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CRIMINAL LAW—THE NEW DISCOVERY RULES

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DURING THE past year, the Illinois Supreme Court made a most significant contribution to the everyday practice of criminal law by liberalizing Illinois' Rules for Discovery and Procedure for Trial in Criminal Cases.¹

By way of background and to better enable one to fully appreciate the significance of the new Illinois Discovery Rules, it should be observed that unlike our brethren at the bar who practice in civil courts, the criminal practitioner has not benefited from the use of pretrial discovery procedures. Unfortunately, the criminal practitioner has been denied the use of discovery due to incomplete incorporation of the English common law.

In 1792, an officer of the East India Company, charged with a delinquency in his account, sought an order from the English court directing the prosecutor to divulge a board of inquiry report which had been prepared in India, the place of the alleged crime. Lord Chief Justice Kenyon not only denied the discovery request, concluding that courts were powerless to order the prosecutor to disclose matters contained in his file, but also confessed to being appalled that such a request was even made.² The Lord Chief Justice was moved to suggest that granting discovery in criminal cases would "subvert the whole system of criminal law."³ Forty years later, English courts rejected the holding of Lord Chief Justice Kenyon in *Rex v. Holland*.⁴ As a result, the English defendant is entitled to

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1. ILL. REV. STAT. ch. 110A, §§ 411-15 (1971).

2. *Rex v. Holland*, 100 Eng. Rep. 1248 (1792).

3. *Id.* at 1249.

4. *See Rex v. Harrie*, 172 Eng. Rep. 1165 (1833).

total discovery of a prosecutor's case through the vehicle of an extensive preliminary hearing.

Regrettably, the courts in our country, with the notable exception of an opinion written by Chief Justice Marshall sitting as circuit judge in *United States v. Burr*,⁵ have totally relied upon and cited as precedent the 1792 decision of *Rex v. Holland*. The result has been most obvious: discovery has not existed as a meaningful adjunct of the criminal practice.

In this regard it is interesting to note that Mr. Justice Brennan, a long-time advocate for the liberalization of discovery in criminal cases, depicted the unfairness of our discovery procedures as compared with those used in the Soviet Union and France:

I think it is particularly ironic that, according to Mr. Justice Jackson, Soviet prosecutors at the War Crimes Trials at Nuremberg vigorously protested against adoption of the prevailing American procedures on the ground that they are just 'not fair to the defendants.' The upshot was a compromise procedure which permitted the accused at those trials more liberal discovery than allowed under American law, although apparently narrower than Soviet or French practice sanctions.⁶

In May of 1969, under the chairmanship of circuit court Judge Warren E. Burger, the American Bar Association's Project on Standards for Criminal Justice released its Tentative Draft of Standards

5. 25 F. Cas. 30, 32 (C.C.D. Va. 1807). The language of Chief Justice Marshall hardly compares with the opinions of other courts in their traditional denials of discovery requests. Addressing himself to the defendant's requests for "copies of certain orders, understood to have been issued to the land and naval officers of the United States for the apprehension of the accused, and an original letter from General Wilkinson to the president in relation to the accused . . ." Chief Justice Marshall made the following general observations: "So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defense, and to obtain the process of the court, for the purpose of enabling him so to do . . . and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual."

.. . .
"It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." [*Id.* at 36].

6. 33 F.R.D. 47, 59 (1963). (Discovery in Federal Criminal Cases, Symposium at the Judicial Conference of the District of Columbia Circuit, 1963).

Relating to Discovery and Procedure Before Trial.⁷ In August of 1970, subject to and accompanied by certain subsequently proposed minor amendments, the House of Delegates of the American Bar Association approved the new Discovery Standards and urged a complete reevaluation of the present procedures. More specifically, the Discovery Standards favor the value of and need for liberalized, comprehensive discovery procedures.⁸ The very first sentence of the introduction to the Discovery Standards notes that "[t]his report proposes more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States."⁹ The introduction further suggests that "[t]he need for changes in procedures appeared manifest in order to lend more finality to criminal dispositions, to speed up and simplify the process, and to make more economical use of resources."¹⁰

In drafting and adopting the new Illinois Discovery Rules, the Illinois Supreme Court responded to the far-reaching recommendations proposed by the ABA. In October of 1970, the court appointed ten distinguished members of the court's bar to serve on the Committee on Criminal Discovery. That committee, chaired by Professor Charles H. Bowman, included judges, prosecutors and defense attorneys.¹¹ The court directed the committee to prepare and submit recommendations for a comprehensive plan for improving the liberalized discovery suggested by the ABA Standards Committee. The efforts of the committee resulted in the court's adoption of the Supreme Court Rules for Discovery and Procedure Before Trial in Criminal Cases on October 1, 1971. The court and its distinguished

7. American Bar Association on Minimum Standards for Criminal Justice, Tentative Draft of Standards Relating to Discovery and Procedure Before Trial (1969) [Hereinafter referred to as *Discovery Standards*].

8. American Bar Association Project on Standards for Criminal Justice, Approved Draft of Standards Relating to Discovery and Procedure Before Trial (1970). See also the President's Commission on Law Enforcement and Administration of Justice in a similar but for the most part unheeded conclusion in its report entitled, "The Challenge of Crime in a Free Society" (1967). The commission expressed itself in favor of "the expansion of pretrial discovery . . ." in criminal cases. *Id.* at 138-39.

9. *Discovery Standards* at 1.

10. *Id.* at 2.

11. Besides Professor Bowman, the members of that committee were: Roy O. Gullely, Administrative Director of the Illinois Courts; Jack E. Brunnenmeyer; Elmer C. Kissane; George Cotsirilos; Allen Lev; Judge Edward J. Egan; Judge Wayne C. Townley Jr.; William V. Hopf; James B. Zagel; and William T. Kirby.

committee are to be complimented for a job well done. As a result of their efforts, Illinois has one of the most comprehensive, farsighted and practical set of discovery rules of any state.

The purpose of this article, however, is not to laud the rules, but to offer practical comments directed to the practitioner's contemplated use of the rules.¹² Accordingly, considering the rules in *seriatim* fashion, the following comments and suggestions relative to their use and possible misuse are offered.

RULE 411—APPLICABILITY

These rules shall be applied in all criminal cases wherein the accused is charged with an offense for which, upon conviction, he might be imprisoned in the penitentiary. They shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing.

The new discovery rules do not apply to misdemeanors unless they are initiated by indictment or information.¹³ Thus, in representing persons accused of misdemeanors not initiated by indictment or information, defense counsel must resort to the discovery procedures available prior to the adoption of the new rules.¹⁴

Although the new rules now apply to all felony and certain misdemeanor cases, defense counsel is not precluded from using prior discovery procedures where, as might often be the case, prior procedures would permit more liberal discovery than otherwise provided for in the new rules.

RULE 412—DISCLOSURE TO ACCUSED

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense

12. See also Zagel and Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557 (1971).

13. See *People v. Garfinkle*, 169 Ill. App. 554 (1912) (misdemeanors can be brought by indictment).

14. Prior to the adoption of the new rules, discovery was provided for in order to: 1) obtain a bill of particulars, ILL. REV. STAT. ch. 38, §§ 114-2 (1971); 2) obtain a list of witnesses and their addresses, ILL. REV. STAT. ch. 38, §§ 114-9 (1971); 3) obtain a copy of the confession of the defendants and witnesses to the confession, ILL. REV. STAT. ch. 38, §§ 114-10 (1971); 4) obtain, subject to availability and the court's discretion, grand jury testimony, ILL. REV. STAT. ch. 38, §§ 112-6 (1971); 5) obtain certain evidence in the state's possession. See *People v. Jordan*, 38 Ill. 2d 83, 89, 230 N.E.2d 161, 165 (1967); *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

counsel, disclose to defense counsel the following material and information within its possession or control:

- (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially *verbatim* reports of oral statements shall be disclosed to defense counsel.

In considering Illinois' disclosure to the accused under this rule, it should be contrasted with the Federal Rule of Criminal Procedure 16(b) and 18 U.S.C. § 3500. Under the federal rule, the defendant is not permitted discovery of statements made by a government witness until the witness "has testified on direct examination. . . ."¹⁵ The Illinois rule is considerably more liberal by allowing discovery of names, addresses and relevant written or recorded statements of prosecution witnesses without conditioning it on the direct examination of the witnesses at trial.

The Illinois rules, however, do not allow discovery of the statements of witnesses not to be called by the prosecutor. In Illinois, this result might be achieved through a motion under Rule 412(h).¹⁶ Having discussed these substantive limitations of Rule 412(a)(i), it is essential to point out the limitations arising from the form that discovery must take under this rule.

By requiring the filing of written motions, the court missed an excellent opportunity to be innovative. The framers of the rules could have eliminated the need for the filing of written motions and provided, instead, that discovery must, upon defendant's request, be automatically granted when dealing with matters thereafter enumerated. Had such a self-operating procedure been adopted, it would have: 1) disentangled the defense attorney from what would

15. 18 U.S.C. § 3500(b). One reason behind this provision is the protection of government witnesses from possible intimidation by the defense. Federal Rule of Criminal Procedure 16(b) does not allow disclosure "of statements made by government witnesses . . ." except as provided in 18 U.S.C. § 3500. As to this reasoning, compare MOORE, FEDERAL PRACTICE § 16.02 with Flannery, *The Prosecutor's Case Against Liberal Discovery*, 33 F.R.D. 74, 79 (1963) and Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. L.Q. 279, 285-88.

16. See *infra* for discussion of Rule 412(b).

soon become, to a large degree, mere ministerial work, 2) alleviated the need for the prosecutor to respond to written motions and, most importantly, 3) diminished the necessity of judges ruling on discovery motions, which augments the overcrowded dockets of the trial courts.

As the rule stands now, the practitioner's attention is called to the necessity of filing written motions. A criminal lawyer who, under the present rules, fails to specifically request all of the matters provided for in the rules would be subject to criticism and the accusation of incompetence.¹⁷

The practitioner must be aware of the limitation of the term "statements," which is, in effect, defined as being limited to "substantially *verbatim* reports." This definition, therefore, excludes "summarizations" of a witness' comments. The court's reasoning is understandable. One of the main purposes in obtaining a witness' statements is to permit impeachment of the witness at trial. However, impeachment is understandably and necessarily limited to statements of the witness himself and not summarizations of those statements by another since the latter are likely to be subjective.

It should be noted, however, that this subsection of the rule still allows for a request to be made of the prosecutor that he specifically identify, even though he need not surrender, summarizations of witness' statements. Where such a request is favorably responded to and the prosecutor does submit a list of summarizations, it remains for the defense attorney to move that the alleged summarizations be submitted to and examined by the court *in camera*.

RULE 412(a) (ii)

- (ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements.

While the defendant is entitled to his own statements and those of his codefendants, no mention is made or distinction drawn between "substantially *verbatim* reports" and mere summarizations. Quite

17. Parenthetically, in making discovery requests pursuant to a specific rule of statutory authorization requests should be made in the exact language used in the specific rule or statutory authorization.

possibly no such distinction was intended since the language of the rule, in addition to using the term "statements," also refers to the "substance of" any statements. By using the terms "substance of" the court may have intended to automatically entitle a defendant not only to his statements but also to summarizations as well.

Whatever the intent of the court, it would seem prudent for defense attorneys, in making a discovery request pursuant to the above subsection, to request "any written or recorded statements. . ." *and summarizations thereof* made by the accused or by a codefendant. To the extent that such a request pertains to summarizations of a defendant's statements, it cannot be reasonably opposed when we recall and appreciate the reason for the "summarization" exception in the preceding subsection. Certainly, a defendant's right to his own statements is in no way conditioned or dependent upon their value in permitting him to impeach himself.

It is also important to note that when making requests and seeking compliance under this subsection, defense attorneys should not overlook their right, by reason of 412(a)(ii), to obtain surreptitiously recorded or monitored conversations of the defendant. All too often requests for this type of statement are predicated solely upon constitutionally protected rights against unreasonable searches and seizures. Requests made under the authority of this subsection are much easier to support.

RULE 412(a) (iii)

- (iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Similar to Rule 16(a)(2) of the Federal Rules of Criminal Procedure, this rule entitles the defendant to his grand jury testimony. In practice, the value of this subsection to the defense counsel is the most illusory of all the discovery provisions, since rarely, if ever, is a putative defendant called before a grand jury. The calling of a putative defendant before a grand jury might indeed raise serious ethical questions.¹⁸

18. See American Bar Association Project on Standards for Criminal Justice, Approved Draft of Standards Relating to the Prosecution Function and the Defense Function, § 3.6(d)(e) (1971).

The Illinois rule, however, goes much further than Federal Rule 16(a)(2) by entitling the defendant to the "relevant" grand jury testimony of persons intended to be called as witnesses by the prosecutor. This portion of the rule is commendably consistent with the recent trend in liberalizing the use of grand jury testimony where the release of such testimony is warranted or required by more significant considerations (such as the defendant's right to prepare and present an adequate defense).¹⁹ Excepting the more liberalized criteria upon which courts have directed the production of grand jury testimony of witnesses (to impeach the witness, to test the witness' credibility or to refresh the witness' memory), there is no longer serious question that a defendant is entitled to the testimony of adverse witnesses who appear before the grand jury. Surprisingly, most prosecutors still successfully resist requests for pretrial disclosure of witness' grand jury "testimony" treating such material as "statements" of those witnesses.²⁰ The new rule automatically entitles the defendant to grand jury testimony without the necessity of determining the existence or nonexistence of the "particularized need" criteria and, more importantly, entitles the defendant to this material as part of pretrial discovery.

It must be pointed out, however, that this portion of rule 412(a) (iii) may also be somewhat ineffectual in practice. The rule does not require prosecutors to stenographically record the testimony of grand jury witnesses. It might well be anticipated that, to avoid the tactical disadvantages which might be occasioned by compliance with this rule, prosecutors, where there is any possibility that the witness' testimony might harm their case, will not have it recorded.²¹

19. In *Dennis v. United States*, 384 U.S. 855, 886 (1966), the United States Supreme Court, depending upon how you read and interpret the decision, either eliminated the "particularized need" test of the *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) decision, or at the very least, suggested a more expansive interpretation of these terms "where the ends of justice require it." 384 U.S. at 869-70.

20. In the federal court, 18 U.S.C. § 3500 and, in Illinois, prior to adoption of the new discovery rules, *People v. Neiman*, 30 Ill. App. 2d 393, 397, 197 N.E.2d 8, 10 (1964); *People v. Wolff*, 19 Ill. 2d 318, 167 N.E.2d 197 (1960) limited the right to review witness' statements until after the witness had testified on direct examination.

21. The only jurisdiction which now requires the stenographic recording of the testimony of all the grand jury witnesses is the United States District Court for the Northern District of Illinois (Local Rules of Criminal Procedure, Rule 1.04(c)).

RULE 412(a)(iv)

- (iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

This subsection of the rule, in effect, adopts Rule 16(a) (2) of the Federal Rules of Criminal Procedure.²² Since the Illinois Rule is comparable to the Federal Rule, the Illinois practitioner would be well advised to use relevant Federal Rules decisions in arguing by analogy.²³

RULE 412 (a) (v)

- (v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused.

In entitling the defendant to anything obtained from or belonging to the accused, this subsection is more limited in one respect than the applicable federal rule. Federal Rule 16(b) allows discovery of any books, papers, documents, tangible objects or places within the possession, custody or control of the government, whether obtained from or belonging to the accused or not.

One should note that the broadest and most significant part of the rule is that which gives a defendant the right to discover anything the prosecutor intends to use at trial. This rule, then, necessarily contemplates pretrial discovery of all items of tangible evidence which the prosecutor might offer into evidence at the trial.

22. FED. R. CRIM. P. 16(a)(2).

23. FED. R. CRIM. P. 16(a) states that "the court *may* order . . ." [emphasis added]. See WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 253 which states that the material enumerated in 16(a) will almost always be granted as a matter of right. A contrary result was reached in *United States v. Isa*, 413 F.2d 244 (7th Cir. 1969) where the court held that though "the court may order . . ." semantically implies discretion, a trial court must order production pursuant to a Rule 16(a) request unless the government interposes a subsection (e) claim requesting a protective order.

The drafters of the 1970 proposed amendments, acknowledged the conflict in circuits occasioned by the use of the term "may", and suggest this conflict be resolved consistent with the holding of the previously cited Seventh Circuit decision. Their amendment substitutes the word "shall" for the present word "may". 48 F.R.D. 547, 589 (1970). It should be noted that this discussion is not limited to this subsection but to all those under Illinois Rule 412(a) and Federal Rule 16(a) and (b).

RULE 412 (a) (vi)

- (vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

In providing for discovery of intended witnesses' "rap sheets," the rule avoids issues which might arise from the Supreme Court's landmark decision in *Brady v. Maryland*.²⁴ In that case, the Supreme Court held that non-disclosure of evidence favorable to the accused²⁵ violated due process regardless of whether the evidence was material to guilt or punishment.

Although no court has expressly applied the *Brady* test to witnesses' prior criminal records, Judge William J. Campbell in *United States v. Leichtfuss*,²⁶ noted, in dicta, that such evidence "may well be evidence . . . favorable to an accused . . ."²⁷ within the meaning of *Brady*.

The practitioner should note that the rule is limited in scope to those records "which may be used for impeachment. . . ." Since this rule is to be used for impeachment purposes, it is necessarily limited to those witnesses whom the prosecutor intends to call and to infamous crimes.²⁸ However, it applies to intended trial witnesses and to intended preliminary hearing witnesses. The addition of the preliminary hearing witnesses may be due to the increasing judicial recognition that what occurs at the hearing may be just as vital or damaging to the defendant's case as what occurs at the trial.

24. 373 U.S. 83 (1963) [Hereinafter cited as *Brady*].

25. *Id.* at 87.

26. 331 F. Supp. 723 (1971). A recent case, *United States v. Gibson*, — F. Supp. —, (D.C. 1972), 12 Cr. L. 2096, however, has held that prior convictions of prospective government witnesses is "exculpatory matter" under *Brady* and must be turned over.

27. *Id.* at 736. See also, *Giles v. State of Maryland*, 386 U.S. 66 (1967). (A rape case in which one of the facts suppressed by the prosecutor which the Court said was favorable to the accused was that a caseworker had recommended probation for the girl because she was beyond parental control.) But see, *Hemphill v. United States*, 392 F.2d 45 (1968), as to denials of defendant's request for pre-trial discovery of witnesses' prior criminal records as not being an abuse of discretion.

28. See generally ILL. REV. STAT. ch. 51, § 1 (1971); which provides that prior convictions of infamous crimes may be used to attack the credibility of a witness. See also *Werdell v. Turznski*, 128 Ill. App. 2d 139, 153-54, 262 N.E.2d 833

RULE 412 (b)

- (b) The State shall inform defense counsel if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party, or of his premises.

In light of Title III of the Omnibus Crime Control and Safe Street Act of 1968²⁹ and our apparent tendency toward an Orwellian society, the importance of determining the existence and obtaining judicial review of electronic surveillance is significant. Moreover, as the incidents of conversation monitoring become more pervasive, the courts have taken it upon themselves to greatly expand the scope of the fourth amendment protection as it pertains to conversation.³⁰

In adopting the rule in its present form, the court is apparently paying heed to the United States Supreme Court opinion in *Alderman v. United States*.³¹ However, the wording of the rule may create additional problems and may be misleading to the practitioner whose client has been under surveillance. In this regard, the following specific comments to the rule's application are offered.

By limiting the rule's scope to "electronic surveillance," the rule apparently excludes surreptitiously overheard conversations where no electronic device was used.³² In *Katz v. U.S.*,³³ although an electronic eavesdropping case, the Court based its decision not upon this fact, nor upon the prior distinction of whether the wiretapping occurred in a constitutionally protected area, but upon the fact that the conversation was intended to be private.³⁴ The fact that no electronic device is used to listen to or intrude upon a conversation would, therefore, not limit the scope of constitutional protection.

(1970). "[A]n infamous crime is an offense implying such a dereliction of morals that it shows a total disregard of the obligation of an oath . . . [and] is inconsistent with the principles of honesty and decency." ILL. REV. STAT. ch. 38, § 587 (1971).

29. 18 U.S.C. 2510 *et. seq.*

30. See generally Note, *Electronic Surveillance and the Supreme Court: A Move Back?*, 21 DEPAUL L. REV. 86 (1972).

31. 394 U.S. 165 (1969) [Hereinafter cited as *Alderman*].

32. Although the exclusion here may be moot in terms of excluding from pretrial discovery altogether any non-electronic surveillance (See *infra* as to how Rule 412(a)(ii) may be used to reach the product of such a surveillance), there is no guarantee of 412(a)(ii)'s effectiveness in this area. Further, there are no viable reasons for restricting 412(b) to electronic surveillance alone.

33. 389 U.S. 347 (1967).

34. *Id.* at 351. The Court stated that "what [a person] seeks to preserve

Accordingly, unless and until this issue is further clarified by the courts, defense counsel should request not only matters obtained by electronic surveillance but also any results of conversation monitoring in addition to the general request under 412(a)(ii) for statements made by the defendant.

It is interesting to note that the committee comments, while citing *Alderman*, suggest the possibility of “*in camera* hearings on the question of suppression of such evidence. . . .”³⁵ This appears to be inconsistent with the holding in *Alderman* which states, “[w]e conclude that surveillance records as to which any petitioner has any standing to object should be turned over to him without being screened *in camera* by the trial judge.” Prior to *Alderman* prosecutors would submit the results of conversation monitoring only to the court. It was then for the court to determine the relevancy of the material to the pending charges. It was this procedure which *Alderman* attacked, concluding that only defendants and defense attorneys could possibly determine the potential relevancy of this material. Appreciating this interpretation of *Alderman*, it is difficult to understand the suggested use of *in camera* proceedings.

RULE 412 (c)

(c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

This rule gives the defendant something less than they are constitutionally entitled. However, it does compel the prosecutor to comply with his obligation somewhat sooner than might otherwise be necessary. In *Brady v. Maryland*, the United States Supreme Court said:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.³⁶

as private, even in an area accessible to the public, may be constitutionally protected.”

35. ILLINOIS RULE BOOK, SUP. CT. RULES, Comments of Rule 412 at 110j and 394 U.S. at 182.

36. 373 U.S. at 87, *see also* *Miller v. Pate*, 386 U.S. 1, 7; *Giles v. Maryland*, 386 U.S. 66 (1967).

The wording of Rule 412(c), in entitling a defendant to material which "tends to negate the guilt . . . or . . . reduce his punishment . . ." merely restates the language of *Brady's* holding calling attention to and enforcing compliance with the dictates of *Brady*.

Nevertheless, serious constitutional questions are raised by the protective order exception in Rule 412(i) which qualifies the rule. It, along with the work product, informer and national security exceptions, is common and fairly well-accepted in the formulation of discovery rules.³⁷ To the extent, however, that the material required by *Brady* to be turned over to the defendant is subject to the protective order exception, or any exception, the rule is constitutionally suspect.³⁸ Since the *Brady* holding was based on a due process analysis, it is obvious that its mandate cannot be subjugated to what is, at best, a policy exception to discovery. Both prosecutors and defense attorneys should be aware that noncompliance with the rule's requirement based on the protective order exception is likely to cause serious constitutional problems.

In one respect the rule, however, goes even further than the apparent requirements of *Brady*, since nowhere in *Brady* does the Court indicate that it would require the production of evidence favorable to the accused prior to trial. The facts in *Brady* involved a post-conviction hearing and thus the Court did not discuss extending its rule to pretrial discovery.

Parenthetically, the most recently released American Bar Association Standards Relating to the Prosecution Function and the Defense Function, Standard 3.11, in addition to encouraging full discovery, condemn as "unprofessional" a prosecutor's failure ". . . to disclose to defense at the earliest feasible opportunity evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment."³⁹

37. See generally *Discovery Standards* §§ 2.6, 4.4 and accompanying commentaries; Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 292 (1963); Comment, *Use of Protective Orders as a Safeguard in Broadening Criminal Discovery*, 111 U. PA. L. REV. 1295 (1965).

38. *Discovery Standards*, § 2.1(c) is phrased in exactly the same manner as the Illinois rule, which appears, for the most part, to have been fashioned from these standards. This does not diminish, however, the constitutional difficulty one may encounter with the rule.

39. See note 18 *supra* at § 3.11.

RULE 412 (d)-(g)

- (d) The State shall perform its obligations under this rule as soon as practicable following the filing of a motion by defense counsel.
- (e) The State may perform these obligations in any manner mutually agreeable to itself and defense counsel or by:
 - (i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed, during specified reasonable times; and
 - (ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.
- (f) The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged.
- (g) Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the State and which is in the possession or control of other governmental personnel, the State shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the State's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

These subsections deal with significant procedural amenities in complying with the spirit and letter of the discovery rules. They speak in general terms of the methods the state is to adopt in complying with the requirements of the new rules, and further, of the state's obligation to obtain material made discoverable by the rules. These enabling provisions are clear, definite and fairly self-explanatory and thus detailed discussion of sections (d), (e), and (f) is not required here.

RULE 412(h)

- (h) Discretionary disclosure. Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by this rule.

This is indeed a broad and yet possibly the most overlooked section of the rules. It apparently adopts the materiality and reasonableness requirements found in Rule 16(b) of the Federal Rules of Criminal Procedure. It also incorporates the relevancy requirements found in Rule 16(a) of the federal rules. Rule 412(h) per-

mits a defendant to make any additional discovery requests not otherwise covered by the rules. Accordingly, this is the rule that could and should be cited by the defense in support of any additional discovery requests made by a defendant.

RULE 412 (i)

- (i) Denial of disclosure. The court may deny disclosure authorized by this rule and Rule 413 if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to counsel.

This subsection provides for a specific exception to otherwise authorized discovery. Although the specific terms are not used, it provides for what have commonly been referred to as "protective orders."

Based upon experience with the analogous federal rule, Rule 16 (e), this exception, though proper, will not often be used. In any event, the subsection does provide that, where appropriate, a prosecutor or defense attorney might seek the court's protection against the necessity of complying with the rule's discovery requirements. Although not specifically spelled out, it would appear that invocation of the rule would require a written motion by the person requesting protection. However, it is quite possible that such a motion might properly be presented *in camera*.

This is one of the few protective order rules which specifically itemizes the possible circumstances which might justify the court in finding it necessary to invoke this exception. If this rule ever becomes widely used, substantial litigation might arise from the subjectivity inherent in the terms "annoyance" and "embarrassment." It should be re-emphasized that this rule cannot be used to avoid compliance with the requirements of *Brady*.

RULE 412 (j)

- (j) Matters not subject to disclosure.

- (i) *Work product*. Disclosure under this rule and Rule 413 shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff.
- (ii) *Informants*. Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not

infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

- (iii) *National security.* Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

Here the rule sets forth the other three generally acknowledged "exceptions" to discovery.⁴⁰ Again, these exceptions cannot serve to justify a failure to provide that which is constitutionally required pursuant to the *Brady* decision.

The "work product" exception is as anomalous as it is apparently well-accepted. Since, in civil practice, the "work product" exception is not an absolute privilege, it must fall whenever a discovery claimant can establish "good cause."⁴¹ Appreciating its dubious status as an exception to civil discovery, constant and uniform reference to the work product exception in criminal discovery is indeed surprising and questionable.

The "identity of informants" exception cautions against the indiscriminate and unnecessary requirement that a prosecutor identify his informants. The language of the rule does an excellent job of codifying and synthesizing the law applicable to disclosure of an informant's identity.⁴²

The last, and definitely the least, important of the exceptions is the "national security" exception. In the context of normal state prosecutions it is doubtful whether this rule will ever be employed.

RULE 413—DISCLOSURE TO PROSECUTION

- (a) The person of the accused. Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the accused, among other things, to:
 - (i) appear in a line up;
 - (ii) speak for identification by witnesses to an offense;

40. See generally American Bar Association Project on Standards of Criminal Justice, *Standards Relating to Discovery and Procedure Before Trial*, § 2.6.

41. *Hickman v. Taylor*, 329 U.S. 495 (1947); see also Fed. R. Civ. P., Rule 34.

42. See *McCray v. Illinois*, 386 U.S. 300 (1967) (A state court is under no absolute duty to require disclosure of an informer's identification at a pretrial hearing held to determine the existence of probable cause where there was ample proof of the informer's reliability).

- (iii) be fingerprinted;
 - (iv) pose for photographs not involving reenactment of a scene;
 - (v) try on articles of clothing;
 - (vi) permit the taking of specimens of material under his fingernails;
 - (vii) permit the taking of samples of his blood, hair and other material of his body which involve no unreasonable intrusion thereof;
 - (viii) provide a sample of his handwriting; and
 - (ix) submit to a reasonable physical or medical inspection of his body.
- (b) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the State to the accused and his counsel, who shall have the right to be present. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for his release.

Consistent with the current trend, Rule 413 provides for reciprocal discovery, or discovery by the prosecutor from the defendant.⁴³ Unlike Rule 16(c) of the Federal Rules of Criminal Procedure, the above rule is not conditioned upon prior defense requests for discovery.

In what may well prove to be obvious understatement, the rule specifically indicated it is "subject to constitutional limitations. . . ." It goes on to specifically itemize areas which are clearly entangled with evolving constitutional problems—in particular, issues created more by the fourth than the fifth amendment.⁴⁴ The difficulty with these issues specifically arises when one seeks to require a defendant to speak for identification, be fingerprinted, permit the taking of blood samples, hair or other materials of his body or provide handwriting exemplars.⁴⁵

A leading case in this area is *Davis v. Mississippi*,⁴⁶ where fingerprints were obtained incident to an arrest without probable cause. There, Mr. Justice Brennan noted that "[d]etentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the fourth amendment."⁴⁷ In light of *Davis*, it is now be-

43. *But see* Doherty, *Total Pretrial Disclosure to the State*, 60 ILL. B.J. 534 (1972) and Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 HARV. L. REV. 994 (1972).

44. *See generally*, Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972).

45. *See* United States v. Dionisio, 41 L.W. 4180 (January 22, 1973) and companion cases; *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprints); *Schmerber v. California*, 384 U.S. 757 (1966) (blood samples).

46. 394 U.S. 721 (1969) [hereinafter cited as *Davis*].

47. *Id.* at 727.

ing argued that the discovery of fingerprints and similar personal items are subject to the fourth amendment's proscription against unreasonable searches and seizures. (This protection in light of *Dionisio et al* extends to the "seizure" of the person but not to the taking of handwriting exemplars or fingerprints.) Although the rule does not necessarily suffer constitutional infirmities, its application certainly warrants caution.

If, for example, an attorney represented a defendant from whom the state, pursuant to Rule 413, requested fingerprints, that attorney would be placed in the position of being required to fully interpret the implications of *Davis*. Assuming the prosecuting attorney supported his fingerprint request with a showing of "probable cause", one issue would be resolved. In this regard, it is appropriate to recall that the fourth amendment does not proscribe all searches, only unreasonable ones.⁴⁸ If, on the other hand, the prosecutor merely relied on the rule in making his request and does not attach to his request affidavits supporting probable cause, a defense attorney might well consider an initial refusal to produce. Assuming that this refusal may be met by a court order requiring production, compliance by the defendant would then preserve any constitutional issue created by the absence of a showing of probable cause.

Another issue is raised when the court, based upon "probable cause," enters its order upon the defendant to submit to the required fingerprint tests. It is sufficient to note here that the court order, as a search warrant, must be narrowly drawn and specific.

Notwithstanding strong arguments to the contrary, this author is not opposed to reciprocal discovery provisions. In opting for broader discovery, it has been my purpose to rally against the present practice of trying criminal cases in a secretive or stealthy manner. By urging the wisdom of taking criminal law out of the dark ages through broad discovery, I am unable to now argue against a prosecutor's right to similar discovery (so long as that right does not infringe upon a defendant's right against self-incrimination).

RULE 413 (c)

(c) Medical and scientific reports. Subject to constitutional limitations, the trial court shall, on written motion, require that the State be informed of, and per-

48. U.S. Const. amend. IV.

mitted to inspect and copy or photograph, any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel has in his possession or control, except that those portions of reports containing statements made by the defendant may be withheld if defense counsel does not intend to use any of the material contained in the report at a hearing or trial.

This rule provides for reciprocal discovery of medical and scientific reports. It should be noted that this disclosure to the prosecution is based on and limited to the sixth amendment right to cross-examination of witnesses at "a hearing or trial." The analogous rule which applies to the defense, Rule 412(a)(iv), is somewhat broader in that it pertains to any medical or scientific reports "made in connection with the particular case. . . ." Such a distinction takes into account the necessary preservation of the defendant's right against self-incrimination.

RULE 413 (d)-(e)

- (d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
- (i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
 - (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial.
- (e) Additional disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule.

This subsection, which requires a defendant to inform the state of any possible defenses he intends to set forth, is quite broad and probably will result in much litigation. Strong support for this subsection, at least as it applies to a possible alibi defense, can be found in the United States Supreme Court decision in *Williams v. Florida*.⁴⁹ In this case, the Court considered and rejected a constitutional attack upon the Florida statute which required a defendant to serve a notice of his alibi upon the prosecution.

49. 399 U.S. 78 (1970) [hereinafter cited as *Williams*].

On the practical side, it might well be expected that many defense attorneys, in violation of the spirit if not the letter of the rule, may reply to a request for a listing of defenses by simply stating "the defendant didn't do it," or by possibly stating, in *seriatim* fashion, every defense imaginable in all criminal cases.

RULE 414—EVIDENCE DEPOSITIONS

- (a) If it appears to the court in which a criminal charge is pending that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial, the court may, upon motion and notice to both parties and their counsel, order the taking of such person's deposition under oral examination or written questions for use as evidence at a hearing or trial.
- (b) The taking of depositions shall be in accordance with rules providing for the taking of depositions in civil cases, and the order for the taking of a deposition may provide that any designated book, papers, documents or tangible objects, not privileged, be produced at the same time and place.
- (c) If a witness is committed for failure to execute a recognizance to appear to testify at a hearing or trial, the court on written motion of the witness and upon notice to the State and defense counsel may order that his deposition be taken, and after the deposition has been subscribed, the court may discharge the witness.
- (d) Rule 207—Signing and Filing Depositions—shall apply to the signing and filing of depositions taken pursuant to this rule.
- (e) The defendant and defense counsel shall have the right to confront and cross-examine any witness whose deposition is taken. The defendant and defense counsel may waive such right in writing, filed with the clerk of the court.
- (f) If the defendant is indigent, all costs of taking depositions shall be paid by the county wherein the criminal charge is initiated. If the defendant is not indigent the costs shall be allocated as in civil cases.

Frequently criminal rules which provide for the taking of depositions appear merely in semantic form and are not a part of the actual practice of criminal law. The above rule easily supports this point. The rule requires a motion which must indicate both that the taking of the deposition is necessary for the preservation of relevant testimony and that there is a substantial possibility that the witness will be unavailable to testify. It is most peculiar when a prosecutor or defense attorney knows in advance that both of these requirements will be present. In sum, the appearance of this rule will have little, if any, effect on the practice of criminal law.⁵⁰

50. See generally Zagel and Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 588-90.

RULE 415—REGULATIONS OF DISCOVERY

- (a) Investigations not to be impeded. Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither the counsel for the parties for other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

Rule 415(a), in effect, proscribes violations of the Canons of Ethics.⁵¹ It is quite interesting to note that this is probably the only instance where a court has, by rule, called specific attention to this proscription against an attorney instructing his witnesses not to discuss the case with his adversary.

In reading the rule one should be reminded that the rule cannot, and indeed does not, in any way curtail a witness' right to refuse to discuss the facts of the case with either or both attorneys. The rule merely serves to preclude attorneys from advising witnesses to exercise this right. Nevertheless, an interesting question remains: would an attorney's advice to a witness of his right to refuse to discuss the facts of the case with opposing counsel be deemed a violation of the duty imposed by the "otherwise impede" language of this rule?

CONCLUSION

In attempting to bring criminal discovery up to the par of its civil counterpart, the Illinois Rules represent a sure and affirmative step. Though there still remain unresolved some substantive and procedural issues, such may be the result of the dangers inherent in being a pioneer. Only when the Illinois discovery rules are put to the test in practice will all the problem areas surface.

51. American Bar Association, *Canon of Professional and Judicial Ethics*; Canon 15 (1967).