

1965

Virgil Redmond and Ed Delyle v. City Court of Salt Lake City, J. Patton Neeley, City Judge, Warren M. Weggeland, Deputy Salt Lake County Attorney :  
Brief of Respondents

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# IN THE SUPREME COURT OF THE STATE OF UTAH

VIRGIL REDMOND and  
ED DeLYLE,

*Plaintiffs-Appellants,*

— vs. —

CITY COURT OF SALT LAKE  
CITY; J. PATTON NEELEY, City  
Judge; and WARREN M. WEG-  
GELAND, Deputy Salt Lake  
County Attorney,

*Defendants-Respondents.*

**FILED**

JUL 9 - 1965

Clt. Supreme Court, Utah

Case

No. 10340

UNIVERSITY OF UTAH

OCT 15 1965

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## BRIEF OF RESPONDENTS

Appeal From the Judgment of the  
Third District Court for Salt Lake County  
HONORABLE STEWART M. HANSON, Judge

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	5
POINT I	
THE APPELLANT VIRGIL REDMOND HAS NO BASIS FOR APPEAL SINCE THE DEMAND FOR A BILL OF PARTICULARS WHICH IS THE SUBJECT OF THIS APPEAL WAS FILED BY ED DeLYLE AND DID NOT PURPORT TO BE ON BEHALF OF VIRGIL REDMOND . . . . .	5
POINT II	
THE POSTURE OF THIS CASE IS SUCH THAT MANDAMUS IS NOT AN APPROPRIATE REMEDY . . . . .	6
POINT III	
THE APPELLANTS HAVE NO RIGHT TO RELIEF SINCE . . . . .	
(a) THE REQUESTED INFORMATION IS OUTSIDE THE SCOPE OF A BILL OF PARTICULARS . . . . .	12
(b) DUE PROCESS DOES NOT COMPEL THE INFORMATION REQUESTED . . . . .	14
CONCLUSION . . . . .	18

### Cases Cited

Baile v. Beckstead, 10 U. 2d 4, 347 P. 2d 554 (1959) . . . . .	7
Clema v. LaGay, 357 U. S. 504 (1958) . . . . .	14
Hathaway v. McConkie, 85 U. 21, 38 P. 2d 300 . . . . .	10
Ketchum Coal Co. v. Christensen, 48 U. 214, 159 Pac. 541 . . . . .	10
Leland v. Oregon, 343 U. S. 790 (1952) . . . . .	14
People ex rel Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927) . . . . .	15

## TABLE OF CONTENTS — (Continued)

People v. Rosario, 9 N. Y. 2d 286, 173 N.E. 2d 881 (1961).....	Pa
Richards v. District Court of Weber County, 71 U. 473, 267 Pac. 779.....	
State v. Bleazard, 103 U. 113, 133 P. 2d 1000.....	
State v. Bunk, 63 A. 2d 842, 25 845 (N. J.).....	
State ex rel Drew v. Shaughnessy, 212 Wisc. 322, 249 N.W. 522 .....	
State v. Hart, 19 U. 438, 57 Pac. 415.....	
State v. Jameson, 103 U. 129, 134 P. 2d 173 (1943).....	
State v. Lack, 118 U. 128, 221 P. 2d 852 (1950).....	
State v. Solomon, 93 U. 70, 71 P. 2d 104 (1937).....	
State v. Tune, 13 N. J. 203, 98 A. 2d 881 (1953).....	
United States v. Garsson, 291 F. 646 (S. D. N. Y. 1923).....	
Watkins v. Simmons, 14 U. 2d 406, 385 P. 2d 154 (1963).....	

### Statutes Cited

#### Utah Code Annotated, 1953:

76-26-7 .....	
77-21-9 .....	7, 8, 9
77-23-3 .....	

### Texts Cited

Abbott, Criminal Trial Practice, 4th Ed., Sec. 64.....	
27 Am. Jur., Indictments and Informations, Sec. 143.....	
35 Am. Jur., Mandamus, Sec. 295.....	
5 A.L.R. 2d 444, Annotation, p. 457.....	
55 C.J.S., Mandamus, Sec. 15b, p. 191.....	
Louisell, Criminal Discovery: Dilemma Real or Apparent? 59 Cal. Law Rev. 56, 98-101 (1961).....	
Moreland, Modern Criminal Procedure, (1958) p. 213, 214.....	

# IN THE SUPREME COURT OF THE STATE OF UTAH

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VIRGIL REDMOND and  
ED DeLYLE,

*Plaintiffs-Appellants.*

--VS.--

CITY COURT OF SALT LAKE  
CITY; J. PATTON NEELEY, City  
Judge; and WARREN M. WEG-  
GELAND, Deputy Salt Lake  
County Attorney,

*Defendants-Respondents.*

Case  
No. 10340

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE KIND OF CASE

The appellants Virgil Redmond and Ed DeLyle appeal from a decision of the Third Judicial District Court denying their petition for a writ of **mandamus** to require certain information and documents requested in a demand for a bill of particulars filed by appellant Ed DeLyle in the City Court of Salt Lake City, or in the alternative, to dismiss the complaint pending against them.

## DISPOSITION IN LOWER COURT

The appellants were charged by complaint, on or about October 1, 1964, in Case No. 42,236 in the City Court of Salt Lake City, with the crime of issuing a check against insufficient funds in violation of Section 76-26-7, Utah Code Annotated, 1953. Thereafter, a bill of particulars was filed with the court which City Judge Horace C. Beck allowed. The prosecution answered the demand except for questions two and three. The appellants moved to quash the complaint, and City Judge Patton Neeley ruled that the information supplied by the prosecution sufficiently answered the demand for a bill of particulars and that the other items omitted were matters properly encompassed in a bill of particulars. Judge Neeley refused to quash the complaint. Thereafter, the appellants sought a writ of mandamus in the Third District Court to compel additional information or in the alternative, dismiss the complaint. The Honorable Stewart M. Hanson denied the writ of mandamus.

## RELIEF SOUGHT ON APPEAL

The respondents, magisterial officers and prosecuting officials of the State of Utah, submit that the decision of the trial court should be affirmed.

## STATEMENTS OF FACTS

The respondents submit the following statement of facts as being more directly related to the issues raised on appeal. Only the facts important to this appeal will be set forth.

On October 1, 1964, the appellants were charged with the crime of issuing a check against insufficient funds by complaint issued by the City Court of Salt Lake City (R. 1). On or about October 28, 1964, the appellant Ed DeLyle served a demand for a bill of particulars on the Salt Lake County Attorney (R. 10). Salt Lake City Judge Horace Beck entered an oral order allowing the demand for a bill of particulars and thereafter the County Attorney filed answers to the requested bill, which answers have not been made a part of the record. The complaint filed against appellants has not been made a part of the record. On December 4, 1964, the appellants moved the City Court of Salt Lake to quash the complaint on the grounds that questions posed in the demand for a bill of particulars had not been fully answered. Judge Patton Neeley denied the motion (R. 48).

On January 5, 1965, appellants filed a complaint for extraordinary relief in the nature of **mandamus** in the Third District Court (R. 1), seeking additional answers to the bill of particulars or dismissal of the complaint. An answer to the complaint was filed on January 22, 1965, and on March 4, 1965, a hearing was held on the matter. Judge Stewart M. Hanson denied the appellants relief (R. 33). Judge Hanson found the bill of particulars, as supplied by the County Attorney, to be adequate and that questions 2 and 3 of the demand need not be answered because they sought evidentiary information and were beyond the scope of a bill of particulars (R. 31).

The demand for a bill of particulars filed by appellant DeLyle did not purport to seek information on behalf of Virgil Redmond (R. 10). Questions (a), (b), and (c), of what is apparently Subparagraph 1 of the demand, were apparently answered by the County Attorney. Questions 2 and 3, which the trial court found to be evidentiary in scope, requested:

"2. A statement as to the acts or things that this defendant is alleged to have done in connection with the alleged uttering of the alleged fictitious check mentioned in the complaint.

"3. This defendant's attorney has been advised that the prosecution has in its possession, or available to it through the Salt Lake City police, a large number of checks drawn on the same bank account and/or by the same maker as the check mentioned in the complaint and/or checks signed by the same person and/or made payable to the same person and/or endorsed by the same person and/or cashed by the use of the same driver's license as the check mentioned in the complaint. The office of the Salt Lake County Attorney has heretofore agreed to furnish said attorney with photo-copies of all of said checks, together with a check deposited in said bank account, but thereafter refused to furnish copies thereof or to permit said attorney to copy those checks. A substantial question exists concerning the identity of the person or persons who signed and/or endorsed said checks. It is necessary for defendant to prepare a proper defense of this matter that he be permitted to examine and to copy said checks and all other instruments in the possession of the prosecution which pertain to this case in order that said instruments may be submitted to handwriting experts and that defendant may interview



the persons who allegedly cashed said checks in order to attempt to identify the person or persons who actually uttered or participated in the uttering of said checks. Accordingly defendant moves the Court for an order requiring the prosecution to permit defendant and/or his agents and attorney to examine and to copy all checks, bank statements, deposit slips, bank signature cards, drivers' licenses and any and all other instruments in the possession of the prosecution and the Salt Lake City police and/or available to the prosecution through the Salt Lake County Sheriff's office or otherwise." (R. 10, 11.)

Thus, the demand for a bill of particulars sought the production of documents and exhibits in the hands of the County Attorney, including checks and instruments not the subject of the crime charged and "all other instruments in the possession of" the Salt Lake City Police or the Salt Lake County Sheriff's Office. Even the production of unspecified drivers' licenses was sought.

From the trial court's refusal of an extraordinary writ compelling the information sought in the demand for a bill of particulars and refusing to dismiss the charges, *both* appellants have prosecuted this appeal.

## ARGUMENT

### POINT I

THE APPELLANT VIRGIL REDMOND HAS NO BASIS FOR APPEAL SINCE THE DEMAND FOR A BILL OF PARTICULARS, WHICH IS THE SUBJECT OF THIS APPEAL, WAS FILED BY ED DeLYLE AND DID NOT PURPORT TO BE ON BEHALF OF VIRGIL REDMOND.

It is submitted that the appellant Virgil Redmond has no standing to seek appellate review. The demand for the bill of particulars, which was filed in the City Court of Salt Lake City and which is the subject of the instant appeal, recites that the demand was filed by E. DeLyle, and is so phrased and stated in the singular as to show that Virgil Redmond was not a party concerned with the demand. Although the complaint, as filed in the District Court, seeking extraordinary relief, named Virgil Redmond as a plaintiff, it is apparent that the cause of action as it pertained to him is unrelated to the demand for a bill of particulars. The appellant Virgil Redmond, having no interest in the litigation as respects the bill of particulars and having failed to expressly include himself within the ambit of the demand for the bill of particulars, is precluded from seeking appellate relief. *State v. Bleazard*, 103 Utah 113, 133 P. 2d 1000.

## POINT II

### THE POSTURE OF THIS CASE IS SUCH THAT MANDAMUS IS NOT AN APPROPRIATE REMEDY.

In the appellants' brief, it is indicated that a writ of mandamus was sought to compel the respondents to furnish a bill of particulars and that the District Court denied the claim. To the extent that Judge Neeley of the City Court of Salt Lake City is named as a party defendant, the writ of mandamus would be to compel the judge to, in turn, compel the County Attorney to file the bill of particulars or, in the alternative, to dismiss the action. To the extent that the Deputy Salt Lake County

Attorney is a party defendant, the writ of mandamus could only be for the purpose of compelling answers to a demand for a bill of particulars. It is submitted that on the posture of the instant case, mandamus will not lie.

When the appellant Ed DeLyle filed his demand for a bill of particulars, the County Attorney responded to question No. 1 of the demand. That question asked for a substantial amount of information relating to the offense charged. The District Court and the City Court ruled that the bill of particulars filed by the County Attorney substantially complied with the demand. Since neither the bill of particulars nor the complaint in the case against Ed DeLyle have been included in the record on appeal, it must be assumed that the record below would substantiate the District Court's and the City Court's determinations. *Watkins v. Simmons*, 14 U. 2d 406, 385 P. 2d 154 (1963); *Baine v. Beckstead*, 10 U. 2d 4, 347 P. 2d 554 (1954). Thus, the issue before this court is whether there is a need for the additional information requested in questions No. 2 and No. 3 of the demand for a bill of particulars. It must be assumed, since the trial court so found, that the facts now known to the appellants properly apprised Ed DeLyle of the nature of the offense charged and have been sufficiently and specifically detailed so as to allow him to prepare his defense and to protect him from claims of jeopardy.

Section 77-21-9, Utah Code Annotated, 1953, relating to a bill of particulars, provides:

"(1) When an information or indictment charges an offense in accordance with the pro-

visions of section 77-21-8, but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense or to give him such information as he is entitled to under the Constitution of this state, the court may, of its own motion, and shall at the request of the defendant, order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the prosecuting attorney may of his own motion furnish such bill of particulars.

“(2) When the court deems it to be in the interest of justice that facts not set out in the information or indictment or in any previous bill of particulars should be furnished to the defendant, it may order the prosecuting attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be so furnished, the court shall consider the whole record and the entire course of the proceedings against the defendant.

“(3) Supplemental bills of particulars or a new bill may be ordered by the court or furnished voluntarily under the conditions above stated.

“(4) Each supplemental bill shall operate to amend any and all previous bills and a new bill shall supersede any previous bill.

“(5) When any bill of particulars is furnished it shall be filed of record and a copy of such bill be given to the defendant.”

It is apparent that since a bill of particulars has been provided, what the appellants now seek is additional information under Subsection (2) of the above Section 77-21-9. It is acknowledged that in *State v. Solomon*, 5 Utah 70, 71 P. 2d 104 (1937), the Utah Supreme Court

in referring to the predecessor of Section 77-21-9, stated that the granting of a bill of particulars is not discretionary with the court as it was at common law, but is a right which defendant can demand. However, the court in that case noted that the statutory conditions must be present. Further, the particular issue before the court in the *Solomon* case involved the use of a bill of particulars only as a supplement to the short form of information and not the question of successive bills or additional information that the defendant may deem desirable. Further, the statement in the *Solomon* case is dicta since the real issue was whether the bill of particulars was a part of the information or indictment. The court, in discussing the bill of particulars in that case, paraphrased the statutory language appearing in Subsection 1 of Section 77-21-9, for it said:

“ \* \* \* The chief purpose in prescribing a short-form information was to get away entirely from the needless formalism and verbosity usual in criminal pleadings and the consequent reversals by courts on so-called technical grounds. The pleader had been too often held to strict nicety in stating the elements of the crime and the particulars thereof. The Legislature further intended to fully safeguard the rights of defendants by providing that the court shall direct the filing of a bill of particulars where the information does not give the defendant the particulars of the offense sufficiently to enable him to prepare his defense or give such information as he is entitled to under the Constitution of the state.”

If the appellants, under the posture of this case, are entitled to the information sought in questions No. 2 and

No. 3 of the demand by Ed DeLyle, it should only be pursuant to Subsections (2) and (3) of Section 77-21-5. Both of these subsections provide that the court may, if it finds it in the interest of justice, grant the defendant the right to additional information and order supplemental bills of particulars. Thus, the power to be exercised under these subsections is discretionary with the court.

It is well settled that mandamus is not an available remedy to compel a discretionary act. *State v. Hart*, 1 Utah 438, 57 Pac. 415. In *Ketchum Coal Co. v. Christensen*, 48 Utah 214, 159 Pac. 541, this court observed that an appellate tribunal may not direct nor control the discretion vested in inferior courts by use of the writ of mandamus. See also *Richards v. District Court of Weber County*, 71 Utah 473, 267 Pac. 779; *Hathaway v. McKelvie*, 85 Utah 21, 38 P. 2d 300. Therefore, in this case mandamus will not lie to direct the City Court of Salt Lake City to compel the filing of additional bills of particulars.

Legal precedent appears to support the proposition that where the granting of a bill of particulars is discretionary, mandamus may not issue to compel a lower tribunal to require a bill of particulars. *State ex rel Drew v. Shaughnessy*, 212 Wisc. 322, 249 N.W. 522; 35 Am. Jur. *Mandamus*, Sec. 295; 55 C.J.S., 55 C.J.S., *Mandamus* Sec. 15b, p. 191.

Additionally, it should be noted that normally the determination of whether to grant a motion to quash is

information or indictment rests in the sound discretion of the trial court, barring some mandatory, statutory, or judicial requirement. Although Section 77-23-3(1)(b), T.C.A., 1953, allows a court to grant a motion to quash where a prosecuting attorney has failed to provide a sufficient bill of particulars, this section appears limited to informations and indictments. Even so, in this case, a determination has been made, by two inferior tribunals, that compliance with the demand has been sufficient and, as noted above, the giving of the additional information sought is purely discretionary with the court. 27 Am. Jur. *Indictments and Informations*, Sec. 143, notes:

"A motion to quash is generally addressed to the sound discretion of the court, the guiding rule in the disposal of the motion being whether prejudice may result to the accused from denial of the motion."

Obviously, therefore, mandamus is not an appropriate remedy for either of the alternatives sought by the appellants.

Finally, it is submitted that since, as will be shown later, the information demanded is evidentiary and outside the scope of a bill of particulars, it could hardly be argued that mandamus should lie to expand the use beyond recognized statutory and judicial limits. The complaint for mandamus was, therefore, procedurally defective and the writ should be denied.

### POINT III

THE APPELLANTS HAVE NO RIGHT TO RELIEF SINCE:

- (a) THE REQUESTED INFORMATION IS OUTSIDE THE SCOPE OF A BILL OF PARTICULARS.
- (b) DUE PROCESS DOES NOT COMPEL THE INFORMATION REQUESTED.

(a) The information sought in the demand for bill of particulars filed by Ed DeLyle which was not supplied by the County Attorney is not information necessary to inform the appellants of the charge against them. Question No. 2 asks for evidentiary information and question No. 3 asks for the production of documents. The request for the production of documents does not specify with any particularity those things sought, and many of the items apparently are not in the possession of the County Attorney. Appellants, therefore, have endeavored to use the bill of particulars as an evidentiary device. In *State v. Lack*, 118 Utah 128, 22 P. 2d 852 (1950), this court observed that a bill of particulars was not available as a discovery device, stating

"Sec. [77-21-9, U.C.A. 1953] was designed to enable a defendant to have stated the particulars of the charge which he must meet, where the short form of indictment or information is used. It was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the state relies to sustain the charge."



In *State v. Jameson*, 103 Utah 129, 134 P. 2d 173 (1943), this court stated:

"He demanded a further bill of particulars showing the exact time, the exact place, whether in or out of a car, and what other person, if any, was present. The court did not err in refusing this request. The purpose of a bill of particulars is to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Laws of Utah 1935, c. 118, 105-21-9. The bill of particulars furnished informed him of the nature of the offense, the time and place of its commission, and was therefore sufficient. The bill of particulars need not plead matters of evidence."

The trial court found the complaint with the additional information supplied by the prosecution to be sufficient to appraise the appellants of the nature of the accusation. It is uniformly settled that a bill of particulars may not be used as a means of gaining information concerning the prosecution's evidence. *Abbott, Criminal Trial Practice*, 4th Ed., Sec. 64; *Moreland, Modern Criminal Procedure* (1958), p. 213, 214. In an annotation in 5 A.L.R. 2d 444, at page 457, it is stated:

"The particulars sought by an accused often are such that the furnishing of them would amount to a disclosure of the prosecution's evidence. In some instances the demand is obviously an exploratory maneuver. Except in those cases in which such information is essential to the accused in order to enable him to prepare his defense, the courts are not inclined to favor the granting of such particulars."

Since the information sought is beyond the scope of the bill of particulars, the appellants have no claim for relief.

(b) The appellants' contention that the denial of the bill of particulars operates to violate due process of law is without merit. The information supplied by the prosecution amply apprises the appellants of the charges against them. This is all that a bill of particulars requires. Additional discovery may be available to the appellants at the time of preliminary hearing or through other procedural devices. Even so, it is clear that there is no merit to the due process argument. In *Leland v. Oregon*, 343 U. S. 790 (1952), the United States Supreme Court passed upon the refusal of a state trial court to require the district attorney to make available the defendant's confession to the crime charged. In *Cicenia v. LaGay*, 357 U. S. 504 (1958), the same issue was passed upon by the United States Supreme Court and again the contention, that the failure to allow inspection prior to trial violated due process, was rejected. The court observed:

" \* \* \* He argues that he was deprived of due process because New Jersey required him to plead to the indictment for murder without the opportunity to inspect his confession.

"The Fourteenth Amendment does not read so far. As stated by the Supreme Court of New Jersey in the earlier proceedings in this case, 6 N.J. 296, 25 299-301, 78 A2d 568, at 570, 571, the rule in that State is that the trial judge has discretion whether or not to allow inspection before trial. This is consistent with the practice in many other jurisdictions. See, e. g., *State v. Haas*, 188 Md. 63, 51 A.2d 647; *People v. Skoyec*, 183 W.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

764, 50 NYS2d 438; *State v. Clark*, 21 Wash.2d 774, 153 P2d 297. In *Leland v. Oregon*, 343 U.S. 790, 801, 802, 96 L. ed. 1302, 1310, 1311, 72 St. Ct. 1002, this Court held that in the absence of a showing of prejudice to the defendant it was not a violation of due process for a State to deny counsel an opportunity before trial to inspect his client's confession. It is true that in *Leland* the confession was made available to the defense at the trial several days before its case was rested, whereas here petitioner pleaded non vult without an opportunity to see the confession. We think that the principle of that case is nonetheless applicable. As was said in *Leland* (343 U. S. 25 801), although it may be the 'better practice' for the prosecution to comply with a request for inspection, we cannot say that the discretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth Amendment. Cf. *Application of Tume* (CA 3 NJ) 230 F2d 883, 890-892."

In *People v. Rosario*, 9 N.Y. 2d 286, 173 N.E. 2d 881 (1961), the appellant contended that he was denied due process of law and that in addition it was error for the trial judge to refuse to turn over to defense counsel statements given before trial by three prosecution witnesses. The New York Court of Appeals rejected the argument and affirmed the conviction. See also *People ex rel Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927), where Justice Cardozo ruled that there was no requirement for general discovery by the defendant in a criminal case. Some courts have felt that this may be getting at the work product of the prosecuting attorney. *State v. Bunk*, 63 A. 2d 842 at 845 (N.J.).

One of the most instructive opinions on the question of whether or not liberal discovery in criminal cases should be allowed was rendered in *State v. Tunc*, 13 N.J. 203, 98 A. 2d 881 (1953), by Chief Justice Vanderbilt, long a supporter of law reform. He stated:

"In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or to frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. *People v. DiCarlo*, 161 Misc. 484, 485-6, 292 N.Y.S. 252, 254 (Sup. Ct. 1936). All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. Hibschman, *You Do Solemnly Swear: Or That Perjury Problem*, 24 J. Crim. L. and Criminology 901 (1934). To permit unqualified disclosure of all statements and information in the hands of the State would go far to

yield what is required in civil cases; it would defeat the very ends of justice.

"In considering the problem it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him. . . .

"Except for its right to demand particulars from the defendant as to any alibi on which he intends to rely, Rule 2:5-7, the State is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable."

Judge Learned Hand, in *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923), observed:

"Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost

of the innocent man convicted. It is an unrea-  
dream. What we need to fear is the archaic for-  
malism and the watery sentiment that obstruc-  
tional delays and defeats the prosecution of crime."

Consequently, it is manifestly apparent that there is  
no merit to the appellants' contention that due process  
of law somehow requires the information sought in this  
demand for a bill of particulars.

The appellants' contention that the Attorney Gen-  
eral's directive of May 21, 1965, is somehow applica-  
ble is without merit. Without considering the power of the  
Attorney General to supervise county and district attor-  
neys, it should be noted that the directive was merely  
"directory," not mandatory, but a suggestion dependent  
upon the particular circumstances of the case.

In the instant case, the appellants seek information  
unrelated to the specific charge before them. The effect  
of their action has been to postpone their prosecution and  
bring the wheels of justice to a halt. There is no merit  
to this appeal.

## CONCLUSION

The State is cognizant of the duty of the prosecu-  
tion to see that justice is rendered, but justice is not ne-  
cessarily equivalent to unbridled leniency and oblivion  
to the needs of society. An important balance must be  
struck between the needs of the accused and those of the State.  
must be struck. Louisell, *Criminal Discovery: Dilemma  
Real or Apparent?* 49 Cal. Law Rev. 56, 98-101 (1961)

In the instant case the time-honored procedures applicable to criminal trials more than satisfy the needs of the appellants. As Justice Holmes once noted, "Experience is the life of the law," and, experience has demonstrated that the position taken by the appellants cannot be sustained.

This court should affirm.

Respectfully submitted,

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