Pre-Trial Criminal Discovery Proposed Illinois Rules

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any rehabilitation facilities, any unused portion of the award could be returned to claimant when he was considered rehabilitated. Although half of the states have a provision for rehabilitation in their acts, Illinois at present has no such provision and provides only for medical, surgical and hospital services.

CONCLUSION

The progress that has been made in psychiatry in the understanding of the psychoneuroses has not been reflected in the grants of compensation for traumatic neurosis. The majority of the courts have completely disregarded the claimant's predisposition to neurosis as well as the collateral factors arising subsequent to the injury. It has been shown in this study that such an approach is medically and legally erroneous. It appears in most cases that the trauma is responsible for only 10 to 20 per cent of the actual neurotic disability, yet the courts grant 100 per cent compensation.

It is apparent that the incidents of traumatic neurosis cases are greatly increasing in the courts today. Workmen's compensation laws are not designed or intended to be social insurance. The employer should only be liable for those injuries which truly arise out of and in the course of employment. Unless this fact is understood and applied, then and only then, can persons suffering from traumatic neurosis be properly compensated. Similarly, in the suicide cases the courts should strive to discover the true cause of the mental condition and not automatically award compensation merely because the suicide follows the accident. It is hoped that this study will be of value to the lawyer, industrial commission and the courts in arriving at just conclusions in this field.

123 2 Larson, Workmen's Compensation 544, 546, Table 15 (1956).

PRE-TRIAL CRIMINAL DISCOVERY
PROPOSED ILLINOIS RULES

The purpose of a trial is to ascertain what facts are involved in a lawsuit so that these facts can be weighed in the light of applicable law and a disposition can be made of the litigation. Finding a sound and effective method for fact finding has been perplexing students, lawyers and judges since earliest times. When crime was a private injury and belief in God and religion were instrumental in determining truth, one was usually able to vindicate himself by his oath to God and by the oaths of compurgators that he was innocent. The more serious the offense or the more disreputable the reputation of the defendant, the more compurgators were re-
quired to prove his innocence. Sometimes, when the defendant was unable to purge himself by oath, he would be subjected to trial by the ordeal of boiling water, hot irons, or trial by battle where it was believed that God would protect the innocent.¹

Although we no longer employ the ninth century superstitions in ascertaining truth, we have not yet achieved an ideal procedure for minimizing the possibility of falsifying evidence. In an attempt to improve upon the present Illinois criminal procedure adopted to aid in the ascertaining of truth, the Illinois State Bar Association has suggested that the present procedure used in pre-trial discovery of the adversary's evidence be altered to eliminate ninth century vestiges of combat which are characterized by concealment of evidence and then the element of sudden surprise at trial. The Bar Association Section on Criminal Law has drafted five rules which, after a failure in 1961, will again be submitted to the Board of Governors of the Illinois State Bar Association and, if approved, then to the Illinois Supreme Court for adoption. It is the purpose of this writing to explore how the proposed rules will affect present Illinois pre-trial criminal procedure.²

**PHYSICAL AND MENTAL EXAMINATIONS OF WITNESSES**

The only reported Illinois decision discussing mental examination of a witness is *People v. Hudson³* where the eye-witness to an alleged arson was a moron. By agreement of the parties, three doctors were selected to examine the mental competency of the witness. The doctor selected by the defendant and the doctor selected by the court found the witness without the mental ability to testify, while the prosecution's doctor found the witness competent to testify although possessing a mental age of nine years. Nevertheless, the court allowed the witness to testify and the defendant was convicted of arson. The Supreme Court of Illinois held that the evidence was not sufficient to establish legal guilt beyond a reasonable doubt because of the testimony of the incompetent witness. The absence of any decision where the court has ordered a physical or mental examination in which there was no stipulation by the parties suggests that the court has no inherent power to compel a witness to be subjected to a physical examination.⁴ Only when the parties voluntarily agree to the examination may the court use the medical testimony in determining whether or not the witness is competent or credible.

² For reasons of clarity of this work the sequence of the rules has been altered.
³ 341 Ill. 187, 173 N.E. 278 (1930).
⁴ People v. Moretti, 6 Ill.2d 494, 527, 129 N.E.2d 709, 727 (1955).
It has been strongly suggested by both psychiatrists and judges that because of the reasonable possibility of false accusations resulting from abnormal wish fulfillment, pathological tendencies and from erotic dreams emanating from skin irritation (vulvitis), in all uncorroborated rape charges the complaining witness should undergo a psychiatric examination to determine if she is competent to testify. In an attempt to persuade the courts to require all complaining witnesses in rape cases to be subjected to both a mental and physical examination, it is argued that when the defendant is unable to disprove the charges it can reasonably be expected that the jury will sympathize with the female who convincingly and sincerely relates an appalling narration of the defendant's ruthless assault.

A search of adjudicated cases and documented arguments reveals that there are three positions with respect to the right of the court to compel a mental and physical examination of a complaining witness in a rape case. The first position is that the courts do not have any power to order an examination of any sort. Proponents of this theory hold that the court cannot compel the complaining witness to "submit the most private parts of her person to the examination of strangers [physicians]. . . . It would be a strange doctrine to say that a court has power to order a compulsory physical examination of anyone for the mere purpose of supporting or refuting evidence given at a trial. . . ." Presently, Illinois adheres to the position that the court cannot compel the mental examination of any witness of either the state or the defendant.

An indication of the
power of an Illinois court to compel a witness to submit to a physical or mental examination can be obtained from the restricted position taken by the courts on requests to compel a witness to submit to a deposition or an interview by the defendant or his counsel. Apparently then, the Illinois courts are without power to compel an unwilling witness to subject himself to a physical or mental examination.

In an attempt to emancipate the Illinois courts from the antiquated thought of viewing the exposure of the private parts of the female to a physician so abhorrent that the defendant is not permitted to vindicate himself, the following proposed rule is being advocated:

**Rule 3 Physical and Mental Examinations of Witnesses**

In any case where the physical or mental condition of a witness is in issue, either party may move the court for an order directing a physical or mental examination of such witness. The court shall grant the order if good cause is shown, and may prescribe the conditions under which the examination shall take place. The results of such examination shall be made available to both parties.

It appears that a reasonable interpretation of the rule would place Illinois in the second position which holds that although the parties do not have an absolute right to require an examination of the adversary's witness, the court, in its sound discretion, may order an examination. In *Walker v. State* a request by the defendant for a physical examination of the seven year old prosecutrix in a rape case was denied by the trial court. The reviewing court held that the trial court erred by abusing its discretion when it refused to grant a physical examination of the complaining witness when her testimony conflicted with that of other witnesses; the girl's testimony was confused; the girl had never been subjected to a physical examination to confirm the rape charge and the testimony of other witnesses was ambiguous. Thus, the court held that a physical examination must always be ordered when the corpus delicti is of an inconclusive character because of the uncertainty that the crime has in fact been committed. Under the proposed rule, Illinois would probably arrive at the same conclusion as did the court in the *Walker* case. Yet, a court is under no absolute duty to compel such an examination as dem-

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14 People v. Graber, 397 Ill. 522, 74 N.E.2d 865 (1947); People v. Turner, 265 Ill. 594, 107 N.E. 162 (1914). Neither the state or the defendant has the right to take depositions for discovery or any other purpose.

15 People v. Touhy, 361 Ill. 332, 349, 197 N.E. 849, 857 (1935). "We know of no rule which would authorize the court to compel a witness to be examined in private by counsel for either side of a case...." People v. Mason, 301 Ill. 370, 133 N.E. 767 (1921); People v. Duncan, 261 Ill. 339, 103 N.E. 1043 (1913); People v. Mitchell, 16 Ill. App.2d 189, 147 N.E.2d 883 (1958).

16 There is no similar rule in any state.

onstrated by *Harkins v. State*\(^{18}\) where the court refused to order a physical examination of a prosecutrix in a rape case\(^{19}\) on the grounds that there were "no facts shown in this record that any such examination was necessary, or that the result of such an examination would be any different from [that of the state's physicians]."\(^{20}\) An analysis of the *Walker* and *Harkins* cases and other decisions holding that it is in the court's discretion to compel a physical or mental examination\(^{21}\) suggests that only where the court feels that the examination will aid in determining the guilt or innocence of the defendant, the court may compel the examination. Thus, the possibility that the complaining witness will be subjected to the abuse of a physical or mental examination without good cause will be removed.\(^{22}\)

The third alternative is advanced by Dean Wigmore\(^{23}\) and is supported by well-documented case studies made by eminent psychiatrists.\(^{24}\) In Wigmore's argument concerning uncorroborated sex offenses he states:

No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.

It is time that the Courts awakened to the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny.\(^{25}\)

This position of Wigmore was adopted in 1953 by the Indiana Supreme Court in *Burton v. State*\(^{26}\) where the defendant appealed the conviction of sodomy of his ten year old daughter. The court held that the uncorroborated testimony of the prosecutrix, who had not been subjected to a psychiatric examination, was insufficient to sustain a guilty verdict. However, four years later the *Burton* case was overruled by *Wedmore*...
v. State\textsuperscript{27} which denied any inherent judicial power to require a psychiatric examination of the complaining witness saying that the matter is for the legislature and to order a physical or mental examination would be to invade the province of the legislature and the jury. With the reversal of the Burton decision, Wigmore has lost his only judicial support. Since Wigmore's position probably does not require examination of every prosecutrix but excludes cases where there is an eyewitness or other corroborating testimony, it is in fact only a liberal interpretation of the second position which enunciates the court's inherent power to order an examination when "good cause is shown." Nevertheless, it is the antithesis of the present Illinois position of not recognizing any inherent judicial power to compel an examination in any circumstances. The proposed Illinois rule will not be an adoption of the Wigmore view which has no judicial support, but it will grant the trial court the same limited discretionary power to order the physical or mental examination as possessed by the many courts supporting the second position.

**LIST OF WITNESSES AND NOTICE BY THE DEFENDANT OF CERTAIN DEFENSES**

While we talk about discovery and what you can get, forget not that in my opinion the best source of discovery is that which is locked behind the ruby lips, the pearly teeth of your client. There's native ore there to be mined. And it can yield pure yellow gold. As the harrassed D.A. will tell you, "Why the hell don't you ask your client? He might even have been there."\textsuperscript{28}

**Advance Notice of the Defense of Alibi**

The defense of alibi has been defined by an Illinois court as "not denying that the crime was committed, but is designed to prove that the defendant during the whole time was so far from the place where the crime was committed that he could not have participated in it."\textsuperscript{29} It is not surprising to find that both the court and the jury are reluctant to credit a vast number of alibis. This can be illustrated by examples of some of the many flagrant errors of instruction, such as an "alibi . . . [is always] to be received with caution . . .,"\textsuperscript{30} and "the defense of alibi is one that is easily fabricated, and is often attempted by contrivance, subornation and perjury. . . ."\textsuperscript{31}

\textsuperscript{27} 237 Ind. 212, 143 N.E.2d 649 (1957).
\textsuperscript{28} Criminal Law Seminar 103 (edited by Nathan Cohn, 1961). In an address given by Martin N. Pulich, Esq., county prosecuting attorney.
\textsuperscript{29} People v. Thomas, 393 Ill. 573, 580, 67 N.E.2d 192, 196 (1946); People v. Marcus, 235 N.W. 202, 203, 253 Mich. 410, 413 (1931) "An alibi is, however, a defense that is easily proven and hard to disprove."
\textsuperscript{30} State v. Smalls, 98 S.C. 294, 297, 82 S.E. 421, 422 (1914).
\textsuperscript{31} Nelms v. State, 58 Miss. 362, 367 (1880). See also, State v. Waid, 92 Utah 297, 305, 67 P.2d 647, 651 (1937); "That it might lend itself to fraud and perjury was recognized
Exploitation of alibis is injurious to both the public and the innocent defendant. The public suffers when a criminal defendant fabricates an alibi which the state is unable to refute leaving a reasonable doubt as to the veracity of the testimony of the state's witness, and the innocent defendant may be wrongly convicted because of the jury's skepticism as to the truth of his alibi. The Illinois procedure of allowing the defendant to introduce his alibi for the first time at the trial, only adds to the injustice for the state's attorney has little time to search into the veracity of the defense and consequently, though there may be merit to the alibi, because of the innate, distasteful connotation of the word and the difficulty of the state's attorney rebutting the defense, an alibi, whether perjured or not, is not fairly evaluated by either the court or the jury. In an attempt to remedy this enigma the following rule has been proposed:

Rule 4 List of Witnesses and Notice by Defendant of Certain Defenses

For purpose of notice only and to prevent surprise, the defendant shall furnish to the Prosecution and file with the Court, at least (20) days prior to the trial, a statement of intention to interpose the defense of insanity, self defense or alibi. If the defendant intends to interpose the defense of alibi, he shall also furnish to the Prosecution and file with the Clerk of the Court, the names, addresses and telephone numbers of all witnesses to be called by the defense in support of the defense of alibi. After the trial commences, no witness may be called by the defendant for the purpose of alibi, unless the name is included on such list, except upon good cause shown. The defendant may, prior to trial, upon motion and showing of good cause, add to the list of alibi witnesses, the names of any additional witnesses.

The proposed rule would reverse the present procedural malady which benefits the guilty and discredits the innocent's defense for the result "would be to erect safeguards against the wrongful use of the defense of alibi and give the prosecution time and information to investigate the merits of such defense. With such safeguards the natural effect would be to give greater weight, not less, to an alibi which such investigation has

by our Legislature." Simmons v. State, 61 Miss. 243 (1883). The very word alibi connotes suspicion and distrust. People v. Reno, 324 Ill. 484, 155 N.E. 329 (1927). It is interesting to note that even the historical use of the word "alibi" casted suspicion for "alibi" is derived from the word "alias" which originally meant to assume another name when the first failed.

33 Id. at 617. "An alibi defense refuted is worse than no alibi at all."
34 Dean v. Commonwealth, 32 Gratt (Va.) 912 (1879). The credibility of an alibi is strengthened when it is set up before the trial and the court and jury are more likely to consider it suspicious if set up at the last moment.
35 The English court is able to discredit a late alibi for the judge may remark to the jury that the police were not given ample time to investigate the alibi. Rex v. Littleboy, 151 L.T.R. (n.s.) 370 (1934).
failed to refute." When the state is unable to disparage the affirmative defense after twenty days of assiduous preparation, the court and jury will certainly give great weight to the alibi of the innocent. If the alibi is in fact perjured, then the likelihood of exposure by the prosecuting attorney will make it "certain that the activities of manufacturing alibi defenses will be seriously checked, and we will no longer have the spectacle of a defendant suddenly and brazenly flaunting a manufactured alibi in the face of the court and of the jury."

Since the first alibi statute in 1927, a large number of states have adopted statutes similar to the present Illinois proposal. Although there are very few decisions in point, the constitutionality of the statute has been generally upheld by the courts. It is especially important to

38 State v. Waid, 9 Utah 297, 67 P.2d 647, 651 (1937). The proposal will prevent the "sudden 'popping up' of witnesses to prove that the accused was not at the scene of the crime at the time of its commission and thus creating a 'reasonable doubt' about the testimony of the state's witnesses." People v. Shade, 161 Misc. 212, 292 N.Y.S. 612, 617 (1937).

37 People v. Shade, 161 Misc. 212, 292 N.Y.S. 612, 619 (1937). "Certain it is that no innocent person can in any manner be injured by this statute."

36 Id. at 619.


41 Wash. Rev. Code Ann. § 1037.030 (1951). The statute requiring a list of defendant's witnesses has been held to be unconstitutional if mandatory but constitutional if directory. See State v. Sickles, 144 Wash. 236, 257 Pac. 385 (1927) where the court held it to be directory.

42 People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1957); People v. Marcus, 233 Mich. 410, 235 N.W. 202 (1931). The court passed over the constitutionality of the issue. People v. Wudarski, 253 Mich. 81, 234 N.W. 157 (1931); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); People v. Shulenberg, 297 App. Div. 1115 (1952). Dean, "Advance Specification of Defense in Criminal Cases" 20 A.B.A.J., 435, 444 (1934). The "alibi" statutes do not infringe on the privilege against self-incrimination. Rather, they set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent." This statute is attacked by Robert F. Maquire, Proposed New Federal Rules of Criminal Procedure, 23 Ore. L. Rev. 56 (1943) in that the rule places the burden on the defendant to prove his alibi. But it is well settled that an "[a]libi is an affirmative defense, and where the corpus delicti is proved, together with evidence tending to show the guilt of an accused, the burden is on him [defendant] to establish an alibi interposed as a defense, although upon the whole case his guilt must be proved beyond a reasonable doubt." People v. Silvia, 389 Ill. 346, 353, 59 N.E.2d 821, 824 (1945). See also: People v. Revall, 410 Ill. 372, 102 N.E.2d 116 (1951); People v. Hendron, 384 Ill. 529, 51 N.E.2d 702 (1943); People v. Filas, 369 Ill. 51, 15 N.E.2d 496 (1938); People v. Pecko, 362 Ill. 568, 200 N.E. 860 (1936); People v. Kerbeck, 362 Ill. 251, 199 N.E. 789 (1935); People v. Gormach, 302 Ill. 332, 134 N.E. 756 (1922); Ackerson v. People,
note, however, that the defendant still may testify to an alibi without giving the necessary statutory notice, for the statute is usually construed as applying only to notice of alibi witnesses.

**Notice of Defense of Insanity and Self-Defense**

The proposal requires the defendant to also give twenty day notice if he intends to raise the defense of insanity or self-defense. A list of witnesses is not required for either of these defenses which are presently raised at the time of the trial. It is argued, as in the instance of alibi, that the jury will give more weight to the defense if the state has had sufficient notice to allow time for investigation. Yet before adopting the rule it is necessary to realize that there must be a different interpretation of the statutory procedure in self-defense and alibi defenses than in insanity defenses. If the defendant did not commit the offense charged he will certainly tell his attorney if he was elsewhere at the time of the crime; if the defendant killed another believing it to be in self-defense of his life, he will also tell this to his attorney who in both of these cases will give the statutory notice of alibi or self-defense. But if an insane defendant commits a criminal act it can not be expected that he would know he was insane, and if his attorney never had any reason to suspect that the defendant was insane at the time of the criminal conduct. It is very possible that not until after the deadline for giving notice of the defense of insanity, or perhaps not until the trial itself, will the defense attorney realize that the defendant may have been insane at the time of the act. Would the judge in this instance refuse the admission of evidence of insanity without abusing his discretionary powers granted by the statute? The suggestion is that if this rule is adopted, the courts will have to give greater latitude to the defendant in giving late notice of insanity at the time of the crime than in cases of late notice of alibi or self-defense. In California where a statute requiring notice of the defense of insanity has been enacted, the defense attorney did not suspect the

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124 Ill. 563, 16 N.E. 847 (1888); Miller v. People, 39 Ill. 457 (1866). It is also argued by Brennan, *Proposed New Federal Rules of Criminal Procedure*, 23 Ore. L. Rev. 56 (1943), that the statute is unconstitutional because if the defendant fails to remember the alibi and therefore does not give notice, he is at the court's mercy as to whether or not he will be able to introduce his defense.

43 People v. Rakiec, 289 N.Y. 306, 45 N.E.2d 812 (1942), 30 A.L.R.2d 483. The purpose for the dichotomy is that there is no question that if the defendant is unable to interpose his own defense, his constitutional rights would be flagrantly violated.

44 Brown v. People, 8 Ill.2d 540, 134 N.E.2d 760 (1956).

45 The burden of proving the defense of alibi is on the defendant, People v. Filas, 369 Ill. 51, 15 N.E.2d 496 (1938), while the burden of proving the sanity of the accused is on the state once the evidence of insanity is interposed by the defendant. People v. Saylor, 319 Ill. 205, 149 N.E. 767 (1925).

46 N. Y. CODE CRIM. PROC. 336 says that the defendant *may* file a special plea of insanity.
defendant was insane until after the deadline for giving notice. The court removed the danger of threatening the abuse of discretion by holding that as long as the defense attorney notifies the court of his late observation of the defendant's insanity within a reasonable time after suspicion, the court will allow admission of evidence of insanity though notice was not given as prescribed by statute.\textsuperscript{47}

A number of statutes requiring advance notice of the defense\textsuperscript{48} of insanity have been held constitutional.\textsuperscript{49} The California statute requires the defendant to plead both not guilty because of insanity at the time of the criminal offense and not guilty as charged.\textsuperscript{50} If the defendant only pleads not guilty because of insanity and is adjudicated sane, he is deemed to have admitted the crime. The result under the proposed Illinois rule is unlike that under the California statute, for under the Illinois rule when the defendant gives notice of insanity at the time of the alleged crime, and is then adjudicated sane, he retains his right to defend on the merits. Finally, the distinction of insanity at the time of the act and insanity at trial, conviction, or sentencing must be emphasized. The Illinois rule regarding raising the defense of insanity during trial\textsuperscript{51} is that at any time during trial the court, prosecuting attorney, or counsel may be prompted to move for a hearing to determine the defendant's sanity.\textsuperscript{52} The proposal only demands notice of insanity at the time of the offense and it does not abrogate the existing rule as to raising the defense of defendant's insanity during the criminal proceedings.

\textit{List of Witnesses}

The proposal regarding the furnishing of lists of prosecution witnesses states:

\textit{Rule 4 List of Witnesses and Notice by Defendant of Certain Defenses}

For purpose of notice only and to prevent surprise, the Prosecution shall furnish to the defendant and file with the Clerk of the Court at the time

\textsuperscript{47} State v. McLain, 199 Wash. 664, 92 P.2d 875 (1939).


\textsuperscript{49} People v. Walker, 33 Cal.2d 250, 201 P.2d (1948); People v. Groves, 9 Cal. App.2d 317, 49 P.2d 888 (1935); People v. Troche, 206 Cal. 35, 273 Pac. 767 (1928), cert. denied 280 U.S. 524 (1929); Bennett v. State, 57 Wis. 69, 14 N.W. 912 (1883).

\textsuperscript{50} Cal. Pen. Code § 1016 (1960). "A defendant who does not plead guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity without also pleading not guilty, thereby admits the commission of the offense charged."

\textsuperscript{51} Brown v. People, 8 Ill.2d 540, 134 N.E.2d 760 (1956).

\textsuperscript{52} People v. Zerba, 20 Ill.2d 269, 170 N.E.2d 97 (1960); People v. Buirson, 11 Ill.2d 360, 143 N.E.2d 239 (1957).
of arraignment, a list of the witnesses intended to be called by the Prosecution. The Prosecution may, prior to trial upon motion and showing of good cause, add to the list the names of any additional witnesses. After the trial commences no witness may be called by the Prosecution unless the name is included in such list, except upon good cause shown. The list of witnesses shall include the names, addresses and telephone numbers of the witnesses.

The above proposed rule merely supplements Chapter 38 Section 729 of the Illinois Revised Statutes and makes no basic change in the procedure. The only variance is that the proposal requires the phone numbers of the prosecution witnesses and requires the list at the time of the arraignment while Chapter 38 Section 729 specifies the list must be furnished previous to the arraignment. Finally, the proposal enunciates the judicial construction of the existing statute which does not expressly state that it is in the court's discretion to allow the testimony of a witness not included on the list.

53 ILL. REV. STAT. ch. 38, § 729 (1961). "Every person charged with treason, murder or other felonious crime, shall be furnished, previous to his arraignment, with a copy of the indictment or the information, as the case may be, and a list of the jurors and witnesses.

"Whenever a written or oral confession shall have been made before any law enforcement officer or agency in this state by any person charged with any crime a copy of such confession, if written, together with a list of the names and addresses of all persons present at the time such confession was made shall be given to the defendant or his counsel prior to arraignment, or at such later time as the court, in its discretion may direct, upon motion by either the prosecution or defense at the time of arraignment. If such confession was not reduced to writing, then a list of the names and addresses of all persons present at the time the confession was made shall be furnished. If the confession is made between the arraignment and the time the case is set for hearing, such fact shall be grounds for a continuance of the case on motions of either party, and the confession shall thereafter be furnished as afore said.

"No confession shall be admitted as evidence in any case unless the confession and/or a list of names and addresses of persons at the time the confession was made be furnished as requested by this Section."

The first part of the statute has been construed to be directory and not mandatory for the accused can only assign error if he has made a demand for the list of witnesses which was refused. People v. Carter, 398 I11. 336, 75 N.E.2d 861 (1947).

The provision requiring a list of witnesses who were present at the confession is mandatory and not directory. People v. Pelkola, 19 Ill.2d 156, 166 N.E.2d 54 (1960); People v. Demos, 28 Ill. App.2d 276, 171 N.E.2d 422 (1961). Only names of witnesses to a confession and not to admissions must be furnished to the defendant. A confession is a voluntary acknowledgment of guilt while an admission is a statement or conduct from which guilt may only be inferred. People v. Stanton, 16 I11.2d 439, 158 N.E.2d 47 (1959).

54 People v. Jones, 9 I11.2d 481, 138 N.E.2d 522 (1956). The Jones case holds that under a reasonable interpretation of the statute, furnishing the list of witnesses on the day of arraignment is proper.

Rule 2 Inspection of Books, Statements, Papers and Objects by Defendant

Upon motion of the defendant at any time after the filing of an indictment or information, the court may, upon a showing of good cause, at a time and place designated by the court, order the prosecution prior to trial to produce for inspection, photographing or copying by the defendant designated books, statements, papers or objects:

(a) obtained from the defendant or others by the prosecution; or
(b) necessary to the preparation of the defendant's case;

regardless of whether the prosecution intends to introduce in evidence such books, statements, papers or objects and regardless of whether they are admissible in evidence. All matters which are privileged against disclosure upon the trial are privileged against disclosure through any discovery procedure.

A subpoena may also be issued prior to the trial directing a person to produce books, statements, papers and objects before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and the court may, upon their production, permit the books, statements, papers or objects or portions thereof to be inspected by the parties and their attorneys.

The subject matter of discovery under the proposal is not limited to that which the prosecution intends to introduce into evidence. Consequently, to avoid violation of a defendant's constitutional right against self incrimination, the prosecution can not employ this proposal to inspect the defendant's evidence. The materials which the defendant may obtain under the proposed rule include documents obtained from third parties, statements of potential prosecution witnesses, grand jury transcripts, tangible objects and materials in the possession of third parties.

Documents Obtained from Third Parties

Rule 16 of the Federal Rules of Criminal Procedure enables the defendant, upon a reasonable request and a showing that the items are material to the preparation of his defense, to inspect books, papers, documents or objects obtained from or belonging to the defendant or obtained from others by seizure or process. The proposed Illinois rule extends the Federal rule by granting the defendant the right to obtain materials regardless of whether such materials were obtained by seizure or were voluntarily surrendered. The distinction between "seizure" and "voluntary surrender" is frequently clouded. A surrender of materials which appears to be voluntary is often made under a tacit threat of seizure. The hazy distinction between "seizure" and "voluntary surrender" should not bar a defendant charged with crime from obtaining materials pertinent to his defense. Under the Illinois rule, since the materials must

be shown to be necessary to the defense, the anomaly of the federal rule excluding material voluntarily given will be avoided.

**Statements of Potential Prosecution Witnesses**

In Illinois the defendant's right to pre-trial production of statements given to the prosecution is apparently within the discretion of the trial court for the Supreme Court, in *People v. Murphy,*\(^57\) held "there is no inherent right in a defendant to demand information which he believes may possibly be in the personal files of the state's attorney, and in any event such motion is addressed to the sound discretion of the court. . . ."\(^58\)

The rule for discovery *at trial* was laid down in *People v. Moses*\(^59\) where the trial court denied the defendant certain records since they were "interdepartmental records which are not public records and are therefore not subject to subpoena."\(^60\) The Supreme Court found error in this denial of inspection because "[A]n accused person is entitled to the production of a document that is contradictory to the testimony of a prosecution witness."\(^61\)

The rule of the *Moses* case, which requires only the production of statements which contradict the testimony of prosecution witnesses, was modified by *People v. Wolff*\(^62\) where the Illinois Supreme Court adopted "the view that where no privilege exists, and where the relevancy and competency of a statement or report has been established, the trial judge shall order the documents *delivered directly to the accused* for his inspection and for impeachment purposes."\(^63\) The *Wolff* case brought Illinois into agreement with the rules for discovery which prevail in the federal courts.

The federal rules do not allow pre-trial discovery of statements given by potential witnesses because neither the "seizure" requirements of Rule 16 or the evidentiary requirements of Rule 17 c are met.\(^64\) Since *Jencks v. United States*\(^65\) and the passage of the Jencks Act,\(^66\) a defendant, in a federal court, although specifically denied pre-trial discovery of statements of prospective Government witnesses, is allowed discovery at trial. The Act provides for an *in camera* inspection and exclusion of nonreve-

\(^{57}\) 412 Ill. 458, 107 N.E.2d 748 (1952).
\(^{58}\) Id. at 460, 107 N.E.2d at 749.
\(^{59}\) 11 Ill.2d 84, 142 N.E.2d 1 (1957).
\(^{60}\) Id. at 89, 142 N.E.2d at 4.
\(^{61}\) Id. at 88, 142 N.E.2d at 3.
\(^{62}\) 19 Ill.2d 318, 167 N.E.2d 197 (1960).
\(^{63}\) Id. at 327, 167 N.E.2d at 201. [Emphasis added.] The *Wolff* case was followed in *People v. Agnello,* 22 Ill.2d 352, 176 N.E.2d 788 (1961).

\(^{64}\) Rule 17 (c) requires that the materials are to be offered in evidence. See United States v. Brown, 17 F.R.D. 286 (N.D. Ill. 1955).

\(^{65}\) 353 U.S. 657 (1957).
lant or privileged material by the trial court if an objection is raised by the prosecution.

Although the intended purpose of the proposed rule differs from that of the Jencks Act, the rule will have the effect of adopting the Jencks Act and restating the rule in the Wolff case and then extending both of them from application during trial to include a pre-trial discovery of statements of prosecution witnesses. The defendant, of course, is still precluded from the discovery of privileged material and the court retains its discretion requiring a showing of good cause before inspection will be permitted.

**Grand Jury Transcripts**

It is possible that under the proposed rules a defendant will request the production of grand jury minutes claiming the transcripts are included under the phrase "statements and papers." The rule in the federal courts specifically allows for the disclosure of matters before the grand jury upon direction from a court after the defendant has shown "that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." This rule continues the traditional practice of secrecy on the part of the members of the grand jury except where the court permits the disclosure.

A few states have statutory authorization which specifically indicates that grand jury proceedings may, at the court's discretion, become the subject matter of discovery. All states seem to hold that it is within the discretion of the trial court to grant the defendant an inspection of the minutes. Not one of the few decisions in Illinois on this point has granted the defendant's motion for this inspection. In the most recent decision, *People v. Moretti,* the court stated: "[T]here is no duty on the prosecution to furnish the defense with transcripts of grand jury minutes or extra judicial statements, and that a defendant is prejudiced in this regard only when he is denied access to such portions of the transcripts as are employed by the prosecution at the trial." This statement suggests that the court has the power to allow inspection of grand jury testimony and that the trial court could have granted the defendant's motion if it felt that the benefit to the defendant outweighed the policy of grand jury secrecy. In light of the fact that the proposed rule unlike Federal Rule 6 (e) does not specifically mention grand juries, coupled with

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67 Fed. R. Crim. P. 6 (e).


70 6 Ill.2d 494, 129 N.E.2d 709 (1955).

71 Id. at 531, 129 N.E.2d at 729.
the traditional policy of grand jury secrecy,\textsuperscript{72} even if the courts interpret grand jury transcripts to be included in the proposal, it is very doubtful that the rule will be useful in obtaining grand jury testimony.

\textit{Discovery of Tangible Objects}

The only reported Illinois decision relating to the defendant's right to inspect tangible objects in possession of the prosecution is \textit{People v. Buzan}\textsuperscript{73} where the defendant, a railroad company guard, was charged with manslaughter resulting from the shooting of a trespasser. The factual issue was whether the defendant fell and his revolver was fired accidentally or whether he voluntarily fired. The defendant, after an adverse verdict, moved for a new trial on the grounds that the bullet which killed the trespasser was in the custody of the state's attorney and he did not have the opportunity to examine it until after his conviction. Markings on the bullet, which was not introduced into evidence, showed that it was deflected before it entered the deceased's body. In affirming the denial of a new trial, the Supreme Court said:

The affidavit failed to disclose why the bullet was not available for examination prior to or during the trial. The fact that it was in the custody of the state's officers would not prevent an examination of it by the defendant or by any person appointed to represent him. It does not appear that, prior to the conclusion of the trial, any effort was made, either by the defendant or by an agent in his behalf, to examine the bullet. Applications for a new trial on the ground of newly discovered evidence are subjected to close scrutiny. The burden is on the applicant to rebut the presumption that the verdict is correct and the evidence must...be such as could not have been discovered before the trial by the exercise of due diligence...plaintiff in error failed to meet [this] requirement.\textsuperscript{74}

Although the court refused the defendant's motion for a new trial because of his lack of diligence, as dictum the court affirmed the defendant's privilege of a pre-trial inspection of tangible objects in the custody of the prosecution. The proposed rule would allow the defendant to inspect upon a "showing of good cause." The rule therefore merely restates the present Illinois law found in the \textit{Buzan} case.

\textit{Subpoena Power against Third Persons}

The last paragraph of the rule provides for the use of a subpoena to reach material held by third persons. This rule is patterned after the federal rule,\textsuperscript{75} and presumably it will be given the same interpretation.

\textsuperscript{72}See 74 \textit{Harv. L. Rev.} 1013 (1961). For arguments opposed to the policy of grand jury secrecy.

\textsuperscript{73}351 Ill 610, 184 N.E. 890 (1933).

\textsuperscript{74}Id. at 618–19, 184 N.E. at 894.

\textsuperscript{75}Fed. R. Crim. P. 17(c).
The federal courts, because the word "may" is used twice in the rule, have required defendants to show good cause. In United States v. Iozia the court required the defendant to show: 1) that the documents were evidentiary and relevant; 2) that they were not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; 3) that the defendant could not properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; 4) that the application was made in good faith and was not intended as a general fishing expedition. The application of these requirements before the issuance of a subpoena by the Illinois courts, under the proposed rule, would allow the trial judge to effectively control the exercise of this power. Finally, it is important to note that once the subpoena has been complied with, both parties will be allowed to inspect the materials submitted for inspection.

**INSPECTION OF TANGIBLE EVIDENCE**

**Defendant's Right of Inspection**

A nearly unknown procedural right of the defendant is to inspect tangible objects which the prosecution possesses and intends to offer in evidence. In People v. Gerold where the defendant was charged with the offense of withholding funds belonging to the city of East St. Louis, the defendant requested the court to impound the records and documents to be used at the trial so that they could be inspected by him. The defendant, on appeal claimed that the trial court erred in refusing to compel the prosecuting attorney to allow the defendant an examination of the documents. The Supreme Court held the trial court's refusal to be reversible error because of the complexity of the accounts, the short time the defendant would have for investigation without pre-trial discovery, the charges were entirely predicated upon the documents and because the defendant should have been given sufficient time for the proper investigation.

The whole theory of our law as to the trial of one accused of a crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial. We see no reason why the motion of plaintiff in error on this point should not have been granted by the trial court.

78 265 Ill. 448, 107 N.E. 165 (1914).
79 The documents were in the possession of the prosecuting attorney.
Although this decision specifically declares that the defendant has a right to an inspection of the prosecution's evidence, there is only one subsequent decision in Illinois that has discussed the defendant's right to inspection.81 Perhaps the paucity of cases may be explained by a common practice of prosecuting attorneys cooperating with the defendant's counsel by voluntarily allowing pre-trial inspection of the tangible evidence which the prosecuting attorney intends to offer into evidence.82 To bring the existing procedural rule laid down by the Gerold case83 to the attention of the defense attorneys, the following rule has been proposed,

Rule 1 Inspection of Tangible Evidence

On motion of either party at any time after the filing of the indictment or information, each party shall produce at a time and place designated by the court all documents, papers or things which the party intends to introduce in evidence. Thereupon any party shall, in the presence of a person designated by the court, be permitted to inspect or copy any such documents, papers or things. If the evidence relates to scientific tests or experiments, the opposing party shall, if practicable and if the court directs, also be permitted to be present during the tests and to inspect the results thereof. The court shall exclude any evidence not presented for inspection or copying pursuant to this Rule, unless good cause is shown for failure to comply. In the latter case opposing party shall be entitled to a continuance during which it may inspect or copy the evidence in the manner provided above.

In reference to the defendant's inspection of the state's evidence, the rule is a slight extension of the doctrine laid down by the Gerold case for the proposal allows inspection of all tangible things which the prosecution intends to introduce into evidence while the Gerold case limits the discovery to tangible evidence to which the defendant must have access for the preparation of his case. Inspection of those items which the prosecuting attorney does not intend to introduce into evidence, but are necessary to the defense are included in rule two. In fact, the provisions of rule two allowing discovery of all privileged evidence necessary to the defense completely encompasses the right of the defendant to inspect the tangible evidence the state intends to offer into evidence, for under this rule, certainly an investigation of all the tangible evidence to be offered by the state is necessary to the defense.84 Consequently, when the de-

81 People v. Buzan, 351 Ill. 610, 184 N.E. 890 (1933).

82 However, motion by the defendant for the court to order the state's attorney to allow inspection of all articles in the possession of the state intended to be used in evidence was properly refused in Newton v. State, 21 Fla. 53 (1884); In State v. Livsey, 190 La. 474, 182 So. 576 (1938) the defendant in a burglary charge was refused inspection of written statements made by his co-defendant on the grounds that he only has a right to inspect public records.

83 265 Ill. 448, 107 N.E. 165 (1914).

84 Therefore the defendant could show good cause for inspection as required by Rule 2.
Defendant wants discovery of the tangible evidence in the custody of the prosecuting attorney, he will make the motion under Rule Two where he need merely show inspection is necessary to his defense rather than Rule One where he must be certain that the prosecuting attorney intends to introduce the objection or document into evidence.85

State’s Right to Inspection

Apparently then, the real purpose of the rule is not to confer a greater discovery right to the defendant but to give the prosecuting attorney the right to inspect the defendant’s “documents, papers or things” which he intends to offer into evidence. The first obstacle to be overcome is the constitutionality of this provision of the proposal, but since there are no states which permit the state to inspect the tangible objects the defendant intends to offer into evidence, no judicial interpretation can be found. The rule provides for the judge’s discretion in admitting evidence not disclosed at the pre-trial inspection; evidence found after the inspection will usually be admitted. The proposal is limited to investigation of the tangible evidence which the defendant intends to introduce in evidence so the defendant’s right of protection from self-incrimination is not violated for he is volunteering the evidence. Nevertheless, it is questionable as to whether or not the prosecution can compel the defendant to decide before trial what tangibles he will offer into evidence. The constitutional ramifications of this issue are not within the scope of this paper, for research indicates that the constitutionality of this provision has not been litigated.

The present procedure in Illinois permits the prosecuting attorney to inspect the defendant’s books and records by the use of a subpoena duces tecum.86 The use of the subpoena is limited by the defendant’s right of protection against self-incrimination87 and unlawful search and seizure.88 The subpoena’s utility is also limited by the requirement that the prosecution must know exactly what documents the defendant possesses or

85 Rule 1 can be used for both pre-trial or during trial discovery.

86 People v. Ryan, 410 Ill. 486, 103 N.E.2d 116 (1951). The subpoena is used in both pre-trial proceedings and in grand jury proceedings.

87 People v. Ryan, 410 Ill. 486, 494, 103 N.E.2d 116, 120 (1952) quoting from People v. Munday, 280 Ill. 32, 61, 117 N.E. 286, 298 (1917). “While one can not be compelled to produce any of his private books or papers which may tend to incriminate him, he can not refuse to produce the books or papers of a corporation of which he is an officer or in which he may be interested, even though they may be in his custody and under his control, as they are not his private books and records but the books and records of the corporation.” See People v. Zazove, 311 Ill. 198, 142 N.E. 543 (1924).

88 However in cases of subpoena deuces tecum the violaton is constructive unlawful search and seizure. People v. Allen, 410 Ill. 508, 103 N.E.2d 902 (1952); United States v. Bausch & Lomb Co., 321 U.S. 707 (1949).
precisely what documents the prosecution is seeking, for he must specify with fair precision what particular items are desired.89

The proposed rule overcomes the ineptness of the subpoena duces tecum for the prosecuting attorney is not longer plagued with definite specification of the evidence desired, self-incrimination and illegal search and seizure. He can be assured that he will have sufficient time to investigate all tangible objects offered into evidence rather than have a limited time for investigation during trial; thus eliminating the present procedure of lengthy trials resulting from continuances for the purpose of granting the state time to analyze documents that the defendant has introduced in evidence. However, it is doubtful that the state's attorney will find a great need for pre-trial investigation of the defendant's tangible evidence because by the use of process, seizure, and appropriation of defendant's belongings at the time of the arrest most of the investigation will have been completed in order to present the case to the grand jury; and the proposed rule can only be used after the grand jury has indicted the defendant. Yet the proposal will protect the state from any surprise tangible objects offered in evidence by the defendant.90

The proposal will not be advantageous to the defendant who will inspect the prosecution’s tangible evidence under rule two and it will not greatly assist the state's attorney who is unable to employ the rule of inspection when he is doing the bulk of investigation in preparation for the grand jury proceedings. The actual purpose of rule one is not only aimed at shortening the length of the trial, but is also intended to encourage the adversaries, by providing an insight into the other's case, to reach a pretrial agreement where the defendant will waive his right to the pending trial and plead guilty for a stipulated sentence.

PRE-TRIAL CONFERENCES

Although a pre-trial conference is not properly considered as a discovery proceeding its value has been shown in the simplification and expedition of civil cases. At present informal pre-trial conferences in criminal cases are held by many Illinois judges in complicated cases where some pre-trial agreement may simplify the issues and proof. Because of the reluctance of some judges and the necessity to formulate a rule to govern the procedure if a pre-trial conference is held, the following rule is proposed:

89 People v. Ryan, 410 Ill. 486, 102 N.E.2d 116 (1952); People v. Allen, 410 Ill. 508, 103 N.E.2d 502 (1952).

90 This will not be the case when each party has “surprise documents” which he wants to conceal from the adversary for neither party will motion for a mutual inspection. The proposal indicates that where a party moves for disclosure of the other’s evidence, both parties must permit mutual inspection.
Rule 5 Pre-trial Conferences

At the suggestion of either party, or on his own initiative, the trial judge may hold a pretrial conference. At the conference the judge may seek to obtain agreement on the simplification of issues and proof, limitation of the number of expert witnesses, or other matters which will promote a fair and expeditious trial or aid in the disposition of the case. The judge shall embody the results of agreement in an order which shall be binding on the parties at the trial unless later modified by the court with mutual consent of the parties. Neither the judge nor the prosecutor shall at such conferences seek to obtain any admissions of guilt from the defendant. No incriminating admissions made by the defense at the conference shall bind the defendant at trial or be admissible in evidence. Pretrial conferences shall not be held unless the defendant is represented by counsel.

The proposed rule raises a constitutional question since the conference may be called at the suggestion of either party or on the motion of the trial judge. It would seem that a pre-trial conference should only be allowed with the full consent of the defendant. Fear that the jury may be advised of his refusal to accept an “invitation” with his counsel to indulge in a pre-trial conference will negate consent and the rule should provide that the defendant is free to refuse to enter a pre-trial conference and this refusal should not be communicated to the jury. This consent must conform to the standard set down in Johnson v. Zerbst\(^9^1\) which called for an “intelligent and competent waiver by the accused.”\(^9^2\)

If a defendant feels compelled to enter a pre-trial conference because of the persuasion of the prosecution or the judge, there may be an infringement of the essential rights which have been established by the substitution of our present day accusatorial procedures for the ancient inquisitorial questioning of defendants.\(^9^3\) Our system of criminal justice relies on the “learning, good sense, fairness and courage of . . . trial judges”\(^9^4\) and any modification of long established procedures must be carefully scrutinized.

However, in spite of the necessity to carefully protect the rights of the defendant, a pre-trial conference can be useful in criminal cases which lend themselves to this procedure. A case involving many exhibits to be offered into evidence that could confuse the jury may be simplified by an agreement at the pre-trial stage to present a short summary to the jury of the significance of the exhibits. This procedure would be an aid to both parties since the trial would not be constantly interrupted by arguments concerning admissibility and authenticity of documents and other

\(^9^1\) 304 U.S. 458 (1938).
\(^9^2\) Id. at 465.
\(^9^3\) See Fee, Pre-Trials in Criminal Cases, 4 F.R.D. 338 (1946); Kaufman, Pre-Trial in Criminal Cases, 52 J. Am. J ud. Soc'y. 150 (1959), and Wright, The Pre-Trial Conference, 28 F.R.D. 141, 156 (1962) where the after use of pre-trial conferences was tested judges found a useful role for them in specific situations.
disputes over procedural matters; the jury would not become hopelessly confused and the defendant would be insured a fair trial.

Judge Irving R. Kaufman who presided at the Apalachin Trial95 reaffirmed his belief in the usefulness of the pre-trial conferences when it proved to be an effective vehicle in administering a trial which arose out of an indictment charging twenty-seven defendants and thirty-six co-conspirators with conspiracy to obstruct justice and to commit perjury. Without the use of pre-trial conferences it was estimated that the trial would have consumed a minimum of six months. The actual trial lasted only eight weeks. Judge Kaufman, in reviewing the trial said "[T]he purpose of pre-trial in the criminal case is the same as it is in the civil case; to establish communication among the parties leading to efficient procedures . . . [T]he balance between efficiency and protection of constitutional rights is a fine one, and the procedures must be developed with great care. No judge would think of bringing any pressure to bear upon counsel in a criminal case to relinquish important rights of his client merely in the interest of speed."96

A pretrial conference can be beneficial in many instances where the case is complicated for it will provide for a pre-trial solution to anticipated problems. The issues will be simplified for better understanding by the jury and the time involved with a complex proceeding will be minimized. To protect the defendant's constitutional rights it is suggested that a pretrial conference only be held with the voluntary consent of the defendant.

CONCLUSION

The Criminal Law Committee of the Illinois State Bar Association realizes that in this day of dynamic social change our criminal law procedures must be periodically reevaluated with close scrutiny to avoid outdated procedures which are often fraught with potential inequities. In an attempt to modernize the Illinois criminal procedure, the committee, in most instances, has either merely restated the existing, yet unused, judicial interpretation of our pre-trial discovery procedures or peroposed a rule that has been tested and is operating efficiently in another jurisdiction. Thus, the committee is not suggesting that Illinois institute an unproven and untried discovery procedure which may require years of struggle before it accomplishes the intended purpose.
