the possession or control of the state. The most significant change was the addition of subsection (b):

This subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal State documents made by agents in connection with the investigation or prosecution of the case, except as provided in subdivision (a) of this rule, or of statements made by State witnesses or prospective State witnesses (other than the defendant or a co-defendant) to agents of the State.⁷⁶

This change in the rules made Delaware the first state to deal with the work product exemption in a discovery rule. Though it does not expressly call them "work product," the rule does place what it calls "reports, memoranda, or other internal State documents" outside the rather broad array of specifically discoverable documents.

Discovery statutes and rules in other jurisdictions show varying scope and liberality. A recent Texas statute gives a defendant in a criminal case discovery rights in terms almost identical to those given a party in a civil suit, except that it further specifically exempts from discovery "the work product of counsel in the case and their investigators and their notes or report."⁷⁷ This is the first statute expressly incorporating the work product concept into criminal procedure.

Colorado, by court rule, provides for production, after a witness's direct testimony, of his statement in the possession of the prosecutor,⁷⁸ but this rule does not authorize inspection of "worksheets or trial notes made in preparation for the trial."⁷⁹

A Florida statute permits inspection of statements and confessions by the defendant,⁸⁰ but has been narrowly construed.⁸¹ Discovery of a witness's statement is denied unless it was made before a magistrate,⁸² this denial

75. The list of reports includes "written reports of autopsies, ballistics tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, and written reports of physical or mental examination of the defendant or the alleged victim by a physician, dentist or psychologist made in connection with the particular case . . ." DEL. SUPER. CT. (CRIM.) R. 16(a) (2) (effective as amended Jan. 1, 1965).

76. DEL. SUPER. CT. (CRIM.) R. 16(b) (effective as amended Jan. 1, 1965).

77. TEX. CODE CRIM. PROC. art. 39.14 (1966); see TEX. R. CIV. P. 167.

78. COLO. R. CRIM. P. 16(b).

79. *Hopper v. People*, 152 Colo. 405, 410, 382 P.2d 540, 543 (1963).

80. FLA. STAT. ANN. § 925.05 (Supp. 1965).

81. The statute is said to apply only to verbatim notes or nonverbatim notes which were approved and accepted by the defendant. 1964 FLA. ATT'Y GEN. BIENNIAL REP. 064-16.

82. See *Jackman v. State*, 140 So. 2d 627 (Fla. Dist. Ct. App. 1962).

being justified in one case in terms of a work product exemption.⁸³ When secret recordings were made of the defendant's conversations with third persons who later were to testify at the trial, the tapes were held to be the work product of the prosecuting attorney,⁸⁴ thus creating an exception to another statute, which allows inspection of evidence which relates to "documents, papers . . . or other tangible things . . ."⁸⁵

A defendant in New Hampshire attempted to subpoena a chief of police and two of his subordinates to obtain depositions and to inspect "all written statements, investigations, reports, and laboratory reports" in their possession.⁸⁶ The court stated that it was unfamiliar with the exact nature of the materials sought, or whether they were obtained while the police merely represented the state or were procured under the direction of the attorney general after he took charge of the prosecution; but, "In either case they become the property or work product of the State as a party, and as such would have been privileged from discovery even under the rule of procedure in civil cases."⁸⁷ This "privilege" was really unnecessary since discovery was not authorized expressly at that time by statute or common law in New Hampshire. In 1965 the court changed its position and adopted a narrow work product doctrine. *State v. Superior Court*⁸⁸ defined work product as "notes personally compiled by law enforcement authorities in the course of their investigation, even if they include notes of conversations with the accused . . ." and limited the application of this exemption, in the case of notes made under the direction of a medical referee in the course of preparing an autopsy report, to those notes made by or on behalf of the attorney general.⁸⁹ Thus, the defendant got more than a simplified

83. *Bedami v. State*, 112 So. 2d 284 (Fla. Dist. Ct. App. 1959).

84. *Peel v. State*, 154 So. 2d 910 (Fla. Dist. Ct. App.), *cert. denied*, 380 U.S. 986 (1963).

85. FLA. STAT. ANN. § 925.04 (Supp. 1965). In *State v. Shouse*, 177 So. 2d 724 (Fla. Dist. Ct. App. 1965), the court declared that documents and legal papers which the state intended to use at the trial were "substantially in accord with the statute," but the same court denied discovery of a witness's sworn statement, citing the work product doctrine applied to such statements in a civil case.

86. *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 225, 153 A.2d 403, 404 (1959). The defendant's attempt was pursuant to N.H. REV. STAT. ANN. § 517:13 (1955).

87. *State ex rel. Regan v. Superior Court*, *supra* note 86, at 227, 153 A.2d at 405.

88. 106 N.H. 228, 208 A.2d 832 (1965).

89. *Id.* at 230, 208 A.2d at 834. *But cf.* *State v. Healey*, 106 N.H. 308, 210 A.2d 486 (1965). In the *Healey* case, decided less than two months after *State v. Superior Court*, the same justice quoted with approval a Note on the civil work product doctrine, 62 MICH. L. REV. 1199, 1200 (1964): "The 'work product doctrine is concerned with protecting a party's trial preparations from disclosure under the modern discovery procedures.'" *State v. Healey*, 106 N.H. 308, 309, 210 A.2d 486, 487 (1965).

autopsy report, but any specific conclusions in regard to the attorney general's investigation were protected.⁹⁰

Past decisions in Missouri have limited discovery to items admissible in evidence,⁹¹ and have denied inspection of material useful for impeachment purposes only.⁹² Concern has been shown that a search for statements may constitute an improper prying into an adversary's preparation for trial.⁹³ In a recent case it was said of a policeman's report and his statement to the warrant officer: "Documents such as those sought here are written as a part of the initial preparation of the State, in contemplation of a prosecution. Whether expressly so made by statute or rule or not, there remains in them inherently an element of work product, and perhaps of privilege."⁹⁴ Since this case was decided, a modest discovery rule was promulgated with no mention of any work product exemption.⁹⁵

In Oregon, a civil procedure discovery statute has been applied to a criminal case through the medium of another statute making the law of evidence in civil actions applicable in criminal cases,⁹⁶ but apparently no controversy over a work product exemption has, as yet, arisen.⁹⁷

III. A CRITICAL ANALYSIS OF WORK PRODUCT IN CRIMINAL DISCOVERY

The term "work product" has already been applied to nearly every type of material in the possession of the state. The various courts which have

The defendant was then given portions of a hospital sanity report and a fire marshall's report because these were no more work product than an autopsy report. The trial court was given discretion to balance the interests of the parties in deciding whether to allow inspection of portions of the hospital report and such portions of the fire marshall's report "as contain the marshall's conclusion with respect to the cause and origin of the fire."

90. The defendant was allowed inspection of "contemporaneous notes," photographs, movies, or slides made as a part of the autopsy, and parts or contents of the corpse in addition to the ten-page autopsy report furnished pursuant to N.H. REV. STAT. ANN. §§ 611:11-13 (1955). The death certificate was furnished pursuant to § 611:16.

91. State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959); State v. Hinojosa, 242 S.W.2d 1 (Mo. 1951).

92. State v. Simon, 375 S.W.2d 102 (Mo. 1964); State v. Kelton, 299 S.W.2d 493 (Mo. 1957).

93. State v. McDonald, 342 Mo. 998, 119 S.W.2d 286 (1938).

94. State v. Aubuchon, 381 S.W.2d 807, 814 (Mo. 1964).

95. Mo. R. CRIM. P. 25 (effective Dec. 1, 1965). The rule provides that the trial judge may order inspection of relevant written or recorded statements or confessions made by the defendant, and relevant results or reports of physical or mental examinations.

96. State v. Leland, 190 Ore. 598, 227 P.2d 785 (1951), *aff'd*, 343 U.S. 790 (1952), applied the civil discovery rule, now ORE. REV. STAT. § 41.615 (1959), through ORE. COD. L. ANN. § 26.932 (now ORE. REV. STAT. § 136.510 (1959)).

97. This theoretically interesting problem may never arise, because the Oregon civil discovery statute makes discovery purely discretionary. ORE. REV. STAT. § 41.615 (1959).

used a work product exemption to protect such material have done so in the context of a wide variety of systems of criminal procedure and criminal discovery rules. In all of these jurisdictions, however, whenever a court has protected a particular item as work product, it has had at its disposal other, longer-recognized grounds upon which it could have denied discovery. Therefore, to date, there has been no need for a work product doctrine to protect the material which courts have wanted to protect. Such a need is not the only basis for wanting to incorporate a work product doctrine, however. A state may want some sort of work product doctrine, broad or narrow, either as a concept which better fits the results it is presently reaching and wishes to reach in the future, or to hold in reserve as an ultimate barrier to the greatly expanded discovery rights which defendants may eventually be given.⁹⁸

A. *Rationale*

The wide variations among jurisdictions both in criminal discovery and in civil work product doctrines make comments about the wisdom of applying the civil work product concept to criminal cases difficult. It is nonetheless clear that no work product concept should be applied to material in the hands of a prosecutor without some consideration of the similarities and differences between its use in civil and criminal cases.⁹⁹ What justifications does this transplantation have? What are its dangers?

The first place to look for justification for a work product doctrine in criminal discovery is its justification in civil discovery. Are the same arguments still forceful?

Two rationales support a broad work product doctrine. The "free ride" rationale carries considerably less weight in a criminal case than in a civil case. A defendant's presumption of innocence should include a presumption that he does not have equal knowledge of the facts to be alleged by the prosecution.¹⁰⁰ Furthermore, in almost no jurisdiction does he have the means which are available in a civil case for obtaining information independently—for example, the taking of statements of witnesses through compulsory deposition proceedings.¹⁰¹ No statistics are available on the

98. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961).

99. The general considerations which distinguish criminal discovery from civil discovery are quite adequately discussed in the authorities cited in note 1 *supra*.

100. *Cf.* *Petition of DiJoseph*, 394 Pa. 19, 27, 145 A.2d 187, 190 (1958) (Musmanno, J., concurring). *But cf.* *Morrissey, Escobedo's European Ancestors*, 52 A.B.A.J. 723 (1966).

101. Missouri is a notable exception in that it allows a defendant to take depositions of prospective state witnesses. MO. REV. STAT. § 545.380 (1959); MO. R. CRIM. P. 25.10; see Rabbitt, *Criminal Discovery in Missouri*, St. Louis B.J., Spring 1966, p. 11, 17-18.

incidence of laziness among defense attorneys, but it seems that no great increase would be caused by allowing them more information with which to work.¹⁰²

The other rationale which supports a broad work product exemption, that it encourages free development of the facts by each party, may be more relevant. Anything which discourages the state from developing leads which might prove exculpatory is clearly detrimental to our system of criminal law.¹⁰³ It has been said that allowing discovery of memoranda, written statements, and the like would result in the police's never committing to paper much that is now written down.¹⁰⁴ Precisely this material might be protected from discovery by a broad work product exemption.¹⁰⁵

The reasons for protecting the work product of an attorney in a civil case are in one sense easy to transfer to the work product of a prosecuting attorney. Protecting his privacy and preserving his role in court as an effective advocate are to some extent as valid reasons for protecting a prosecuting attorney's work product as for protecting any other attorney's work product.

Even this basis for protection is not borne out by any exact correspondence between the position of a lawyer for a private litigant in a civil case and that of a prosecuting attorney in a criminal case. There are differences both in that a criminal proceeding differs from a civil case and in that a prosecuting attorney is also a public official. A criminal proceeding differs from a civil case in the lesser degree of freedom given to a plaintiff to develop novel factual and legal theories, to bring suit on the basis of half-formed factual theories, or to plead inconsistently.¹⁰⁶ A prosecutor thus has less need for protecting the privacy of his factual and legal theories than has a lawyer in a civil case. In his capacity as a public official, the prosecutor has a duty to see that justice is done rather than to win his case for his client. This duty acts as a limitation on the adversary system in criminal cases. To the extent that the adversary procedure is modified,

102. See Louisell, *supra* note 98, at 94-96.

103. *Cf.* Note, 1966 WASH. U.L.Q. 68. The extent to which police and prosecutors would simply allow a defendant to develop his own case if their efforts were discoverable is, of course, not known. There is probably not much of a threat both because of their sense of justice and because of the pressures on them not to try an innocent man.

104. See Louisell, *supra* note 98, at 91-92. Again, the seriousness of the threat is not really known, partly because if carried out it could cut both ways by leading to surprise of the prosecution at trial by its own witnesses.

105. Louisell suggests a possible need for work product protection for prosecutors on this ground. *Ibid.*

106. *But cf. Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1061-62 (1961).

arguments based on the needs of an adversary system, such as those eloquently expressed in *Hickman v. Taylor*, are weakened.

In addition to the arguments which have been used to support a work product doctrine, the Supreme Court's response to an argument made by the petitioner seeking discovery in *Hickman v. Taylor* should be considered. The argument was that a rule protecting the work product of an attorney would tend to work to the advantage of certain classes of parties, notably corporations with large legal staffs.¹⁰⁷ It was dismissed by the Court on a ground which applies equally to such an argument made against any kind of civil work product doctrine: that discovery must apply workably to "any party, individual or corporate, plaintiff or defendant," and "in light of the limitless situations where the particular kind of discovery sought by petitioner might be used."¹⁰⁸

Neither half of the Court's response is applicable to criminal discovery. In criminal discovery there is no single discovery rule applied to both parties,¹⁰⁹ and there seems to be no good reason to attempt to formulate such a rule. The Court's explanation that discovery rules must apply to all types of parties also fails because in a criminal case only one class of plaintiffs exists, invariably having a staff of lawyers and investigators. Similarly, in a criminal case, the types of information in the possession of the prosecutor are relatively limited. This is in part due to the relatively few types of issues presented in all criminal cases taken together, in part due to the fact that there is only one potential plaintiff instead of a limitless number, and in part due to the unique nature of the state as a party in a criminal case.

Unlike a private party, the state, in its law enforcement capacity, has as its regular course of business preparation for the possible trial of persons with whom it deals. Therefore, whereas in civil cases an opposing party may have in his possession a large amount of material which was not created in anticipation of litigation but in the regular course of business, a prosecutor will usually have in his possession only material which is broadly the result of the state's preparation for litigation. This material can be classified as physical evidence and communications. The former has merely been *obtained* in anticipation of litigation, but the latter have, to some extent, been *prepared* by some agent of the state in anticipation of litigation. Thus, at least as to the latter material, the essential criterion for classification as work product is almost always met.

107. 329 U.S. at 506.

108. 329 U.S. at 507.

109. Even those rules which call for reciprocity have separate discovery rules for the state and the defendant. See FED. R. CRIM. P. 16.

B. *Possible Approaches to a Work Product Doctrine
in Criminal Procedure*

The fact that almost anything but physical evidence in the hands of the prosecutor might be considered work product means that almost everything which a defendant might want to discover could be protected in this way. Included would be communications, made to or taken by an agent of the state, made by prospective witnesses, the defendant, the prosecutor, experts, police, or grand juries. If all of these items are not to be protected indiscriminately by a work product doctrine, careful definition of the extent of the doctrine is necessary. Two basic approaches to defining the scope of a criminal work product concept are possible. One approach would be that taken in civil discovery: defining work product as including specific items, such as "statements of prospective witnesses taken by an attorney." The other approach, which would be more subtle and difficult to administer, would cut across any list of items by defining a work product exemption in terms of the quantum of involvement of the mental processes of the prosecutor or his agents, such as "those portions of items which reflect merely the thought processes of the prosecuting attorney." Which of these approaches is superior depends to a large extent on the discretion which a rule-making court or legislature wants to give trial courts, and cannot be answered at all without examining the possible techniques by which a work product exemption can be defined in criminal procedure.

1. *Techniques for Defining the Scope of Work Product*

a. *work product defined by analogy to civil work product.* The most common method of introducing a work product doctrine into a state's criminal procedure has been for a court to deny discovery on the basis of a work product exemption in a given case. Other states have applied all their civil discovery rules to criminal cases. A similar approach would be to have a general rule allowing discovery, but exempting work product. With any of these approaches, the use of the term "work product" leads almost irresistably to a process of defining work product, item by item, by analogy to the state's civil work product doctrine. The extent of such a work product exemption will vary, of course, with the state's civil work product doctrine.

Physical evidence never reflects an opinion formed by anyone in anticipation of litigation, and thus should never be protected as work product even though it was obtained as part of the state's trial preparation. It seems no attempt has been made to do so.

Statements made to the prosecutor by prospective witnesses would seem always to fall within the scope of even a narrow work product doctrine,

on the basis of *Hickman v. Taylor*.¹¹⁰ A number of cases have so held.¹¹¹ Whether or not other statements in the possession of the prosecutor are considered work product would depend on the approach used in the analogous civil situation and the strength of the specific analogy. It is significant that although relatively few jurisdictions have as yet used the term "work product" in a criminal case, those which have used it have already collectively classified as work product statements made by defendants,¹¹² prosecutors,¹¹³ experts,¹¹⁴ and the police.¹¹⁵ Grand jury transcripts seem to reflect the opinion of the grand jury and thus to be the work product of the grand jury. The ambiguous relationship between the grand jury and the state and prosecutor, and the lack of any analogous situation in civil cases make the application of civil work product problematical. Just how broad a civil work product precedent a court might feel is needed before grand jury transcripts would fall within it, if indeed a civil precedent were needed at all, is difficult to predict. No court has yet seemed to make the attempt.¹¹⁶ The identity of possible witnesses, including experts, could be considered work product only by analogy to the civil cases allowing the broadest of work product concepts.¹¹⁷ However, the presence of a

110. See notes 16-19, 24-25 *supra* and accompanying text.

111. See *Edens v. State*, 235 Ark. 178, 359 S.W.2d 432, *cert. denied*, 371 U.S. 968 (1962); *People v. Valdez*, 203 Cal. App. 2d 559, 21 Cal. Rptr. 764 (1962); *State v. Shouse*, 177 So. 2d 724 (Fla. Dist. Ct. App. 1965); *Brown v. State*, 241 Ind. 14, 158 N.E.2d 290 (1959). *Contra*, *People v. Hawa*, 15 App. Div. 2d 740, 224 N.Y.S.2d 156, 157 (1962), *aff'd*, 13 N.Y.2d 718, 191 N.E.2d 904, 241 N.Y.S.2d 847 (1963).

112. *Peel v. State*, 154 So. 2d 910 (Fla. Dist. Ct. App.), *cert. denied*, 380 U.S. 986 (1963) (made to third party); *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 225, 153 A.2d 403, 404 (1959) (*dictum*).

113. *State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 76, 275 P.2d 887, 888 (1956).

114. *State v. Winsett*, 200 A.2d 237, 239 (Del. Super. Ct. 1964) (probably overruled by DEL. SUPER. CT. (CRIM.) R. 16(b)); *State ex rel. Regan v. Superior Court*, 102 N.H. 224, 225, 153 A.2d 403, 404 (1959). *But see State v. Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961).

115. *State v. Aubuchon*, 381 S.W.2d 807, 814 (Mo. 1964); see *Brown v. State*, 241 Ind. 14, 158 N.E.2d 290 (1959).

116. Other protection of the secrecy of grand jury proceedings may make a work product claim unnecessary. This protection may be in the form of a statute or of the grand jury's traditional secrecy. See FED. R. CRIM. P. 6(e); 8 MOORE, FEDERAL PRACTICE ¶ 6.05 (Cipes 1965); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1184 n.116 (1960); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1012, 1056 (1961); cf. 4 MOORE, FEDERAL PRACTICE ¶ 26.25[6.-3] (1963).

117. One of the states with such a broad work product doctrine is Texas. See *Ex parte Ladon*, 160 Tex. 7, 325 S.W.2d 121 (1959). For a suggestion that under a new criminal statute lists of witnesses will be protected as work product in Texas criminal cases see Tessler, *Discovery in Texas Criminal Courts*, 28 TEX. B.J. 855 (1965). See note 77 *supra* and accompanying text.

generally recognized informer privilege reduces the state's need for work product protection in this area.¹¹⁸

In some few jurisdictions, the material which would fall within a work product exemption defined by analogy to civil precedents might coincide nicely with at least some of the material which the state is trying to protect, without unduly limiting discovery of other material. However, the difference in underlying rationales between the work product exemption in civil discovery and the protection of the state's material in criminal discovery makes a good fit unlikely. Furthermore, the broader the work product exemption is allowed to become in criminal cases, the more purely fortuitous any such fit becomes. In a jurisdiction which recognizes a broad civil work product exemption, virtually anything which a defendant might seek to discover could be withheld as the work product of the state, without the court's taking into account the true policy considerations.¹¹⁹

b. work product defined for criminal discovery purposes. The surest way for a state to make a work product exemption coincide with particular material it wants protected is to protect "work product" from discovery and, at the same time, define "work product" for the purposes of criminal discovery as being that particular material. If the definition is in terms of a list of specific items which is merely exemplary, a process of analogy both to the list and to civil work product seems inevitable; if the list is meant to be exhaustive, the use of the term "work product" at all would serve only to confuse.

Another possible definition of work product is in terms of "internal memoranda of the state." Although the basis of this concept is not entirely coextensive with that of work product, if an exemption from discovery were put in terms of internal memoranda instead of work product, the material protected would amount to a broad work product exemption, defined by the type of item.

A third method of defining work product, whether the actual term is used or not, is to frame the exception in terms of material which "reflects the mental processes" of a prosecuting attorney, or of other agents of the state. Because everything in the possession of the state can be said to reflect to some extent the impressions of some agent of the state, a more desirable way to define work product in criminal discovery would be as "material which *merely* reflects" the theories, opinions, or conclusions of the prose-

118. See Goldstein, *supra* note 116, at 1185 n.118; *cf.* 4 MOORE, *op. cit. supra* note 116, ¶ 26.25[6.-2].

119. These considerations are well presented in the authorities cited in note 1 *supra*.

cuter, or, perhaps, of agents of the state.¹²⁰ This proposal, which is clearly a "quantum of involvement" approach rather than a classification by type of item approach, has the advantage of preserving the most important part of the work product doctrine from the point of view of the prosecutor, while preventing the doctrine from expanding unduly. It could, however, create difficult problems of administration. What type of writing reflects merely thought processes? Can thought processes be separated from facts in a given writing without denying the defendant some of the facts? Who is to decide what part of the material in the prosecutor's hands reflects merely thoughts? One solution would be to frame a rule which put the burden on the state to separate work product from the rest of a writing, under the supervision of the trial court. Of course, even if satisfactory solutions to the administrative problems could be formulated, the basic question remaining is whether this material should be protected.

c. work product used in conjunction with specifically discoverable material. Another way to limit the possible scope of work product in criminal discovery is not only to protect work product but also to provide specifically that certain items, which might otherwise be protected as work product, are discoverable under specified circumstances. Three basic approaches of this sort can be taken. It is not essential to any of them that the source of the list of discoverable items and the source of the work product be the same. The first approach is to provide that except for the specified items, work product is protected. This approach assures discovery of the most common items which the rule-making court or legislature wants to be discoverable. As to items not specified, work product will probably be interpreted exactly as if the list of discoverable items were nonexistent. If work product is not defined, it will probably expand by analogy to civil cases to cover almost everything not specified; if it is defined by a quantum of the prosecutor's mental efforts, each item not specified will have to be passed upon on its own merits.

A second approach is to provide that the specification of discoverable items does not authorize the discovery of work product. If a court considers the question of when an item specified might or might not be work product, it seems certain that it will quickly realize that this approach calls for a definition of work product in terms of the quantum of the prosecutor's mental efforts which went into the particular item in question, at least as to the specified items. If work product is not specifically defined in these terms, there might be more of a tendency as to items specified to consider

120. This approach was taken in the recently proposed Missouri Code of Criminal Procedure at Title IX, § 3(3) (1964), but has now been abandoned.

entire documents work product or not, rather than consider what parts of a document are and are not work product. This would be unfortunate, because it would tend to allow the defendant to discover scientific reports, for example, when they were not an essential part of the case, but to deny their discovery whenever they were crucial enough to the case that the prosecutor directed their preparation.

A third approach is to provide that work product is not normally discoverable, without relating this statement to the specified discoverable items. This approach is likely to occur when the work product exemption is announced in a decision, particularly if the discoverable items were also specified in the prior case law, although a single rule could be drafted this way. The added ambiguity implicit in such a rule is immediately apparent. When an item falls within a court's definition of work product, but is also made specifically discoverable, it is unlikely that the court will use the work product doctrine to subvert the purpose of the rule. Nonetheless, it could reach any of the results reached under the two approaches discussed above. Furthermore, it could broaden discovery rights beyond those obtained under either of the above approaches, by reasoning that if the specified material is discoverable, and therefore not work product, then the item under consideration is similarly not work product. The breadth of the possible results of this approach to work product makes it a risky one.

d. work product rejected. Having considered the weaknesses in the rationale supporting work product in criminal cases, the possible difficulties in administering a work product doctrine, and the general policy considerations in granting or denying discovery,¹²¹ a state might well decide that rejecting the work product doctrine, per se, in criminal discovery would keep the true policy considerations to the fore. The language of the California Supreme Court in *Greyhound Corp. v. Superior Court* would be appropriate:

We are therefore inclined to the view that the work product privilege does not exist in this state. This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions, or theories would be against public policy . . . or would be eminently unfair or unjust, or would impose an undue burden.¹²²

Although this was a civil case, the same approach is quite as valid in a criminal case. The California court's characterization of work product

121. See authorities cited note 1 *supra*.

122. 56 Cal. 2d 355, 401, 364 P.2d 266, 291, 15 Cal. Rptr. 90, 115 (1961).

as "a form of federally created privilege"¹²³ seems to indicate that it did not want to adopt into its procedure a concept which had already been developed under a different system of procedure. The same reservation could be expressed in a case refusing to adopt the work product doctrine in criminal procedure by characterizing work product as "a concept developed for the special needs of civil procedure." This approach would allow protection of a prosecutor's work papers in a proper case, without unthinkingly restricting other discovery either systematically or capriciously.

2. *Approaches to Defining the Effect of Classification as Work Product*

Of course, the effect of any of these approaches on discovery opportunities can be varied widely by the choice of effect to be given to a finding that certain material is work product. A state which has a very broad work product exemption but allows discovery of work product on a showing of necessity may in fact be granting broader discovery opportunities to defendants than a state which has a relatively narrow exemption but grants absolute immunity to anything which falls within the exemption.

In a state which allows discovery not as a matter of right but only at the discretion of the trial court on a proper showing, a work product exemption, if it has any meaning at all, must mean that for such material the standard for a proper showing is higher. Unless the standard for non-work product material is quite low, for instance as low as the showing of "relevancy" under the Federal Rules of Civil Procedure, a higher standard for work product will tend to be impossible to meet; that is to say, work product will be expressly or impliedly immune from discovery. On the other hand, although a state which allows discovery of some material as a matter of right can make a meaningful distinction between that material and work product by allowing discovery of work product only at the discretion of a trial court, such a state could also make work product absolutely immune from discovery. Again, the interaction between scope and effect is apparent.

If the principles of civil work product are applied to criminal discovery, it seems clear that a statement made by the defendant (such as a confession) in the hands of the prosecutor should not be protected merely because it is classified work product, since its usefulness as evidence should be sufficient justification for its production.¹²⁴ It is possible that the oft-remarked upon

123. *Ibid.*

124. See notes 31-36 *supra* and accompanying text. This was essentially the result reached in *State ex rel. Polley v. Superior Court*, 81 Ariz. 127, 302 P.2d 263 (1956), discussed in notes 51-57 *supra* and accompanying text. Most courts have not taken this position once a confession has been classified work product. If the defendant's state-

reluctance of witnesses to talk to a defense attorney after making a statement to the state constitutes sufficient necessity to allow discovery of such statements.¹²⁵ This and other situations in which the difference in investigative opportunities between state and defendant becomes apparent may call for a finding of sufficient necessity in all such cases or for allowing trial judges a great deal of discretion.¹²⁶ Whether trial courts will be left with broad discretion to balance the interests of defendant and state when and if criminal work product is widely adopted remains a crucial unanswered question.

CONCLUSION

The civil work product doctrine is an attempt to set out in broad terms an exception to the broad and generally stated discovery provisions of civil procedure. The more modest needs of criminal discovery, in terms of the variety of situations to which it must apply, call for either a more specifically stated general rule or a more specifically stated work product exception. This is particularly true because of the peculiar position of the state as a party, which makes almost all of the material in its possession potentially work product.

Having considered not only the needs of the state and prosecutor but the variety of needs of defendants, a state should either reject the work product doctrine in criminal discovery and rely on other means for protecting material in the hands of the prosecutor, or set out with particularity either what is work product or what is not and the showing required to obtain discovery in either case.

ment is taken by the prosecutor, it may never be discoverable in a number of states under this approach. See notes 32-33 *supra*.

One way to circumvent rules which seem to deny access to confessions is to follow Louisiana, which early held that denial of discovery in this single instance would be a denial of the due process guaranteed by the state constitution. *State v. Dorsey*, 207 La. 928, 22 So. 2d 273 (1945).

125. See, e.g., Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 236 (1964).

126. The lack of such a safety outlet, particularly in a state with a broad criminal work product doctrine, could clog the channels of discovery. For example, the absolute immunity for work product predicted under a new Texas statute could prove difficult to live with. See Tessmer, *supra* note 117, at 899, discussing TEX. CODE CRIM. PROC. art. 39.14 (1966). Although a work product doctrine which gives trial judges power to allow discovery on a proper showing allows guided discretion, the same result, or a superior one, can be achieved without any work product doctrine at all, simply by allowing protective orders on motion by the prosecutor. See FED. R. CRIM. P. 16(e).