CRIMINAL LAW—A MANSLAUGHTER CONVICTION WILL NOT BE REVERSED ON THE GROUNDS THAT A DRAGNET DISCOVERY MOTION SEEKING EXCULPATORY EVIDENCE HAS BEEN IMPROPERLY DENIED AND THAT AN EXCULPATORY STATEMENT ALLEGEDLY MADE BY THE VICTIM HAS BEEN SUPPRESSED WITHOUT A SHOWING BY THE DEFENSE THAT THE STATEMENT WAS EVER REDUCED TO WRITING, THAT IT WAS EVER SUPPRESSED, AND THAT IT WAS SIGNED OR ADOPTED BY THE VICTIM, OR CONSTITUTED A CONTINUOUS NARRATIVE OF HER REMARKS.—*State v. Hummell* (Iowa 1975).

Defendant's ex-wife died as a result of injuries inflicted upon her by defendant during an altercation. Prior to trial, defendant filed a dragnet discovery motion seeking the production of all statements and investigative reports in the prosecution's possession. The trial court denied the motion, declaring it moot as a result of the state's apparent compliance with the request.[1] On appeal, defendant sought reversal of his manslaughter conviction on the grounds, *inter alia*, that the trial court had erred in denying his discovery motion, and that the state had suppressed an exculpatory statement allegedly made by the victim to the county sheriff and his deputy during a hospital interrogation sometime prior to her death. By way of a "professional statement" offered in support of defendant's post-trial motions, his counsel claimed to have been informed after trial by Deputy Sponberg of the deceased's statement indicating she was "willing to and did accept responsibility for the events which took place at her home involving defendant and that she did not want [him] prosecuted as she felt responsible for those events."[2] Deputy Sponberg submitted an affidavit, controverted by Sheriff Van Crawford, stating that she had placed in the sheriff's office a written and transcribed memorandum as well as her original notes from the meeting with the deceased. The County Attorney denied any knowledge of such written material, and asserted that he had informed defendant's counsel before trial of the substance of the statement as related to him by Sheriff Crawford. *Held, affirmed*, all justices concurring. A manslaughter conviction will not be reversed on the grounds that a dragnet discovery motion seeking exculpatory evidence has been improperly denied and that an exculpatory statement allegedly made by the victim has been suppressed, without a showing by the defense that the statement was ever reduced to writing, that it was ever suppressed, and that it was signed or adopted by the victim, or constituted a continuous narrative of her remarks. *State v. Hummell*, 228 N.W.2d 77 (Iowa 1975).

1. The prosecutor indicated that "he has or will give to defendant's attorney copies of all statements and reports in his possession." Defense counsel conceded that all requested documents in the prosecution's possession had been turned over, but argued that there had been "some impropriety at another level with the result the records (of the deceased's statements to Officers Sponberg and Crawford) are missing." State v. Hummell, 228 N.W.2d 77, 80 (Iowa 1975).

2. *Id.*

The Supreme Court of Iowa has explicitly recognized the current trend toward allowing greater discovery rights for defendants in criminal prosecutions.[3] The 1974 case of *State v. Peterson*[4] has been cited for the proposition that "liberal criminal discovery has won judicial acceptance in Iowa."[5] *State v. Hummell* necessarily raises questions as to the substance and future of this liberalizing trend. Although *Hummell* is not an expansive decision, it does not erode the advances in criminal discovery made by the *Peterson* decision. However, it does raise substantial questions concerning the defendant's burden on appeal in any effort to protect his discovery rights.

State v. Hummell is concerned with the discovery and disclosure of exculpatory evidence in accordance with the constitutional mandate of *Brady v. Maryland*,[6] rather than with the discovery of non-exculpatory evidence useful for impeachment or in preparation for trial.[7] In *Brady*, the United States Supreme Court established that due process requires disclosure by the prosecution, upon request, of material evidence favorable to the accused.[8] *Moore v. Illinois* elucidated this requirement:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct is to be measured.[9]

The discovery process is the means by which the disclosure of exculpatory evidence is implemented. The importance of liberal discovery rules to the actualization of *Brady v. Maryland* has been described as follows:

> There is a basic inconsistency between recognition of the principle that suppression of evidence favorable to the defendant violates due process and a refusal to allow a defendant to discover the evidence uncovered by the State. What we really say is: "The defendant can seek and obtain a new trial *if by accident* he discovers that favorable evidence has been suppressed. It does little good to recognize a right but deny the tools to implement that right."[10]

In establishing standards for the disclosure of exculpatory material, the Iowa supreme court has expressed its objectives in terms of securing a fair trial

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3. "We believe this statement is consistent with the principles and philosophy upon which present day opinions are extending greater discovery rights in criminal prosecutions: that surprise and guile should, as far as possible, be removed from the arena in criminal trials just as it has in civil cases." State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969).

4. 219 N.W.2d 665 (Iowa 1974).

5. Note, *Revival of the Right to a Fair Trial—Traditional Myths and the Necessity of Criminal Discovery and Depositions Under Iowa Criminal Law*, 24 DRAKE L. REV. 185, 201 (1974).

6. 373 U.S. 83 (1963).

7. Documents and other materials requested through criminal discovery "may be divided into two kinds—that which exculpates a defendant, and other material." State v. Aossey, 201 N.W.2d 731, 734 (Iowa 1972).

8. Brady v. Maryland, 373 U.S. 83, 87 (1963).

9. 408 U.S. 786, 794 (1971).

10. State v. Eads, 166 N.W.2d 766, 775 (Iowa 1969) (Becker, concurring specially).

for both the defendant and the state.[11] The defendant is often unaware of the existence or nature of exculpatory evidence in the prosecution's possession. The state, on the other hand, is not required to make a complete and detailed accounting of its investigatory work, a protection often framed in terms of freedom from unbridled "fishing expeditions" into its files and "work product."[12] The task of shaping the process and boundaries of pretrial disclosure "goes to the heart of the puzzle as to how courts can reach the delicate balance essential to guarantee *both* a defendant and the State a fair trial."[13]

To understand and evaluate *Hummell*'s impact on the defendant's right of access to exculpatory evidence requires a disentangling of its multiple strands. *State v. Hummell* is a deceptively uncomplicated decision dealing with an area of the law which is newly evolving.[14] Unfortunately, the Iowa supreme court has not clearly analyzed the significance and relationship of *Hummell*'s component strands. An attempt to do so follows, considering *Hummell* in the context of: (1) the discovery advances of *State v. Peterson*;[15] (2) the "reversal for suppression" criteria of *Brady v. Maryland*;[16] and (3) the "signed, adopted or narrated" requirement of the federal Jencks Act.[17]

I. Criminal Discovery and State v. Peterson

The two leading Iowa criminal discovery cases of recent vintage are *State v. Eads*[18] and *State v. Peterson*.[19] *State v. Eads* was largely concerned with the discovery of non-exculpatory physical evidence and hence is of limited significance for this analysis.[20] *State v. Peterson* made two relevant advances over past decisions. First, a general request for "any exculpatory evidence known to the state" was held to be adequate to impose a burden of production on the prosecution.[21] Such a broad and undirected motion had been condemned as a "catch-all" attempt to embark upon a "fishing expedition" in *State v. Niccum*[22] and *State v. Eads*.[23] Second, the state could not withhold production of

11. "Our consideration of the problem before us is confined to the fundamental principle of fair trial." State v. Eads, 166 N.W.2d 766, 768 (Iowa 1969).
12. Moore v. Illinois, 408 U.S. 786, 795 (1972); State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975); State v. Eads, 166 N.W.2d 766, 774 (Iowa 1969).
13. State v. Eads, 166 N.W.2d 766, 773 (Iowa 1969).
14. "However clear the general trend [of expansion of discovery procedures], the day-to-day course of criminal discovery is still one of trial and error, perhaps inevitably so in a land of great diversity and dimension." Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 229 (1964).
15. 219 N.W.2d 665 (Iowa 1974).
16. 373 U.S. 83 (1963).
17. 18 U.S.C. § 3500 (1970).
18. 166 N.W.2d 766 (Iowa 1969).
19. 219 N.W.2d 665 (Iowa 1974).
20. 166 N.W.2d 766, 767 (Iowa 1969).
21. 219 N.W.2d 665, 674 (Iowa 1974). *See* Note, *Revival of the Right to a Fair Trial—Traditional Myths and the Necessity of Criminal Discovery and Depositions Under Iowa Criminal Law*, 24 Drake L. Rev. 185, 199 (1974).
22. "Defendant's motion was too vague and general and placed too heavy a burden on the county attorney to make a judgment as to what was and was not exculpatory." State v. Niccum, 190 N.W.2d 815, 827 (Iowa 1971).
23. 166 N.W.2d 766 (Iowa 1969). Although the precise question relating to the

exculpatory evidence on the grounds that it was inadmissible hearsay or rebuttable at trial.[24] According to the court,

> Both defenses miss the point. Under our cases the defense was entitled to the exculpatory evidence in order to investigate it and to use it both in trial preparation and in the trial itself. It is no answer that the State does not believe the evidence to be true or believes it could object to it when offered.[25]

State v. Hummell does not necessarily erode either of these important advances. The defense discovery motion in *Hummell* sought

> . . . all signed or unsigned statements of any persons known to have knowledge of any part of the facts or events involved in the pending charge, including any . . . statements . . . transcribed by a third person, all investigative reports of members in the police department . . . [and] all statements attributed to the defendant.[26]

The court found such a dragnet motion to be defective, holding that the defendant must "specifically seek 'exculpatory evidence.' "[27] Because of its finding that "the prosecutor's unrefuted remarks at the post-trial hearing . . . suggests defendant's counsel must have been aware before trial that Ms. Sponberg had some information concerning such a statement,"[28] the Iowa supreme court was willing to impose on defense counsel in *Hummell* the burden of specifically requesting the victim's statement.[29] However, where the defendant is unaware of the particular nature of alleged exculpatory material, the *Hummell* decision does not seem to preclude a motion for "all exculpatory evidence known to the state" as was upheld in *Peterson*.[30] Formally, therefore, the discovery motion generally seeking exculpatory evidence is still viable, at least where the defense cannot be charged with more specific knowledge.

Nor does *Hummell* seem to require that the existence of the evidence sought to be discovered be proved at the trial level in laying a foundation for discovery, although the state had argued on appeal for this position.[31] Indeed, the significance and potency of the *Peterson* motion only manifest themselves when defense counsel is *unaware* of whether any exculpatory evidence is in existence.

Although the Iowa supreme court did not find error in the trial court's

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"catch-all" request for "all exculpatory evidence known to the state" was not argued on appeal, the trial court had denied the motion and the reasoning of the Iowa supreme court is consistent with such denial. State v. Eads, 166 N.W.2d 766, 768 (Iowa 1969).

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

25. *Id.*

26. State v. Hummell, 228 N.W.2d 77, 80 (Iowa 1975).

27. *Id.* at 81.

28. *Id.*

29. "No mention was made in the discovery motion of any statement given Ms. Sponberg by the deceased," despite the suggested knowledge of defense counsel. State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975).

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

31. "The State counters defendant's contention with the argument he failed to lay a proper foundation for production of the statement, citing State v. Niccum, 190 N.W.2d 815 (Iowa 1971)." State v. Hummell, 228 N.W.2d 77, 80 (Iowa 1975).

denial of defendant's discovery motion,[32] the rationale for the holding as to this issue is not entirely clear. Certainly the request in *Hummell* was too broad, especially in light of the court's finding that defense counsel had some information before trial concerning the victim's statement.[33] Because the court merges its consideration of the discovery and suppression issues in the case, however, some ambiguity is created regarding the defendant's burden at trial in seeking discovery and his burden on appeal in obtaining a reversal for the prosecution's failure to disclose exculpatory evidence.[34] Were *Hummell* to be interpreted as requiring a showing of existence before a discovery motion should be granted, the liberalizing achievement of *State v. Peterson* would be emasculated. However, *State v. Hummell* should not be understood as taking such a backward step. It should be read to hold that the defendant's discovery motion in *Hummell* was formally defective, rather than defective because no prior showing of existence had been made. Although the opinion in *Hummell* does not explicitly distinguish between the requisite trial and appellate showings, any other interpretation would seem to impute to the Iowa supreme court a major retreat in criminal discovery based upon a decision which is at best murky in its discussion of these threshhold issues.[35]

Neither does the court in *State v. Hummell* allow the inadmissibility of exculpatory material to be a criterion for refusing production.[36] Although the state argued that it did not intend to call Deputy Sponberg as a witness and that her testimony in relation to the statement would be inadmissible hearsay,[37] the Iowa supreme court did not include the hearsay problem in its delineation of the factors supporting its failure to reverse.[38]

II. Reversal for Suppression Under Brady v. Maryland

The heart of the decision in *Hummell* is the court's discussion of the requisite existence and suppression showings in order to obtain a reversal based on *Brady v. Maryland*. In other words, before a defendant can successfully claim on appeal that he has been denied due process, he must be able to prove that some exculpatory evidence is in existence, and that the state suppressed

32. *Id.*
33. *See* notes 26-28 *supra* and accompanying text.
34. "The record also reveals that except for the affidavit of Ms. Sponberg, controverted by Sheriff Crawford, there was no showing the alleged statement was ever reduced to writing, *i.e.*, existed in a form susceptible of reproduction by the State." State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975). The question not directly answered by the court is when this showing must be made. Ms. Sponberg's affidavit was submitted after trial. *Id.* at 80.
35. The confusion resulting from the merger of the discovery and suppression issues is exemplified by the court's holding: "Defects in defendant's discovery motion aside, there has been no showing here the State suppressed from defendant exculpatory evidence, or for that matter, no showing the evidence he sought was of such a nature as to be susceptible to discovery as the actual statement of the deceased." State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975).
36. *Id.* at 81-82.
37. *Id.* at 80.
38. *Id.* at 82.

it.[39] This view is based on the rationale that a court will not reverse a decision based on an alleged denial of due process without a showing that the defendant was in fact denied what he was entitled to by law.[40] It follows that if the evidence did not exist in the first instance, there could be no denial of access to it. Therefore, although *Peterson* does not require that existence be proven at the trial level as part of laying the proper foundation for discovery, *Hummell* dictates that a reversal based on a denial of due process cannot be obtained without such a showing. According to the court, "his request for exculpatory evidence must be for that which exists."[41]

Whether at the trial level or on appeal, existence in written form may, from the defendant's point of view, be difficult to prove. The facts of *Hummell* illustrate the potential hardship on the defendant in establishing that a statement has been reduced to writing and placed in the prosecution's possession where the declarant is deceased and the writing, though possibly extant at one time, may have been lost or misplaced. The defense in *Hummell* submitted an affidavit by the deputy sheriff stating that her transcribed notes from the meeting with the deceased had been placed in the sheriff's office, although she was unaware of their present whereabouts.[42] If the evidence was lost or destroyed, what more can the defendant do to prove its existence? The *Hummell* court may have imposed an insurmountable burden on the defendant seeking to prove existence. Although the court fails to elucidate the standard of proof required, *Hummell* hopefully does not indicate that conclusive proof of existence is necessary.

The Supreme Court of Iowa also failed to find under the facts of *Hummell* any "hard evidence" of suppression.[43] Since the burden of showing existence was not met, and the state provided the defense with all other requested material, there was no basis for a holding of suppression. Additionally, the court accepted the prosecutor's contention that he had informed defense counsel, prior to trial, of the general nature of the statement made by the deceased as related to him by Sheriff Crawford.[44] Therefore, presumably, the defense knew of the exculpatory statement and could itself have further interrogated Deputy Sponberg. Where the defense has actual knowledge of the exculpatory information, or should with due diligence have acquired it, courts have held that there is no suppression.[45] "This is so because '[in] the end, any allegation of suppression boils down to an assessment of what the state knows at trial in comparison to the knowledge held by the defense.'"[46]

39. Gordon v. United States, 344 U.S. 414, 420 (1953); State v. Niccum, 190 N.W.2d 815, 826 (Iowa 1971); State v. Kelly, 249 Iowa 1219, 1221-22, 91 N.W.2d 562, 564 (1958).
40. State v. Niccum, 190 N.W.2d 815, 826 (Iowa 1971).
41. State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975).
42. *Id.* at 80.
43. *Id.* at 81.
44. *Id.* at 80.
45. United States v. Brawer, 367 F. Supp. 156, 177 (S.D.N.Y. 1973). *See* Annot., 34 A.L.R.3d 16 (1970).
46. United States v. Brawer, 367 F. Supp. 156, 177 (S.D.N.Y. 1973), *quoting* Giles v. Maryland, 386 U.S. 66, 96 (1967).

III. The Jencks Requirement

Even if the victim's statement were shown to exist in written form and to have been deliberately suppressed by the prosecution, the conviction in *Hummell* would presumably not have been reversed because there was no showing that it was discoverable as the "actual statement of the deceased."[47] The requirement that a discoverable statement must have been signed, adopted or narrated by the declarant is derived from the federal Jencks Act,[48] which governs the discovery of extra-judicial statements made by testifying prosecution witnesses. It provides that such statements are discoverable by the defense, after the witness has testified, if they are relevant to the proffered testimony and if they meet the "signed, adopted or narrated" requirement.[49] The restrictive meaning given by the Act to discoverable "statements" was considered necessary because:

> [I]t was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations.[50]

The Supreme Court of Iowa has specifically applied the federal Jencks Act procedure for determining defendant's right to see statements of witnesses.[51] Such cases have always involved the discovery of evidence for the purpose of impeaching a prosecution witness, and the court has been careful to distinguish requests for alleged exculpatory evidence.[52] *State v. Hummell* appears to be the first Iowa case in which the "authentication" issue arises in relation to discovery of an exculpatory statement made by a non-testifying declarant.[53]

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47. State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975).

48. 18 U.S.C. § 3500 (1970).

49. *Id.*

50. State v. Schlater, 170 N.W.2d 601, 607 (Iowa 1969), *quoting* Palermo v. United States, 360 U.S. 343, 350 (1959).

51. State v. Lyons, 210 N.W.2d 543 (Iowa 1973); State v. Houston, 209 N.W.2d 42 (Iowa 1973); State v. Schlater, 170 N.W.2d 601 (Iowa 1969).

52. It must be remembered that Mrs. Thornton made no statement which she actually signed, nor signed one reduced to writing by anyone else which she adopted; and no verbatim rendition is claimed to have been made of her statements to the police. *Nor does defendant in this case claim he was entitled to access to the police report because it was exculpatory in nature.* State v. Lyons, 210 N.W.2d 543, 547 (1973) (emphasis added).

"Defendant in this case does not claim access to the police report because it is exculpatory *or* a verbatim, signed or adopted statement of the witness . . . . Several of our cases have approved the federal Jencks Act procedure for determining defendant's right to see statements of *witnesses*." (citations omitted) (emphasis added) State v. Houston, 209 N.W. 2d 42, 46 (Iowa 1973).

53. The Iowa supreme court, in *State v. Aossey*, suggests that the Jencks discovery procedure is limited to witnesses' statements: "We do not have a Jencks' problem here, as Rugger was not a witness at the trial." State v. Aossey, 210 N.W.2d 732, 734 (Iowa 1972).

The *Hummell* court, in discussing the applicability of the Jencks standard, writes: "In those cases we clarified the distinction between a statement made by a witness (*including the victim*) and an imprecise summary of what another understood him to say. . . ." State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975) (emphasis added). However, where discovery has been sought of a victim's statement, the victim, as in State v. Lyons, 210 N.W.2d 543 (Iowa 1973), was a testifying prosecution witness.

In applying an authentication requirement developed for the discovery of witnesses' statements used for impeachment purposes to the pretrial disclosure of alleged exculpatory statements by persons not expected to testify, the Iowa supreme court has perhaps unknowingly extended a restrictive discovery rule to a new context. As applied to statements by non-witnesses, the rigid Jencks standard is excessively harsh, because there is no danger that testimony will be challenged based upon a distorted account of what an individual has previously said. As applied to the discovery of statements alleged to be exculpatory, the restriction may seriously detract from the due process right to disclosure of favorable evidence defined in *Brady v. Maryland*.[54] Although even the more liberal rules of civil discovery protect against disclosure of the impressions and interpretations of opposing counsel,[55] civil discovery and criminal discovery of non-exculpatory evidence are not constitutionally protected as fundamental to due process but rather policy considerations as to how a trial should be conducted.[56]

Even if an unacknowledged or unauthenticated statement is inadmissible at trial,[57] *State v. Peterson* seems to require that its potential usefulness in preparation for trial not preclude production on this basis.[58] Unquestionably, a balance must be sought between undue invasion of the prosecution's work product and the defense's access to exculpatory material. Strict application of the Jencks Act procedure to discovery of an exculpatory statement made by a non-testifying declarant, however, potentially deprives the defendant of access to favorable and material evidence which *Brady v. Maryland* should afford him.

The Supreme Court of North Dakota has held that "[t]he 'Brady rule' is separate from, and not related to, the 'Jencks rule', . . . which requires production of documents after a witness has testified."[59] Research has not revealed any other state applying the Jencks rule in the *Hummell* context. Furthermore, the Jencks authentication requirement for the discovery of im-

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54. *See* notes 8-9 *supra* and accompanying text.

55. "In ordering discovery of such materials [those constituting the 'work product' of opposing counsel] the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(3).

56. "For present purposes we take as established the argument that, in the absence of suppression of evidence favorable to a defendant, states do not violate due process by denying pre-trial discovery." State v. Eads, 166 N.W.2d 766, 768 (Iowa 1969).

57. The admissibility of a written statement may depend upon an authentication of authorship. "By whom was it written, signed or adopted? Certainly any intelligible system of procedure must require that if the legal significance of the writing depends upon its authorship by a particular person, some showing must be made that he was the author, if the writing is to be accepted for consideration." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 185 (1st ed. 1954).

58. *See* notes 36-38 *supra* and accompanying text.

"The producibility of statements under the Jencks Act and their admissibility under the rules of evidence are separate questions, United States v. Berry, 277 F.2d 826, 830 (7th Cir. 1960), but obviously closely related." Campbell v. United States, 373 U.S. 487, 493 n.7 (1963).

59. State v. Hilling, 219 N.W.2d 164, 166 (N.D. 1974).

peachment evidence has been eliminated in California[60] and has been somewhat relaxed in the federal system.[61] If the "signed, adopted, or narrated" standard can viably be eliminated or relaxed where the statement sought to be discovered will be used for impeachment purposes, it seems that the standard, as applied to pretrial disclosure of exculpatory statements by non-witnesses which may be used solely in trial preparation, unjustifiably restricts the defendant's rights to criminal discovery.

Iowa's apparently backward step in this regard may result, however, more from a failure to distinguish between types of discoverable evidence, discovery situations, and disclosure rights than from a conscious decision to limit pretrial disclosure. The analytic deficiency which this failure produces has made more difficult the task of the courts in formulating standards on a case by case basis. In turn, this has led to a proclaimed need for legislative participation in the development of rules governing criminal discovery.[62]

IV. Conclusion

Throughout the decisions on criminal discovery runs the fear of allowing defendants to embark upon unbridled "fishing expeditions" into the prosecution's files.[63] Although it is uniformly held that the "work product" of the prosecution is entitled to protection from complete disclosure,[64] the courts have perhaps been prone to react too strongly to the fishing expenditure scare. As Judge Angstman said in dissent in *State ex rel. Keast v. District Court*:[65]

> Likewise, the fact that defendant may uncover something that will be helpful in his defense which he could not have forseen, i.e., he might accidentally catch a fish, and thus the matter be given the earmarks of a fishing expedition is in my opinion no valid objection.

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60. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 244 (1964).

61. *See* Campbell v. United States, 373 U.S. 487 (1963). "There, an F.B.I. agent took notes while interviewing a witness and then, by referring to the notes, reiterated the witness' story for his approval; several hours later, the agent dictated an interview report based on both the notes and his memory. The Supreme Court upheld a trial judge's finding that this report was a copy of a statement made and adopted by the witness. . ." and was therefore discoverable under the Jencks Act. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 241 n.71 (1964).

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> The decisional method is not well suited for use in embarking upon a new criminal discovery system. . . . I would therefore stand by our present decisions on criminal discovery pending action by the next General Assembly on its proposed revision of Iowa criminal procedure. At the same time, I would suggest to the Assembly the advisability of a new statute authorizing this court to propose rules of criminal procedure. . . . This seems to me a wiser approach than the ad hoc decisional method, especially with respect to criminal discovery when we do not have a set of standing rules which were designed for criminal cases.

State v. Peterson, 219 N.W.2d 665, 675 (Iowa 1974) (Uhlenhopp, concurring specially, joined by Moore and Rees).

63. "A familiar objection to discovery, seen also in civil cases, is that the inquirer ought not to be permitted to go on a 'fishing expedition,' and that the work product of the opposing lawyer ought not to be exposed to discovery." Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 Stan. L. Rev. 293, 313 (1960).

64. "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795 (1971).

65. 342 P.2d 1071 (Mont. 1959).

> . . . I do not think this court should condemn defendant's efforts as an attempt to embark upon a fishing expedition when there is nothing before the court to indicate an absence of good faith on his part to obtain evidence relating to his defense.[66]

State v. Hummell, although not a liberalizing decision in the case law surrounding the defendant's right to disclosure of exculpatory evidence, need not portend a reactionary future. The facts of the case create an unimpressive vehicle for an affirmation or expansion of pretrial discovery rights and the protection they are accorded on appeal. The Iowa supreme court in *Hummell* imposed a heavy burden on the defendant seeking to show that exculpatory evidence exists and has been suppressed. However, this burden may have been colored by the weak probative value of the exculpatory statement allegedly suppressed.[67] Nevertheless, Iowa remains in the forefront of the march toward liberal criminal discovery and it can realistically be hoped that future and less problematic cases will be supportive of this trend.

SANDRA M. CONSIGNY

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66. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 313 n.81 (1960), *quoting* State *ex rel.* Keast v. District Court, 342 P.2d 1071 (Mont. 1959) (dissenting opinion).

67. "[T]he general rule is that a private individual has no power to ratify, settle or condone a public wrong even if it was a wrong which injured his person or harmed his property. . ." R. PERKINS, CRIMINAL LAW. 975 (2d ed. 1969).