ARTICLE IV. RULES ON CRIMINAL PROCEEDINGS

IN THE TRIAL COURT

NOTE: The general rules of article I of these rules, beginning with Supreme Court Rule 1, apply to both civil and criminal proceedings.

PART A. WAIVERS AND PLEAS

Rule 401. Waiver of Counsel

(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and

(3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

(b) Transcript. The proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed and made a part of the common law record.

Amended June 26, 1970, effective September 1, 1970; amended effective September 1, 1974; amended September 29, 1978, effective November 1, 1978; amended April 27, 1984, effective July 1, 1984.

Committee Comments[1]

(Revised April 27, 1984)

Rule 401, as adopted in 1967 (36 Ill. 2d R. 401), covered (1) waiver of indictment, (2) waiver of counsel, (3) pleas of guilty, and (4) the requirement of representation by counsel in open court on a guilty plea or waiver of counsel or waiver of indictment by persons under 18 years of age. In 1970, items (3) and (4) were transferred to Rules 402 and 403 respectively (43 Ill. 2d Rules 402, 403), and waiver of counsel and waiver of indictment were separated into separate lettered paragraphs (a) and (b), respectively (43 Ill. 2d R. 401(a), (b)), in order to give a clearer and more specific statement of the requirements for each type of waiver, since in a given case both waivers might not occur, or might occur at different times. In 1975, the Code of Criminal Procedure of 1963 was amended to abolish the requirement of indictment, and in 1978, to reflect this change, paragraph (b) of Rule 401 (58 Ill. 2d R. 401) was rescinded and former paragraph (c) became the present paragraph (b).

With regard to waiver of counsel, the 1970 amendments made no major change in substance, although they made explicit some requirements that were only implicit in the rule as originally adopted. For example, Rule 401 as originally adopted merely stated that the defendant must understand "the consequences [of the charges against him] if found guilty" (36 Ill. 2d R. 401(b)), while paragraph (a)(2) defines these consequences. The definition is the same as in Rule 402, paragraph (a)(2), concerning admonition of the consequences when a plea of guilty is accepted. See the committee comments to Rule 402.

Original Rule 401 (36 Ill. 2d R. 401), and Rule 401(a), as amended in 1970 (43 Ill. 2d R. 401(a)), required waiver of counsel only in cases in which the defendant was accused of a crime punishable by imprisonment in the penitentiary. In 1974, this paragraph of the rule was amended (58 Ill. 2d R. 401(a)) to conform to the decision of the Supreme Court of the United States in *Argersinger v. Hamlin* (1972), 407 U.S. 25, in which it was held that no imprisonment may be imposed, absent a knowing and intelligent waiver, unless the defendant was represented by counsel at his trial.

The present paragraph (b) is derived from the last two sentences of paragraph (b) of former Rule 401 (36 Ill. 2d R. 401).

In 1984 paragraph (b) was amended to require transcription of the verbatim report of waiver proceedings only when ordered by the trial court. This brings Rule 401(b) into line with Rule 402(e), which requires transcription of guilty-plea proceedings in felony cases to be transcribed only when ordered by the trial court.

Rule 402. Pleas of Guilty or Stipulations Sufficient to Convict

In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him; or that by stipulating the evidence is sufficient to convict, he waives the right to a trial by jury and the right to be confronted with any witnesses against him who have not testified.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement

shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

(d) Plea Discussions and Agreements. When there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraphs of this rule, shall apply:

(1) The trial judge shall not initiate plea discussions.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

(3) If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement.

(e) Transcript. In cases in which the defendant is charged with a crime punishable by imprisonment in the penitentiary, the proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed, and made a part of the common law record.

(f) Plea Discussions, Plea Agreements, Pleas of Guilty Inadmissible Under Certain Circumstances. If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding.

Adopted June 26, 1970, effective September 1, 1970; amended effective September 17, 1970; amended January 5, 1981, effective February 1, 1981; amended May 20, 1997, effective July 1, 1997.

Committee Comments

(Revised May 1997)

The procedure on pleas of guilty was previously dealt with briefly in former Rule 401, paragraph (b). More extended and specific treatment of this subject is now required for at least two reasons. For one, the Supreme Court of the United States has recently held that it is a violation of due process to accept a guilty plea in State criminal proceedings without an affirmative showing, placed on the record, that the defendant voluntarily and understandingly entered his plea of guilty. (*Boykin v. Alabama* (1969), 395 U.S. 238.) For another, increased attention has recently been given to the long-standing practice of pleading guilty as a consequence of a prior agreement between the prosecution and defense concerning the disposition of the case; it is generally conceded that "plea discussions" and "plea agreements" are often appropriate, but that such procedures should not be concealed behind an in-court ceremony at which the defendant sometimes seems to think that he is expected to state falsely that no promises were made to him. (See American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved Draft 1968); Enker, *Perspectives on Plea Bargaining*, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report (1967): The Courts.) Two major objectives of new Rule 402 are: (1) to insure compliance with the *Boykin* requirements; and (2) to give visibility to the plea-agreement process and thus provide the reviewing court with a record containing an accurate and complete account of all relevant circumstances surrounding the guilty plea. See *United States v. Jackson* (7th Cir. 1968), 390 F.2d 130.

Paragraph (a) sets forth the admonitions which must be given to the defendant to insure that his guilty plea is intelligently and understandingly made, as required by *Boykin*. Subparagraph (1) requires that the defendant be informed of the nature of the charge, as now also required by section 113--1 of the Code of Criminal Procedure of 1963. Subparagraph (2) requires that the defendant also be informed of the minimum and maximum sentences prescribed by law; this deviation from section 113--4(c) of the Code, which only expressly requires explanation of the "maximum penalty provided by law," is based upon the assumption that notice of both the minimum and maximum will give the defendant a more realistic picture of what might happen to him. (See ABA Standards Relating to Pleas of Guilty 28 (Approved Draft 1968).) Subparagraphs (3) and (4) cover the requirements enumerated in *Boykin*, namely, that the record on a guilty plea affirmatively show a waiver of "three important federal rights": the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers.

The 1997 amendment was added to require that admonitions be given in cases in which the defense offers to stipulate to the sufficiency of the evidence to convict. See *People v. Horton*, 143 Ill. 2d 11 (1991).

Paragraph (b) requires a determination that the guilty plea is voluntary by inquiry of the defendant as to whether any force or threats or promises were made to him. This is now accepted practice, see, *e.g., People v. Darrah* (1965), 33 Ill. 2d 175, 210 N.E.2d 478, although not expressly required by Code section 113--4. In contrast to current practice, paragraph (b) also requires that if the tendered plea is the result of a plea agreement, then the agreement must be stated in open court. It is important to give visibility to the plea-agreement process in this way, as otherwise the defendant may feel required to state falsely that no promises were made and the plea may later be subject to collateral attack.

Paragraph (c) requires that the court determine there is a factual basis for the plea. Such inquiry is not uncommon in current practice, but heretofore has not been specifically required by law. The language of paragraph (c) is based upon the recent revision of Rule 11 of the Federal Rules of Criminal Procedure, and, as is true under the Federal rule, no particular kind of inquiry is specified; the court may satisfy itself by inquiry of the defendant or the attorney for the government, by examination of the presentence report, or by any other means which seem best for the kind of case involved. For a statement of the value of such a procedure, see ABA Standards Relating to Pleas of Guilty 30-34 (Approved Draft 1968).

Underlying paragraph (d), concerning plea discussions and plea agreements, is the notion that it is sometimes permissible for a defendant to plead guilty pursuant to a prior agreement that the prosecution will obtain, seek, or not oppose a certain disposition. For one assessment of various reasons upon which such practices may be legitimately based, see ABA Standards Relating to Pleas of Guilty 36-52 (Approved Draft 1968).

Subparagraph (1) of paragraph (d) prohibits the trial judge from initiating plea discussions.

Under subparagraph (d)(2), the judge, if he considers it appropriate, may be advised, in advance of the plea, of the tentative plea agreement and indicate his conditional concurrence or (if, with consent of the defendant, he then receives evidence in aggravation or mitigation) concurrence. Such concurrence or conditional concurrence is to be stated for the record when the plea is received, but if the judge later determines before sentencing that a more severe disposition is called for he must so advise the defendant and give him an opportunity to withdraw the plea. If the defendant does withdraw his plea under these circumstances, it would be inappropriate for the same judge to be involved in the trial of the case, so he is required to recuse himself. If, however, the defendant elects not to withdraw his plea, the judge is not required to recuse himself. Under subparagraph (3), where there is a plea agreement but no concurrence or conditional concurrence by the judge (either because the parties have not sought it or the judge has declined to give it), the judge is required to advise the defendant that he is not bound by the agreement stated in court at the time of the plea. This caution will remove any possibility of an inference by the defendant that the judge's awareness of the agreement indicates concurrence in it. See *People v. Baldridge* (1960), 19 Ill. 2d 616, 169 N.E.2d 353.

Paragraph (e) is derived from former Rule 401. It was amended in 1981 to leave within the court's discretion the question of whether the proceedings shall be transcribed. The requirement that they shall be taken verbatim remains.

Paragraph (f) adopts the prevailing view that once a guilty plea has been annulled by withdrawal or other means, it should not be subsequently admissible against the defendant in criminal proceedings. (See *People v. Haycraft* (1966), 76 Ill. App. 2d 149, 221 N.E.2d 317.) It follows that a plea discussion which has not resulted in a still-effective guilty plea should likewise be inadmissible, for otherwise defendants could engage in plea discussions only at their peril.

Rule 402A. Admissions or Stipulations in Proceedings to Revoke Probation, Conditional Discharge or Supervision.

In proceedings to revoke probation, conditional discharge or supervision in which the defendant admits to a violation of probation, conditional discharge or supervision, or offers to stipulate that the evidence is sufficient to revoke probation, conditional discharge or supervision, there must be substantial compliance with the following.

(a) Admonitions to Defendant. The court shall not accept an admission to a violation, or a stipulation that the evidence is sufficient to revoke, without first addressing the defendant personally in open court, and informing the defendant of and determining that the defendant understands the following:

(1) the specific allegations in the petition to revoke probation, conditional discharge or supervision;

(2) that the defendant has the right to a hearing with defense counsel present, and the right to appointed

counsel if the defendant is indigent and the underlying offense is punishable by imprisonment;>

(3) that at the hearing, the defendant has the right to confront and cross-examine adverse witnesses and to present witnesses and evidence in his or her behalf;

(4) that at the hearing, the State must prove the alleged violation by a preponderance of the evidence;

(5) that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, there will not be a hearing on the petition to revoke probation, conditional discharge or supervision, so that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, the defendant waives the right to a hearing and the right to confront and cross-examine adverse witnesses, and the right to present witnesses and evidence in his or her behalf; and

(6) the sentencing range for the underlying offense for which the defendant is on probation, conditional discharge or supervision.

(b) Determining Whether Admission Is Voluntary. The court shall not accept an admission to a violation, or a stipulation sufficient to revoke without first determining that the defendant's admission is voluntary and not made on the basis of any coercion or promise. If the admission or tendered stipulation is the result of an agreement as to the disposition of the defendant's case, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the agreement, or that there is no agreement, and shall determine whether any coercion or promises, apart from an agreement as to the disposition of the defendant's case, were used to obtain the admission.

(c) Determining Factual Basis for Admission. The court shall not revoke probation, conditional discharge or supervision on an admission or a stipulation without first determining that there is a factual basis for the defendant's admission or stipulation.

(d) Application of Rule 402. The provisions of Rules 402(d), (e), and (f) shall apply to proceedings on a petition to revoke probation, conditional discharge or supervision.

Adopted October 20, 2003, effective November 1, 2003.

Committee Comments
(October 20, 2003)

This rule follows the mandate expressed in *People v. Hall*, 198 Ill. 2d 173 (2001).

Rule 403. Pleas and Waivers by Persons Under 18

A person under the age of 18 years shall not, except in cases in which the penalty is by fine only, be permitted to enter a plea of guilty or to waive trial by jury, unless he is represented by counsel in open court.

Adopted June 26, 1970, effective September 1, 1970; amended August 9, 1983, effective October 1, 1983.

Committee Comments

(June 1970)

This rule is derived from former Rule 401, paragraph (c). The only change in substance is the insertion of the phrase "except in cases in which the penalty is by fine only," qualifying the requirement of representation by counsel when a person under 18 enters a plea of guilty or waives jury trial. This change conforms to section 113--5 of the Code of Criminal Procedure of 1963.

Rules 404-410. Reserved

PART B. DISCOVERY

Rule 411. Applicability of Discovery Rules

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. If the accused is charged with an offense for which, upon conviction, he might be sentenced to death, these rules shall be applied to the separate sentencing hearing provided for in section 9-1(d) of the Criminal Code of 1961 (720 ILCS 5/9-1(d)). They shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing.

Effective October 1, 1971; amended March 1, 2001, effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the amended provisions in a particular case pending at the time the amendment becomes effective would not be feasible or would work an injustice, in which case former procedures would apply.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

Rule 411, as amended, makes criminal discovery rules applicable to the sentencing hearing in a capital case. A capital sentencing hearing is a unique and complex proceeding, which often takes place immediately following trial on the merits. Allowing pretrial discovery for capital sentencing will assist counsel in preparing for this critical stage of a capital trial and prevent delay and disruption of the sentencing hearing. See also Rule 416(c) (pretrial notice of aggravating factors the State will rely upon in sentencing).

The amendment to Rule 411 does not create new forms of discovery. Instead, the amendment extends the application of existing discovery methods to capital sentencing hearings. The committee notes that any discovery rule that requires disclosure by the defense is subject to constitutional limitations and limitations based on attorney-client or other privilege. Existing discovery rules expressly mention constitutional limitations on defense disclosures (see, *e.g*., Rule 413) and provide that attorney work product is not subject to disclosure by the State or the defense (Rule 412(j)).

The committee found that the existing discovery rules and associated case law would adequately address constitutional and privilege-based objections to pretrial disclosure of sentencing information by the defense. However, constitutional and privilege-based limitations on discovery do not preclude the possibility that pretrial disclosure of defense sentencing information could directly or indirectly aid the State's case on the merits. The extension of discovery procedures to capital sentencing is not intended to provide such an advantage to the State.

In the event the defense objects to disclosure of specific sentencing information on the ground that disclosure would harm the defense case on the merits, the trial court should take any action necessary to prevent that harm. Options available to the trial court include excision of objectionable material pursuant to Rule 415(e) and the use of protective orders to defer disclosure or restrict the use of information disclosed (Rule 415(d)). *In camera* review of a claim of potential harm from disclosure of sentencing information (Rule 415(f)) may be appropriate to prevent disclosure of defense theories or strategy, or where the identity of a defense sentencing witness is unknown to the State

Committee Comments

To avoid confusion, the committee rejected the ABA standard which called for the application of discovery rules in "all serious criminal cases." No such standard exists in Illinois, and the application of the discovery rules is extended to all offenses carrying a possible penalty of penitentiary imprisonment. The use of the extensive discovery procedures prescribed in these rules at preliminary stages of the criminal trial would serve no valid purpose, and their use is confined to post-indictment procedures. The committee considered but unanimously declined to make the rules applicable in juvenile court proceedings since the nature of such proceedings generally does not require discovery rules. However, if such proceedings become more adversary in nature, it may be desirable or necessary to apply the rules to them at some future date. In any event, the requirements of *In re Gault* (1967), 387 U.S. 1, must be met.

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 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;

(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;

(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;

(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, and a statement of qualifications of the expert;

(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; and

(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.

If the State has obtained from the defendant, pursuant to Rule 413(d), information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the State intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii), and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

(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.

(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 which would tend to reduce his punishment therefor. The State shall make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense. At trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State's identification of any material or information as tending to negate the guilt of the accused or reduce his punishment.

(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.

(h) Discretionary Disclosures. 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.

(i) Denial of Disclosure. The court may deny disclosure authorized by this rule and Rule 413 if it finds that there is 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.

(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.

Effective October 1, 1971; amended October 1, 1976, effective November 15, 1976; amended June 15, 1982, effective July 1, 1982; amended March 1, 2001, effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the amended provisions in a particular case pending at the time the amendment becomes effective would not be feasible or would work an injustice, in which case former procedures would apply.

In developing the specific-identification proposal, the committee was concerned with the possibility that information that clearly tends to be exculpatory or mitigating would not be disclosed or would be lost among other information. Examples of information that clearly tends to be exculpatory or mitigating include: a statement that a person other than the defendant committed the crime, a statement that the act that caused death was committed by an accomplice, or a preliminary scientific test result that is not inculpatory, and some types of impeachment evidence, such as certain prior convictions of State witnesses, information concerning promises or expectations of leniency for a State witness, or prior inaccurate or unsuccessful attempts at identification of the perpetrator by an occurrence witness. The purpose of the specific-identification requirement is to reinforce the duty to disclose and reduce the chance of pretrial or trial error with respect to this type of evidence.

The amendment to paragraph (c) requires a "good-faith" effort to specifically identify exculpatory and mitigating materials "based on information available to the State at the time the material is disclosed to the defense." Thus, the duty to specifically identify is not as broad as the duty to disclose under Rule 412(c). See Rule 416(g), committee comments. The good-faith standard is intended to avoid creating an impossible burden for the prosecution. A "good-faith" effort by prosecutors would include the specific identification of information that clearly tends to be exculpatory or mitigating. The amended rule is not intended to require that prosecutors specifically identify materials with remote or speculative exculpatory or mitigating value. The need to specifically identify materials falling between the extremes will depend upon the facts of the case.

The language stating that the duty to identify exculpatory or mitigating information must be viewed in light of the information available to the State when the material is disclosed to the defense is significant for several reasons. First, the information available to the State when disclosure is made will guide the determination of whether the State has made a good-faith effort to specifically identify exculpatory or mitigating information. Failure to identify information that can be characterized as exculpatory or mitigating only when viewed in light of the defense's theory of the case cannot be seen as evidence of failure to comply with the rule when the State was not aware of the defense theory. Second, placing the focus of the inquiry regarding compliance with the rule on information available at the time of disclosure to the defense is intended to avoid a standard based on hindsight evaluation of the exculpatory or mitigating value of information. Thus, a prosecutor's failure to identify information should not be second-guessed based on defense theories revealed after the information has been disclosed, unexpected events at trial, or new theories suggested after the trial.

The committee notes that in light of new evidence received or events at trial, materials that had no exculpatory value when initially disclosed could be viewed as exculpatory later in the trial process. The committee did not intend that the duty to specifically identify exculpatory or mitigating information would be subject to continuous updating.

The specific identification of potentially exculpatory or mitigating material by the prosecution pursuant to paragraph (c) is not an admission by the State for any purpose. Neither the terms or manner of the specific identification by the prosecution nor the fact that the prosecution has made the specific identification are relevant or admissible for the purposes of trial on the merits or sentencing. In addition, specific identification of materials pursuant to paragraph (c) does not imply that the material will be admissible as

evidence

Committee Comments

Paragraph (a). It is intended that the disclosures required by this paragraph be implemented as a matter of course, and without time-consuming recourse to the courts. The discovery is not intended to be "automatic," in the sense that the State is not required to furnish information without any request by the defense counsel. It is recognized that in many cases discovery will be neither necessary nor wanted; paragraph (a), therefore, reflects the committee's opinion that the choice of discovery or no discovery under this rule be within the discretion of defense counsel. By requiring the motion to be made in writing, rather than allowing oral motions, the committee expressed the intent that certainty was necessary in order to prevent later disputes.

Paragraph (a), subparagraph (i), enlarges upon the Code of Criminal Procedure of 1963, section 114--9(a). In addition to requiring production of a list of intended witnesses and their last known addresses (in the case of a police officer his official address shall be sufficient), the State will also be expected to produce these witnesses' prior statements. *People v. Moses*, 11 Ill. 2d 84, 142 N.E.2d 1 (1957), and decisions thereunder required the State to tender to defense counsel all such statements when the witness was tendered for cross-examination. Nothing herein changes the types of material that are to be provided; only the time of their disclosure is changed. By requiring disclosure prior to trial, it is hoped that the fruits of discovery can be harvested. Or in the event the parties have been unable to arrange a guilty plea or a dismissal, the disclosure assures defense counsel adequate time to prepare. Pretrial disclosure of this nature not only affords defense counsel adequate opportunity to investigate the case, but also ensures the end of untimely interruptions at trial occasioned by disclosures of statements at trial. The ABA standard limited production of witnesses' statements to those in written or recorded form. Paragraph (a), subparagraph (i), requires the additional production of any substantially verbatim report of an oral statement by a witness. The State is also obliged to produce a list of all memoranda reporting or summarizing oral statements whether or not the memoranda appear to the State to be substantially verbatim reports of such statements. The defense is then entitled, upon filing of a written motion, to have the court examine the memoranda listed by the State. If the court finds that the memoranda do contain substantially verbatim reports of witness statements, the memoranda will be disclosed to defense counsel. This additional requirement serves two purposes. First, it ensures that the final responsibility for determining what is producible rests with the court. Second, it establishes, as a matter of record, the contents of the State's file with respect to reports of witness' statements and thereby facilitates appellate review of contested questions of discovery under this subsection.

Paragraph (a), subparagraph (ii), is substantially section 114--10(a) of the Code of Criminal Procedure of 1963. Because of the decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1601 (1966), uncertainty as to the proper definition of "confession" exists. To ensure uniformity the committee therefore chose to make all statements, not only confessions, discoverable. The availability of all such statements will also enable defense counsel to better prepare the case. The major change in prior law is that provision which makes discoverable the prior statements, etc., of all the accused's codefendants. If an informed motion for severance or excision of a codefendant's statement to remove prejudice is to be properly made, defense counsel must be able to obtain all of the codefendant's statements.

Paragraph (a), subparagraph (iii), adopts the ABA standard for production of grand jury minutes. In terms of Illinois practice, it makes mandatory disclosure of what is now discretionary under the second sentence of section 112--6(b) of the Code of Criminal Procedure of 1963. Such full disclosure is now required in a number of other jurisdictions, including California, Iowa, Kentucky and Minnesota.

In paragraph (a), subparagraph (iv), the committee chose to adopt the standard recommended by the ABA.

There should be no problem of tampering with or misuse of the information, and without the opportunity to examine such evidence prior to trial defense counsel has the very difficult task of rebutting evidence of which he is unaware. In the interest of fairness paragraph (a), subparagraph (iv), requires the disclosure of all such results and reports, whether the result or report is "positive" or "negative," and whether or not the State intends to use the report at trial. If the State has the opportunity to view the results of any such examination, the same opportunity should enure to defense counsel. No relevancy limitation is included; the only requirement is that the examination, etc., have been made "in connection with" the case. This subparagraph, and the others in this paragraph, are intended to supplement Rule 412(c), which requires the State to disclose any results, etc., which tend to negate the guilt of the accused or would tend to reduce his punishment were he convicted.

Paragraph (a), subparagraph (v), is identical to the ABA standard for production of books, papers, documents, photographs and tangible objects.

Paragraph (a), subparagraph (vi), differs from the ABA standards in that it is limited to prior convictions which may be used for impeachment purposes in Illinois. The committee could discern no valid reason why this information should not be disclosed to the defense prior to trial when such information is in the possession or control of the State.

Paragraph (b) is included to expose for appropriate challenge an important collateral constitutional question. The nature of the exposure is designed to ensure the confidentiality of the information, and to provide flexibility in the releasing of the information, but to permit the litigation of any issues which those facts may present at a time when such litigation is most economical for the process. The necessity of the revelation of the existence of electronic surveillance has been recognized, and *in camera* hearings on the question of suppression of such evidence might be necessary. (*Alderman v. United States*, 394 U.S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969).) Because of the small number of cases in which such activity is involved, the committee chose to put the burden on the State to inform defense counsel, rather than to require the submission of a motion.

Paragraph (c) is included to comply with the constitutional requirement that the prosecution disclose, "evidence favorable to an accused *** where the evidence is material either to guilt or to punishment." (*Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194, 1196-97 (1963).) Although the pretrial disclosure of such material is now not constitutionally required, it is clear that, if a conviction is to be valid, the material must be disclosed so that the defense can make use of it. In providing for pretrial disclosure, this paragraph permits adequate preparation for, and minimizes interruptions of, a trial, and assures informed pleas by the accused.

Paragraph (d) differs from the ABA standards only to require the State to perform its obligations as soon as is practicable following defense counsel's motion for discovery, rather than as soon as is practicable following his request for discovery. This change was made to accommodate the procedures of Rule 412(a), which require the filing of a written motion to initiate most discovery. More precision in describing the standard for performance was not deemed feasible for a rule that would be applied in such a wide variety of situations.

Paragraph (e) is designed to provide an orderly procedure for disclosure by the State. It delimits the extent of its responsibility to notifying defense counsel, only in general terms, as to the existence and availability of the material and information. The State need not send copies to defense counsel and it need not point out the significance of various items. It must, however, make the material available at specified and reasonable times, and permit--and provide suitable facilities or other arrangements for--inspection, testing, copying and photographing the material or information. If the State should desire to delay or restrict discovery it can seek a protective order therefor (Rule 415(d)) at the time of defense counsel's original motion, or at any time

following. Access to material by a defense expert must be permitted, sufficient to allow him to reach conclusions regarding the State's examining or testing techniques and results. Where feasible, defense counsel should have the opportunity to have a test made by his chosen expert, either in the State's laboratory or in his own laboratory using a sufficient sample.

Paragraph (f) is designed to deal with the problem of the extent to which the State can be expected to know of the existence of material or information which it is obligated to disclose. In discharging its duties it should know, or seek to know, of the existence of material or information at least equal to that which it should disclose to defense counsel. The formulation of a rule such as this means especially that the State should not discourage the flow of information to it from investigative personnel in order to avoid having to make disclosure. Supplementing paragraph (f) are Rules 412(g), dealing with material held by other government personnel, and 415(b), dealing with the State's continuing duty to disclose new information of which it learns. The committee chose not to include a rule similar to ABA standard 2.1(d), which describes persons whose possession or control of material and information could be imputed to the prosecutor. It is assumed that this paragraph and the paragraphs cited in this comment will be sufficient to guide a court in determining if proper disclosure has been made.

Paragraph (g) is part of the attempt to delineate the scope of the State's responsibilities for obtaining information which it is obligated to disclose to defense counsel. It complements the requirement in Rule 412(F), that it ensure the flow of information between the prosecutor and investigative personnel. Since the State's obligations are not limited to revealing only what happens to come within its possession or control, it is expected that the State will attempt to obtain material not within its possession but of which it has knowledge. Accordingly, this paragraph is primarily concerned with material of which the State does not have knowledge but of which defense counsel is aware; and therefore the burden is upon defense counsel to make the request and to designate the material or information which he wishes to inspect. This paragraph avoids placing the burden on the prosecutor, in the first instance, of canvassing all governmental agencies which might conceivably possess information relevant to the defendant. Paragraph (g) is not intended to enlarge the scope of discovery but merely to deal with problems of implementation. It is, therefore, limited to material or information "which would be discoverable if in the possession or control of the State."

Paragraph (h) of this rule authorizes discovery only if the court so orders within the exercise of its discretion; discovery will only be allowed when defense counsel can show that what he seeks is material to the preparation of the defense. Though there was some opinion in the committee that the production of items and the performance of duties required in paragraphs 412(a) through (g) would result in adequate discovery in most cases, by providing for mandatory discovery the committee did not intend to bar discovery of any other matters which the defense might find useful. To deal with such a broad area, however, it is believed that the criteria here set forth and the discretionary power accorded to the court provide a satisfactory balance between the needs of the State and the needs of the defense.

Paragraph (i). Although the ABA standards combine the provisions of this paragraph with the provisions of paragraph 412(h), the committee separated the paragraphs. By separating the two paragraphs it was felt that there would be no confusion in the application of the court's right to deny disclosure. Paragraph (i) is intended not only to be used by the court in conjunction with the discretionary disclosures provided for in paragraph 412(h), but is also to be applied whenever the risks of disclosure outweigh the advantages of such disclosure to the defense or State.

Under paragraph (j), subparagraph (i), the material which is protected is primarily that which is protected from civil discovery under the doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). But rather than merely indicate that "work product" is exempted from discovery the committee chose instead to define it in such a way as to provide guidance to those who will administer and carry out the disclosures provided for in these rules.

Paragraph (i), subparagraph (ii). The value of informants to effective law enforcement is so highly regarded that encouragement of their use, through protection of their identity, has resulted in the development of one of the few privileges accorded to the State. The public interest in protecting the sources of information concerning the commission of crimes is served by providing for the nondisclosure of the identity of informants except when compelling circumstances require it. Disclosure should only be required when constitutional problems are raised or when the informant's identity is to be disclosed at trial (although a protective order under Rule 414(d) might still be in order). The cases which have established this privilege include *McCray v. Illinois*, 386 U.S. 300 (1967), *Roviaro v. United States*, 353 U.S. 53 (1957), *People v. White*, 16 N.Y.2d 270, 266 N.Y.S.2d 100, 213 N.E.2d 438 (1965), and *Commonwealth v. Carter* 208 Pa. Super. 245, 222 A.2d 475 (1966), aff'd mem., 209 Pa. Super. 732, 226 A.2d 215 (1967).

Paragraph (j), subparagraph (iii). While a defendant has a constitutional right to information which tends to negate his guilt or mitigate his punishment (*Brady v. Maryland*, 373 U.S. 83 (1963)), and to be confronted with the witnesses against him (*Jencks v. United States*, 353 U.S. 657 (1957)), and to any other information the withholding of which might violate his constitutional rights, he has no such right to information which does not affect his constitutional rights. This subparagraph, therefore, permits nondisclosure if disclosure would involve a substantial risk of grave prejudice to national security, and if such nondisclosure does not violate a constitutional right of the defendant. If the State intends to use the information or material at trial it should be disclosed to defendant prior to trial unless the State obtains a protective order delaying disclosure.

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 lineup;

(ii)speak for identification by witnesses to an offense;

(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 materials 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.

(c) Medical and Scientific Reports. Subject to constitutional limitations, the trial court shall, on written motion, require that the State be informed of, and permitted 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, including a statement of the qualifications of such experts, except that those portions of reports containing statements made by the defendant may be withheld if defense counsel does not intent to use any of the material contained in the report at a hearing or trial.

(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, and 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;

(iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

(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.

Effective October 1, 1971; amended October 1, 1976, effective November 15, 1976; amended June 15, 1982, effective July 1, 1982.

Committee Comments

Paragraphs (a) and (b) provide for procedures to secure evidence from or involving the use of defendant's person consistent with the rules enunciated in *Gilbert v. California*, 388 U.S. 263 (1967), and cases cited therein. See also *Williams v. United States*, 419 F.2d 740 (D.C. Cir. 1970) (bail order may provide for appearance of defendant for lineup).

Paragraph (c) provides for the production of medical and scientific evidence in the possession or control of defense counsel. Such evidence does not fall within the attorney-client privilege (*People v. Speck*, 41 Ill. 2d 177), nor does such evidence involve self-incrimination unless it is based upon statements made by defendant. Where statements of defendant are involved they may be excised from reports. When defense counsel intends to use the scientific or medical evidence based upon the defendant's statements to the expert, excision shall not be made.

Paragraph (d) requires that defense counsel inform the State of any defenses he intends to offer. The notice

of defenses includes both affirmative defenses, *i.e.*, insanity, and nonaffirmative defenses, *i.e.*, consent to intercourse in rape cases. The notice may include alternative and inconsistent defenses. In addition, defense counsel must produce a list of witnesses and their statements, along with any records or physical evidence he intends to use and any record of prior convictions, known to him. The general justifications for discovery in criminal cases apply to discovery against the defense. Such discovery eliminates unfair surprise and allows the opposing party to establish the truth or falsity of the defense. In addition, discovery against the defense eliminates the argument that criminal discovery is a one-way street. The discovery provisions with respect to the defense case are based upon two further premises: (1) when defense counsel receives full discovery of the evidence the State will introduce, he can then determine what defenses he can offer to that evidence and (2) only when defense counsel states his defense or defenses can the trial court make a full and fair determination of whether the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), have been fully met.

Paragraph (e) allows the court to order additional discovery not covered by the remainder of the rule but only upon a showing of materiality and reasonableness. The provision is parallel to Rule 412(h).

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 books, 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.

Effective October 1, 1971.

Committee Comments

The committee chose not to include depositions for discovery purposes, but did decide to follow the unmistakable trend and provide for depositions to preserve testimony. This rule allows both the State and defense counsel to take such depositions and use the testimony as evidence at a hearing or trial in situations where the potential witness will be unable to appear at hearing or trial for any reason. The deposition is not taken by right but is subject to court approval. Notice should be taken of the fact that depositions may be taken by written questions as well as by oral examination.

Paragraph (c) provides for the taking of a deposition in circumstances which most other jurisdictions have recognized as a necessary use of depositions. In order to prevent unnecessary incarceration, a judge may permit the deposition of a witness committed for failure to execute a recognizance to appear.

Paragraphs (e) and (f) protect the defendant's constitutional rights. Paragraph (e) protects his rights of confrontation and cross-examination, and paragraph (f) assures equal protection to those indigents whose defense requires the taking of a deposition.

Rule 415. Regulation 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 nor 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.

(b) Continuing Duty to Disclose. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(c) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

(d) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit counsel to make beneficial use thereof.

(e) Excision. When some parts of certain material are discoverable under these rules, and other parts not discoverable, as much of the material should be disclosed as is consistent with the rules. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised pursuant to judicial order shall be sealed, impounded and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal.

(f) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed, impounded, and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal.

(g) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

(ii) Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Effective October 1, 1971.

Committee Comments

Paragraph (a). One barrier to pretrial investigation and meaningful discovery procedures is the practice of some attorneys of advising witnesses not to cooperate with opposing counsel. This paragraph is included to provide that discovery shall not be frustrated by improper conduct of counsel or the various agents of counsel.

Paragraph (b) is modeled after Federal Rule of Criminal Procedure 16(c). This paragraph is intended to permit thorough preparation and to minimize paperwork and delay. After discovery has been conducted as provided, any additional material or information acquired by either side which is subject to disclosure should be automatically and promptly disclosed. The notification required by this paragraph is intended to make such disclosures as simple and easy as possible.

Paragraph (c). If the materials to be provided were to become, in effect, matters of public availability once they had been turned over to counsel for the limited purposes which pretrial disclosures are designed to serve, the administration of criminal justice would likely be prejudiced. Accordingly, this paragraph establishes a mandatory requirement in every case that the material which an attorney receives shall remain in his exclusive custody. While he will undoubtedly have to show it to, or at least discuss it with, others, he is not permitted to furnish them with copies or let them take it from his office. It should be noted that this paragraph also applies to the State. Nothing in this paragraph should be interpreted to prevent counsel from having tests performed by experts on materials furnished by opposing counsel or from having experts examine reports received from opposing counsel. Tangible objects, such as guns, knives, clothing, not subject to duplication but furnished for purposes of testing, *etc.*, should be returned to the furnishing party when such testing or inspection is completed. If not returned routinely the last phrase permits the court to so order, in addition to any other terms and conditions provided.

Paragraph (d). In order that legitimate needs of exceptional cases will not shape discovery policy and result in denial of discovery in all cases, this paragraph is designed to provide sufficient flexibility to meet such

exceptional needs. This paragraph, adapted from Federal Rule of Criminal Procedure 16(e), permits application by the party concerned to the court for a protective order adjusting the time, place, recipient, or use of the disclosures as are necessary in a particular case. It is anticipated that it will ordinarily be needed with respect to those matters for which discovery is mandatory, rather than matters where the court has discretion in allowing discovery under Rule 412(h). While the protective order is designed to permit flexibility, it is to be used under a policy of as full and as early discovery as possible; it is not intended to permit denial of disclosure, although it may result in deferral until a later time. The disclosure must be made in time for a party to make beneficial use of it. Normal use of the protective order will be made when there is substantial risk to any person of physical harm, intimidation, bribery, or economic reprisals which outweigh any usefulness of disclosure to the defendant or State.

Paragraph (e). Occasions will arise when material will contain information which is both discoverable and nondiscoverable. This paragraph recognizes the right of a party to excise, or have excised, the nondiscoverable portion. The procedure under this paragraph is different from that under the Jencks Act, 18 U.S.C. §3500(c), and under present Illinois practice, only in giving approval to a party excising portions of material without court supervision. Approval of counsel's independent conduct is consistent with the purpose of expediting the discovery process, but it is expected that in many cases counsel will seek a decision by the court, and that, in any event, he will be held accountable for excisions, if they are challenged by opposing counsel. The only change from the ABA standards is the requirement that the material excised pursuant to a judicial order not only be sealed, but also impounded and preserved.

Paragraph (f) provides for preserving the confidentiality of material at such times as the trial court is called upon to decide whether to require its disclosure. In issuing protective orders under paragraph (d), allowing excision of portions of material under paragraph (e), or in otherwise deciding that certain material is not subject to disclosure, the trial court must have an opportunity to examine, in private, the particular material as well as the reasons for nondisclosure. The purpose of issuing such rulings would often be defeated if the hearing were to be held in open court. To protect the litigants from error by the trial court, provision is made for the making and preserving of a record of all such proceedings for purposes of appeal.

Through paragraph (g), the committee intended to emphasize that these discovery rules must be enforced. Rather than attempt to provide specific sanctions for specific violations, the committee deemed it wise to leave the sanctions to the discretion of the trial court. This paragraph does contain one provision not present in the ABA standards. If justified under the circumstances, the court may exclude evidence which a party has failed to disclose under applicable discovery rules. The committee felt that such a device is a useful sanction, and that even though some problems may arise in applying it against the accused, the sanction can be applied in some situations. In this regard this paragraph conforms to Federal Rule of Criminal Procedure 16(g), and further guarantees the expedition of the discovery process. The sanctions listed are not exclusive.

Rule 416. Procedures in Capital Cases

(a) Scope of Rule. The procedures adopted herein shall be applicable in all cases wherein capital punishment may be imposed, unless the State has given notice of its intention not to seek the death penalty.

(b) Statement of Purpose. This rule is promulgated for the following purpose:

(i) To assure that capital defendants receive fair and impartial trials and sentencing hearings within the courts of this state; and

(ii) To minimize the occurrence of error to the maximum extent feasible and to identify and correct with due promptness any error that may occur.

(c) Notice of Intention to Seek or Decline Death Penalty. The State's Attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in section 9–1(b) of the Criminal Code of 1961 (720 ILCS 5/9–1(b)) which the State intends to introduce during the death penalty sentencing hearing.

(d) Representation by Counsel. In all cases wherein the State has given notice of its intention to seek the death penalty, or has failed to provide any notice pursuant to paragraph (c), the trial judge shall appoint an indigent defendant two qualified counsel who have been certified as members of the Capital Litigation Trial Bar pursuant to Rule 714, or appoint the public defender, who shall assign two qualified counsel who have been certified as members of the Capital Litigation Trial Bar. In the event the defendant is represented by private counsel, the trial judge shall likewise insure that counsel is a member of the Capital Litigation Trial Bar.

The trial judge shall likewise insure that counsel for the State, unless said counsel is the Attorney General or the duly elected or appointed State's Attorney of the county of venue, is a member of the Capital Litigation Trial Bar.

(e) Discovery Depositions in Capital Cases. In capital cases discovery depositions may be taken in accordance with the following provisions:

(i) A party may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of court upon a showing of good cause. In determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition. However, under no circumstances, may the defendant be deposed.

(ii) 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 books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(iii) Attendance of Defendant. A defendant shall have no right to be physically present at a discovery deposition.

(iv) Signing and Filing Depositions. Rule 207 shall apply to the signing and filing of depositions taken pursuant to this rule.

(v) Costs. 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.

(f) Case Management Conference. No later than 120 days after the defendant has been arraigned or no

later than 60 days after the State has disclosed its intention to seek the death penalty, whichever date occurs earlier, the court shall hold a case management conference. Counsel who will conduct the trial personally shall attend such conference. At the conference, the court shall do the following:

(i) Confirm the certification of counsel under Supreme Court Rule 714 as a member in good standing of the Capital Litigation Trial Bar.

(ii) Confirm that all disclosures by the State required under Supreme Court Rule 412 have been completed and that the certificate required by paragraph (g) below has been filed or establish a date by which the same shall be accomplished.

(iii) Confirm that all disclosures required by defense counsel under Supreme Court Rule 413 have been completed and that the certificate required by paragraph (h) below has been filed or establish a date by which the same shall be accomplished.

(iv) Confirm that the State has disclosed all statutory aggravating factors enumerated in section 9–1(b) of the Criminal Code of 1961 (720 ILCS 5/9–1(b)) which the State intends to introduce during the death penalty sentencing hearing or establish a date by which the same shall be accomplished.

(v) Confirm that all disclosures required by Supreme Court Rule 417 have been completed or establish a date by which the same shall be accomplished.

(vi) Enter any other orders and undertake any other steps necessary to implement this rule.

(vii) Schedule any further case management conferences which the trial court deems advisable.

(g) In all capital cases the State shall file with the court not less than 14 days before the date set for trial, or at such other time as the court may direct, a certificate stating that the State's Attorney or Attorney General has conferred with the individuals involved in the investigation and trial preparation of the case and represents that all material or information required to be disclosed pursuant to Rule 412 has been tendered to defense counsel. This certificate shall be filed in open court in the defendant's presence.

(h) In all capital cases the defense shall file with the court not less than 14 days before the date set for trial, or at such other time as the court may direct, a readiness certificate signed by both lead and co-counsel stating that they have met with the defendant and fully discussed the discovery, the State's case and possible defenses, and have reviewed the evidence and defenses which may mitigate the consequences for the defendant at trial and at sentencing. This certificate shall be filed in open court in the defendant's presence.

Adopted March 1, 2001. The provisions of paragraphs (d) and (f)(i) which require membership in the Capital Litigation Trial Bar shall be effective one year after adoption of this rule and shall apply in cases filed by information or indictment on or after said effective date. The remaining provisions of the rule shall be effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the new rules in a particular case pending at the time the rule becomes effective would not be feasible or would work an injustice, in which case former procedures would apply.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

(Revised September 23, 2008)

Rule 416 is part of a series of measures designed to improve pretrial and trial procedures in capital cases. The purpose of Rule 416, as stated in paragraph (b), is to ensure that capital defendants receive fair and impartial trials and to minimize the occurrence of error in capital trials. See also Rule 43 (judicial seminars on capital cases), Rule 411 (applicability of discovery rules to capital sentencing hearings), Rule 412(c) (State identification of material that may be exculpatory or mitigating), Rule 417 (DNA evidence), and Rules 701(b) and 714 (Capital Litigation Trial Bar).

Paragraph (a) limits the application of Rule 416 to cases in which the death penalty may be imposed, *i.e.*, a case involving a first degree murder charge, where the defendant may be eligible for the death penalty and the State has not provided notice it will decline to seek the death penalty. The capital case procedures of Rule 416 are generally not intended to take effect until the State has had the opportunity to provide notice of its intent to seek or decline to seek the death penalty as provided in paragraph (c). All capital case procedures under Rule 416 take effect upon the earlier of: (1) notice that the State intends to seek the death penalty; or (2) expiration of the time for notice under paragraph (c) without notice of the State's intent to seek or not seek the death penalty. A case is presumed to be capital in the event the State does not provide notice in the time allowed by paragraph (c) in order to prevent unreasonable delay in the application of capital case procedures.

Paragraph (c) requires the State to provide pretrial notice of its intent to seek or decline to seek the death penalty as soon as practicable. Unless the court directs otherwise for good cause shown, notice must be given within 120 days after the defendant's arraignment. If the State intends to seek the death penalty, the aggravating factors the State intends to introduce in the death penalty sentencing hearing must also be disclosed. The notice requirement is intended to improve trial administration by providing the defendant and the court with advance notice that a case is actually, rather than potentially, a capital case. The notice requirement is also intended to promote fairness in capital trials by ensuring the defendant is clearly advised of the State's intent to seek the death penalty and the basis upon which the death penalty will be sought, thereby allowing better preparation for trial. Early notice that the State will not seek the death penalty will also help to limit the use of capital case resources and procedures to actual capital cases.

The committee chose 120 days after arraignment as the benchmark for State notice so that State's Attorneys would have adequate time to decide whether to seek or not seek the death penalty. The committee found that by exercising careful and informed discretion in deciding whether to seek the death penalty, the State's Attorney provides an indispensable check against the possibility of injustice in capital cases. The committee sought to encourage the elected or appointed State's Attorney to personally review potential death penalty cases before making the decision to seek or not seek the death penalty. The committee found that for most capital cases statewide, and nearly all capital cases in Cook County, notice no more than 120 days after arraignment will be far enough in advance of the trial date to provide the defendant with meaningful notice of the nature of the case and to trigger capital case procedures early enough allow the defendant to receive the intended benefit of those procedures.

In some circumstances the State will be required to give notice of its intent to seek or decline to seek the death penalty before 120 days have elapsed. For example, if the State is ready to proceed to trial at an early date, notice of the State's intent should be given immediately. In such cases, the decision to seek or not seek the death penalty has been made, and paragraph (c) requires notice *as soon as practicable*. If the defendant intends to exercise the right to a speedy trial and insist on an early trial date, the defendant may move to accelerate the time for notice. The rule is also intended to permit the trial court to accelerate the time for notice *sua sponte*.

Paragraph (d) provides that two attorneys who are members of the Capital Litigation Trial Bar established by Rule 714 must be appointed to represent an indigent defendant in a capital case. In appointing counsel, the trial court may wish to consider whether the appointment will conflict with counsel's existing caseload. Paragraph (d) also provides that the trial court must confirm that all attorneys appearing in a capital case (other than the Attorney General or the duly elected or appointed State's Attorney for the county of venue) are members of the Capital Litigation Trial Bar, whether they are public defenders, appointed counsel, retained defense counsel, or members of the prosecution. But see Rule 701(b) (nonmembers may participate in the capacity of third chair under the direct supervision of qualified lead or co-counsel).

The duty to verify the qualifications of counsel and appoint a second attorney to represent an indigent defendant does not take effect until the State gives notice of intent to seek the death penalty or until the time for notice under paragraph (c) expires without any notice from the State. However, while the State's decision to seek or decline to seek the death penalty is pending, the trial court should act to minimize potential harm to the defendant. If the defendant is indigent a member of the Capital Litigation Trial Bar, certified as lead counsel, should be appointed. Appointment of private counsel will be necessary in such cases when the public defender's office does not have qualified counsel available, when the public defender's office can only provide one qualified attorney for the case and has declined to provide representation in association with private appointed counsel (see discussion of mixed representation, below), or when the public defender is otherwise unavailable to provide representation.

In a small number of cases, the defendant may initially retain an attorney who is not member of the Capital Litigation Trial Bar or is not certified as lead counsel. See Rule 701(b) (private attorneys who are not members of the Capital Litigation Trial Bar should not agree to provide representation in a potentially capital case). When the defendant in a potentially capital case appears with retained counsel, the trial court should immediately determine whether the attorney is a member of the Capital Litigation Trial Bar and whether the attorney is certified as lead counsel or will serve as co-counsel with properly certified lead counsel. If it appears counsel is not a member of the Capital Litigation Trial Bar or does not have the proper certification, the court should explain the Capital Litigation Trial Bar membership requirements to the defendant and (unless the State indicates notice that the death penalty will not be sought will be filed *instanter*) advise the defendant to retain a properly certified member of Capital Litigation Trial Bar. Similarly, if a nonindigent defendant in a potentially capital case appears initially without counsel, the court should advise the defendant to retain a properly certified member of the Capital Litigation Trial Bar.

Paragraph (d) also provides that if appointed in a capital case, the public defender shall assign two qualified attorneys to represent the defendant. As noted above, the appointment of private counsel may be necessary when the public defender's office is unable to provide two qualified attorneys. However, Rule 416(d) is not intended to prohibit the trial court from appointing a private attorney to serve with an attorney from the public defender's office if the public defender's office is able to provide one qualified attorney and both the public defender and private counsel consent.

The committee believes that in many cases the public defender will be willing and able to work with private appointed counsel. The advantages of mixed representation include the ability of the public defender's office to assist private appointed counsel in gaining access to capital case resources and to provide insight regarding local practices. Mixed representation could also provide the opportunity for qualified co-counsel in the public defender's office to obtain experience in capital cases. On the other hand, the risk of inconsistency and disharmony on the defense team, and potential liability issues for the public defender, suggest that the trial court should never make an appointment involving mixed representation without the express consent of the public defender and the private attorney. <u>However, trial courts shall not appoint attorneys of the Office of the State Appellate Defender to serve as trial counsel in capital cases, nor shall attorneys of that agency serve in that capacity unless and until such time as they may be statutorily</u>

authorized to appear as trial counsel.

Concerns about potential conflicts between defense counsel also warrant caution when the court appoints two private attorneys for an indigent capital defendant. Lead counsel should be appointed first, and allowed to recommend co-counsel. Lead counsel's recommendation for co-counsel should be accepted, unless the attorney recommended is not a member of the Capital Litigation Trial Bar.

Paragraph (e) permits the parties to seek leave of court to depose persons who have been identified as potential witnesses pursuant to Rule 412 or Rule 413. The committee found that discovery depositions may enhance the truth-seeking process of capital trials by providing counsel with an additional method to discover relevant information and prepare to confront key witness testimony. The availability of discovery depositions may also aid the trial judge in ruling upon motions *in limine* and evidentiary objections at trial.

Although depositions are a necessary means of improving discovery in capital cases, the trial court must be aware of the impact a deposition may have on a witness, and address any witness problems and concerns as they arise. For example, depositions should be scheduled to avoid conflicts with the work and family obligations of a witness. If there is any concern regarding witness safety, the court may require that the deposition be held in a place or manner that will ensure the security of the witness. The court may also issue protective orders to restrict the use and disclosure of information provided by a witness. Counsel should be prepared to advise the trial court of any special concerns regarding a witness, so the court may fashion an appropriate deposition order.

The decision to permit a deposition is committed to the sound discretion of the trial court. The rule does not limit the use of depositions to specific categories of witnesses, because the need to depose a potential witness will depend on the facts of each case. The committee found, however, that depositions are more likely to be necessary for certain types of witnesses. For example, complex trial issues are often raised by the testimony of jailhouse informants, witnesses who have criminal charges pending, witnesses who have not completed their sentence in a criminal case, and witnesses who testify for the State by agreement. Trial courts may also find depositions of eyewitnesses, and particularly sole eyewitnesses, are warranted to ensure full disclosure and adequate testing of crucial eyewitness testimony. In addition, the complex nature of expert testimony suggests that depositions of expert witnesses may often be justified.

The categories of witnesses mentioned above are illustrative only. Depositions of witnesses falling within these categories are not intended to be automatic. For example, the deposition of a pathologist who will testify regarding cause of death may not be necessary in a case involving the defense of insanity. Conversely, the categories of witnesses suggested above are not exclusive. The trial court's decision to grant or deny a request to depose must be made on a case-by-case basis, considering the facts and issues of the case and the factors listed in the Rule.

Paragraph (e)(iii) provides that a defendant has no right to be physically present at a discovery deposition. The rule is based on the determination that concerns about the risk of witness intimidation, as well as the cost and security issues related to a defendant's attendance at a deposition, far outweigh any potential benefits attendance may have for the defendant. The rule does not foreclose the possibility that the trial court may find sufficient cause to permit the attendance of the defendant at a discovery deposition and is not intended to restrict the discretion of the trial court in that regard.

Paragraph (f) requires the court to hold a case management conference no later than 120 days after the defendant has been arraigned or 60 days after the State provides notice of its intent to seek the death penalty, whichever is earlier. At the case management conference, the court will confirm that counsel are members in good standing of the Capital Litigation Trial Bar, and appoint qualified counsel, as necessary. The case management conference also provides the court with an opportunity to verify that the State has

provided notice of those aggravating factors the State intends to introduce in the capital sentencing hearing. The court may also take any other steps necessary to ensure compliance with Rule 416. Scheduling of additional case management conferences is within the discretion of the trial court.

The case management conference provides an important tool for management of the discovery process. Subparagraphs (ii) and (iii) of paragraph (f) authorize the court to monitor compliance with discovery requirements and set deadlines for discovery under Rules 412 and 413, respectively. The provisions of subparagraph (vi) of paragraph (f) permit the court to establish deadlines for requesting and taking depositions. Specific deadlines for depositions should be established when needed to prevent undue delay in bringing a case to trial and to avoid speedy-trial issues.

Paragraph (f) does not limit the trial court's discretion with respect to procedures for case management conferences, and permits the trial court to expand the scope of the conferences as the circumstances require. For example, the trial court may wish to hold a conference pertaining to discovery deadlines in an informal setting, and confirm the results of the conference with a written discovery order. While the rule is intended to be flexible, the committee notes that in the context of a criminal proceeding the use of informal case management conference procedures must be approached with caution, and the need for a record should always be considered.

Paragraph (g) requires the State to certify that disclosures required by Rule 412 have been completed (subject to the continuing duty to disclose additional materials under Rule 415(b)). Paragraph (g) also requires certification that the State has contacted persons involved in the investigation and trial preparation of the case to determine the existence of material required to be disclosed under Rule 412. The duty to contact persons involved in the investigation under paragraph (g) supplements the duty to ensure a flow of information between prosecutors, investigators, and other law enforcement personnel established by Rule 412(f) and is intended to minimize the risk of nondisclosure of exculpatory or mitigating evidence. Prosecutors should also verify that they have obtained and properly disclosed all relevant information from experts and laboratory personnel.

Making specific inquiries to determine the existence of material that must be disclosed is especially important with respect to information that must be disclosed under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). In *Strickler v. Greene*, 527 U.S. 263, 280-81, 144 L. Ed. 2d 286, 301-02, 119 S. Ct. 1936, 1948 (1999), the United States Supreme Court provided the following summary of its decisions regarding the duty to disclose:

> "In *Brady*, this Court held '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.' [Citation.] We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused [citation] and that the duty encompasses impeachment evidence as well as exculpatory evidence [citation]. Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citations.] Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' [Citation.] In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' [Citation.]
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

> impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' "

Under *Strickler*, there can be no question that the responsibility to disclose exculpatory or mitigating material extends beyond disclosure of information in the prosecutor's file. Regardless of the good faith of the prosecutor, failure to disclose exculpatory or mitigating information in the possession of police or other law enforcement personnel, laboratory personnel, and State experts may undermine confidence in the outcome of a trial. The committee recognizes that conferring with the ofttimes numerous persons involved in investigating and preparing a capital case for trial may be burdensome; however, the committee found that making the effort to do so is, in fact, the only prudent course in light of the scope of the duty to disclose and the magnitude of the proceedings.

The reference to the "State's Attorney or Attorney General" in paragraph (g) of Rule 416 is intended to emphasize the importance of making proper pretrial disclosures to the defense, but includes all counsel acting on behalf of the State's Attorney or the Attorney General. Consequently, paragraph (g) does not require the personal appearance or action of the State's Attorney or the Attorney General, and certification may be provided by the attorney(s) prosecuting the case. Similarly, paragraph (c) is not intended to require that notice of intent to seek or not seek the death penalty must be provided personally by the State's Attorney or the Attorney General, though the actual responsibility to decide whether to seek the death penalty will rarely, if ever, be delegated. On the other hand, "Attorney General or the duly elected or appointed State's Attorney of the county of venue," as used in the last sentence of paragraph (d), refers exclusively to the individuals who occupy the office of Attorney General and the office of State's Attorney of the county of venue.

Paragraph (h) requires certification of defense readiness for trial. Like the State's certification under paragraph (g), the defense certification of readiness for trial is to be filed in open court, in the presence of the defendant. At the time of filing the certificates required by paragraphs (g) and (h), the defendant should be allowed the opportunity to voice any objections regarding pretrial matters such as the lack of opportunity to speak to counsel, or other complaints, so these issues can be dealt with in advance of trial.

Rule 417. DNA Evidence

(a) Statement of Purpose. This rule is promulgated to produce uniformly sufficient information to allow a proper, well-informed determination of the admissibility of DNA evidence and to insure that such evidence is presented competently and intelligibly. The rule is designed to provide a minimum standard for compliance concerning DNA evidence, and is not intended to limit the production and discovery of material information.

(b) Obligation to Produce. In all felony prosecutions, post-trial and post-conviction proceedings, the proponent of the DNA evidence, whether prosecution or defense, shall provide or otherwise make available to the adverse party all relevant materials, including, but not limited to the following:

(i) Copies of the case file including all reports, memoranda, notes, phone logs, contamination records, and data relating to the testing performed in the case.

(ii) Copies of any autoradiographs, lumigraphs, DQ Alpha Polymarker strips, PCR gel photographs and electropherogams, tabular data, electronic files and other data needed for full evaluation of DNA profiles produced and an opportunity to examine the originals, if requested.

(iii) Copies of any records reflecting compliance with quality control guidelines or standards employed during the testing process utilized in the case.

(iv) Copies of DNA laboratory procedure manuals, DNA testing protocols, DNA quality assurance guidelines or standards, and DNA validation studies.

(v) Proficiency testing results, proof of continuing professional education, current curriculum vitae and job description for examiners, or analysts and technicians involved in the testing and analysis of DNA evidence in the case.

(vi) Reports explaining any discrepancies in the testing, observed defects or laboratory errors in the particular case, as well as the reasons for those and the effects thereof.

(vii) Copies of all chain of custody documents for each item of evidence subjected to DNA testing.

(viii) A statement by the testing laboratory setting forth the method used to calculate the statistical probabilities in the case.

(ix) Copies of the allele frequencies or database for each locus examined.

(x) A list of all commercial or in-house software programs used in the DNA testing, including the name of the software program, manufacturer and version used in the case.

(xi) Copies of all DNA laboratory audits relating to the laboratory performing the particular tests.

Adopted March 1, 2001, effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the new rule in a particular case pending at the time the rule becomes effective would not be feasible or would work an injustice, in which case former procedures would apply.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

The standardized disclosures required by Rule 417 are intended to provide the information necessary for a full understanding of DNA test results, and to aid litigants and the courts in determining the admissibility of those results. The rule requires disclosure of information that is, or should be, readily available from any laboratory performing DNA testing. Standardized disclosure requirements should also make responses to disclosure requests less burdensome for laboratory personnel.

In drafting the rule, the committee considered court opinions from several jurisdictions that established guidelines for pretrial disclosures regarding DNA evidence. See, *e.g.*, *People v. Castro*, 144 Misc. 2d 956, 978-9, 545 N.Y.S.2d 985, 999 (1989); *People v. Perry*, 586 So. 2d 242, 255 (Ala. 1991); *Polk v. State*, 612 So. 2d 381, 394 (Miss. 1992). Rule 417 draws from those opinions, but also reflects the committee's

examination of current practices in forensic science.

The disclosures required by the rule can be crucial in any trial in which the discovery rules for criminal cases apply, and also in related post-trial and post-conviction proceedings (including a proceeding on a motion for DNA testing not available at the time of trial to establish actual innocence (725 ILCS 5/116-3)). Therefore, the rule requires production of information regarding DNA testing by the proponent of DNA evidence in any felony trial, and in all related post-trial or post-conviction proceedings. While the disclosures required under the rule encompass the technologies presently utilized (restriction fragment length polymorphism, polymerase chain reaction, short tandem repeats, etc.), production is not limited to those techniques. Because the rule provides no limitation upon the specific information or materials to be provided, it is designed to encompass future techniques that may be developed in the testing of DNA evidence.

Rules 418-429. Reserved

PART C. TRIALS

Rule 430. Trial of Incarcerated Defendant

An accused shall not be placed in restraint of any form unless there is a manifest need for restraint to protect the security of the court, the proceedings, or to prevent escape. Persons charged with a criminal offense are presumed innocent until otherwise proven guilty and are entitled to participate in their defense as free persons before the jury or bench. Any deviation from this right shall be based on evidence specifically considered by the trial court on a case-by-case basis. The determination of whether to impose a physical restraint shall be limited to trial proceedings in which the defendant’s innocence or guilt is to be determined, and does not apply to bond hearings or other instances where the defendant may be required to appear before the court prior to a trial being commenced. Once the trial judge becomes aware of restraints, prior to allowing the defendant to appear before the jury, he or she shall conduct a separate hearing on the record to investigate the need for such restraints. At such hearing, the trial court shall consider and shall make specific findings as to:

(1) the seriousness of the present charge against the defendant;

(2) defendant’s temperament and character known to the trial court either by observation or by the testimony of witnesses;

(3) defendant’s age and physical attributes;

(4) defendant’s past criminal record and, more particularly, whether such record contains crimes of violence;

(5) defendant's past escapes, attempted escapes, or evidence of any present plan to escape;

(6) evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;

(7) evidence of any risk of mob violence or of attempted revenge by others;

(8) evidence of any possibility of any attempt to rescue the defendant by others;

(9) size and mood of the audience;

(10) physical security of the courtroom, including the number of entrances and exits, the number of guards necessary to provide security, and the adequacy and availability of alternative security arrangements.

After allowing the defendant to be heard and after making specific findings, the trial judge shall balance these findings and impose the use of a restraint only where the need for restraint outweighs the defendant's right to be free from restraint.

Adopted March 22, 2010, effective July 1, 2010.

Commentary

(March 22, 2010)

This rule codifies the holdings in *People v. Boose*, 66 Ill. 2d 261 (1977), and *People v. Allen*, 222 Ill. 2d 340 (2006).

Rule 431. Voir Dire Examination

(a) The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

(b) ~~If requested by the defendant, t~~The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court’s method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.

Renumbered October 1, 1971; amended April 3, 1997, effective May 1, 1997; amended March 21, 2007, effective May 1, 2007.

Committee Comments

The new language is intended to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984). It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.

Rule 432. Opening Statements

Opening statements in criminal cases are governed by Rule 235.

Renumbered October 1, 1971.

Committee Comments

This rule is new, as is Rule 235, which this rule makes applicable to criminal cases.

Rule 433. Impeachment of Witnesses; Hostile Witnesses

The impeachment of witnesses and the examination of hostile witnesses in criminal cases is governed by Rule 238.

Adopted September 29, 1978, effective November 1, 1978; amended February 19, 1982, effective April 1, 1982.

Rule 434. Jury Selection

(a) Impaneling Juries. In criminal cases the parties shall pass upon and accept the jury in panels of four, commencing with the State, unless the court, in its discretion, directs otherwise, and alternate jurors shall be passed upon separately.

(b) Names and Addresses of Prospective Jurors. Upon request, the parties shall be furnished with a list of prospective jurors with their addresses, if known.

(c) Challenging Prospective Jurors for Cause. Each party may challenge jurors for cause. If a prospective juror has a physical impairment, the court shall consider such prospective juror's ability to perceive and appreciate the evidence when considering a challenge for cause.

(d) Peremptory Challenges. A defendant tried alone shall be allowed 14 peremptory challenges in a capital case, 7 in a case in which the punishment may be imprisonment in the penitentiary, and 5 in all other cases; except that, in a single trial of more than one defendant, each defendant shall be allowed 8 peremptory challenges in a capital case, 5 in a case in which the punishment may be imprisonment in the penitentiary, and 3 in all other cases. If several charges against a defendant or defendants are consolidated for trial, each defendant shall be allowed peremptory challenges upon one charge only, which single charge shall be the charge against that defendant authorizing the greatest maximum penalty. The State shall be allowed the same number of peremptory challenges as all of the defendants.

(e) Selection of Alternate Jurors. After the jury is impaneled and sworn the court may direct the selection of alternate jurors, who shall take the same oath as the regular jurors. Each party shall have one additional peremptory challenge for each alternate juror. If before the final submission of a cause a member of the jury dies or is discharged he shall be replaced by an alternate juror in the order of election.

JUSTICE SIMON, dissenting:

The motivation for the idea of reducing the number of peremptory challenges in criminal cases was to alleviate the practice of using peremptory challenges to exclude black persons from service on juries solely because of their race. I do not believe that this is the proper remedy for what I perceive to be an existing, serious and evil practice.

This court should not tamper, by rule, with the number of peremptory challenges allowed because this is a decision that historically has been made by the General Assembly. We should therefore leave any change to that body. In 1983, our chief justice recommended to the legislature a reduction in the number of peremptory challenges permitted by statute in criminal cases. Before considering any independent action we should allow the legislature ample time to consider the wisdom of, and to act on, that recommendation.

Presently, the General Assembly has before it three separate bills designed to prevent the use of peremptory challenges to exclude persons from juries because of their race or sex. House Bills 319 and 325 both would require clerks to keep records of the sex and race of jurors removed by peremptory challenges. House Bill 324 would require prosecutors to state their reasons for using peremptory challenges when the defendant requests an explanation or on the court's own motion in cases where the defendant or the court believes that peremptory challenges are being used to exclude persons on the sole basis of race. I would allow the legislature ample time to consider these approaches and any others developed during its consideration of the problem of excluding persons from juries because of their race before we attempt to solve it in the fashion proposed by this rule.

I find it peculiar that the court is reducing the number of peremptory challenges presently available in criminal cases in the guise of dealing with the problem of excluding persons from juries because of their race. This court has consistently denied there is any such problem in Illinois. For example, in *People v. Mack* (1984), 105 Ill. 2d 103, this court said:

"Regardless of the many emotional arguments on this question that have been raised in this court and in our appellate court, there is just no evidence that blacks are systematically and purposefully excluded from serving on juries in Cook County where the defendants are black." *People v. Mack* (1984), 105 Ill. 2d 103, 122.

I have argued that in many cases in this State black persons have been excluded by prosecutors from juries for no other reason than that they are black. There is a problem in many counties in Illinois, and the proper way to attack it is for trial judges to put a stop to it whenever they observe prosecutors using peremptory challenges to exclude persons from the *voir dire* because they are black. The solution approved by the United States Court of Appeals for the Second Circuit in *McCray v. Abrams* (2d Cir. 1984), 750 F.2d 1113, will be more effective in stopping this pernicious practice than trying to stop it by reducing the number of peremptory challenges. See also *People v. Wheeler* (1978), 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890; *Commonwealth v. Soares* (1979), 377 Mass. 461, 387 N.E.2d 499, *cert. denied* (1979), 444 U.S. 881, 62 L. Ed. 2d 110, 100 S. Ct. 170; *State v. Crespin* (N.M. App. 1980), 94 N.M. 486, 612 P.2d 716; *State v. Neil* (Fla. 1984), 457 So. 2d 481; *People v. Payne* (1983), 99 Ill. 2d 135, 140 (Simon, J., dissenting); *People v. Frazier* (1984), 127 Ill. App. 3d 151.

The reduction in the number of peremptory challenges given to a criminal defendant in capital cases is also a matter of concern from the standpoint of fairness. A prosecutor has the opportunity to select a jury which is strongly in favor of the death sentence by challenging for cause potential jurors who express equivocal or ambivalent views about imposing a death sentence. (See *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770.) Curtailing the number of peremptory challenges available to a defendant in a capital case decreases the defendant's opportunity to exclude prospective jurors who demonstrate unusual zeal in favor of the death sentence, and thus could diminish the viability of his constitutional right to trial by jury as required by the Constitution.

In addition, I question how effective the change the court has adopted will be in preventing exclusion of persons from jury service solely because of their race. Fourteen peremptory challenges in a capital case will still permit any prosecutor who is bent on excluding black persons the opportunity to eliminate many otherwise qualified jurors solely because of their race. Therefore, I recommend that this court attack this pattern of abuse head on instead of circuitously. We should do it by forbidding the use of peremptory challenges based on race and leave to the General Assembly its traditional role in setting the number of legitimate peremptory challenges permitted in criminal cases.

Finally, I question why it is necessary to place, in our rules, new Rules 434(b), (c) and (e), which merely duplicate what is already in the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 115--4). This appears to be needless repetition.

Adopted February 19, 1982, effective April 1, 1982; amended March 27, 1985, effective May 1, 1985.

Committee Comments

(March 27, 1985)

This 1985 amendment incorporates many of the purely procedural aspects of jury selection now contained in section 115--4 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 115--4). This 1985 amendment also reduces from 20 to 14 the number of peremptory challenges permitted to be exercised by either the defendant or the State in a capital case in which only one defendant is on trial (and from 12 to 8 the number allowed each defendant and the State when two or more defendants are tried jointly for such an offense). It also reduces from 10 to 7 the number of peremptory challenges allowed when one defendant is tried for an offense which may be punishable by imprisonment in the penitentiary (and from 6 to 5 the number allowed each defendant and the State when two or more defendants are joined for trial in a case in which each is charged with an offense which may be punishable by imprisonment in the penitentiary).

Rules 435. Reserved

Rule 436. Separation and Sequestration of Jury in Criminal Cases; Admonition by Court.

(a) In criminal cases, either before or after submission of the cause to the jury for determination, the trial court may, in its discretion, keep the jury together in the charge of an officer of the court, or the court may allow the jurors to separate temporarily outside the presence of a court officer, overnight, on weekends, on holidays, or in emergencies.

(b) The jurors shall, whether permitted to separate or kept in charge of officers, be admonished by the trial court that it is their duty (1) not to converse with anyone else on any subject connected with the trial until they are discharged; (2) not to knowingly read or listen to outside comments or news accounts of the procedure until they are discharged; (3) not to discuss among themselves any subject connected with the trial, or form or express any opinion on the cause until it is submitted to them for deliberation; and (4) not to view the place where the offense was allegedly committed.

Adopted May 20, 1997, effective July 1, 1997.

Committee Comments

This proposed rule is intended to allow jurors to go home for an evening, weekend, holiday, or emergency and dispense with the need to accommodate the jurors in a hotel overnight, even if the cause has been submitted to them for final deliberation. The Code of Criminal Procedure presently requires "an officer of the court *** to keep [jurors] together and prevent conversation between the jurors and others" (except interpreters), after final submission of the cause to the jury for determination. 725 ILCS 5/115--4. This proposed rule provides that in appropriate cases, jurors may separate temporarily after being admonished with regard to their duties. It does away with the blanket requirement that they be sequestered and guarded.

Rules 437-450. Reserved

Rule 451. Instructions

(a) Use of IPI Criminal Instructions; Requirements of Other Instructions. Whenever Illinois Pattern Jury Instructions, Criminal ~~(2d ed. 1981)~~ (4th ed. 2000) (IPI Criminal ~~2d~~ 4th), contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal ~~2d~~ 4th instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI Criminal ~~2d~~ 4th does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument.

(b) Court's Instructions. At any time before or during the trial, the court may direct counsel to prepare designated instructions. Counsel shall comply with the direction, and copies of instructions so prepared shall be marked "Court's Instructions." Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it, and the court shall rule on these objections as well as objections to other instructions. The grounds of the objections shall be particularly specified.

(c) Section 2-1107 of the Code of Civil Procedure to Govern. Except as otherwise provided in these rules, instructions in criminal cases shall be tendered, settled, and given in accordance with section 2-1107 of the Code of Civil Procedure, but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require. The court shall instruct the jury after the arguments are completed, or, in its discretion, at the close of all the evidence.

(d) Procedure. The court shall be provided an original and a copy of each instruction, and a copy shall be delivered to each opposing counsel. In addition to numbering the copies and indicating who tendered them, as required by section 2-1107 of the Code of Civil Procedure, the copy shall contain a notation substantially as follows:

"IPI Criminal ~~2d~~ 4th No. _____" or "IPI Criminal No. _____ Modified" or "Not in IPI Criminal"

as the case may be. All objections made at the conference and the rulings thereon shall be shown in the report of proceedings.

(e) Instructions Before Opening Statements. After the jury is selected and before opening statements, the court may orally instruct the jury as follows:

(i) On cautionary or preliminary matters, including, but not limited to, the burden of proof, the believability of witnesses, and the receipt of evidence for a limited purpose.

(ii) On the issue of substantive law applicable to the case, including, but not limited to, the elements of the offense. When requested by the defendant, the court may instruct the jury on the elements of an affirmative defense. Nothing in this rule is intended to eliminate the giving of written instructions at the close of the trial in accord with paragraph (c).

(f) Instructions During Trial. Nothing in the rule is intended to restrict the court's authority to give any appropriate instruction during the course of the trial.

(g) Proceedings When an Enhanced Sentence is Sought. When the death penalty is not being sought and the State intends, for the purpose of sentencing, to rely on one or more sentencing enhancement factors which are subject to the notice and proof requirements of section 111-3(c-5) of the Code of Criminal Procedure, the court may, within its discretion, conduct a unitary trial through verdict on the issue of guilt and on the issue of whether a sentencing enhancement factor exists. The court may also, within its discretion, upon motion of a party, conduct a bifurcated trial. In deciding whether to conduct such a bifurcated trial, the court must first hold a pretrial hearing to determine if proof of the sentencing enhancement factor is not relevant to the question of guilt or if undue prejudice outweighs the factor's probative value. Such bifurcated trial shall be conducted subject to the following:

(1) The court shall first conduct a trial through verdict on the issue of guilt under the procedures applicable to trials in other cases.

(2) If a guilty verdict is rendered, the court shall then conduct a separate proceeding before the same jury, or before the court if a jury was waived at trial or is waived for purposes of the separate proceeding. This separate proceeding shall be confined to the issue of whether the sentencing enhancement factor exists. The order in which the parties may present evidence and argument and the rules governing admission of evidence shall be the same as at trial, with the burden remaining on the State to prove the factor beyond a reasonable doubt. After the evidence is closed, the submission and giving of instructions shall proceed in accordance with paragraphs (a), (b), (c) and (d) of this rule.

(3) The court may enter a directed verdict or judgment notwithstanding the verdict respecting any fact at issue in the separate proceeding.

Amended June 19, 1968, effective January 1, 1969; amended February 19, 1982, effective April 1, 1982; amended May 28, 1982, effective July 1, 1982; amended May 20, 1997, effective July 1, 1997; amended February 10, 2006, effective July 1, 2006.

Committee Comments
(February 10, 2006)

Paragraph (g)

In response to the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the Illinois legislature adopted Illinois Code of Criminal Procedure section 111-3(c-5) (725 ILCS 5/111-3(c-5)), which sets notice and proof requirements for sentencing enhancement factors in nondeath penalty cases. However, this section does not specify how the sentencing enhancements are to be tried when the trier of fact is a jury. Rule 451(a) provides a basis for trial courts to utilize special interrogatories when the sentencing enhancement factor is to be proven during a unitary trial.

The Supreme Court Committee on Jury Instructions in Criminal Cases recommended the adoption of a rule which would provide that bifurcated trials as well as unitary trials are authorized, and that trial courts have discretion in deciding which to conduct.

Because bifurcating a trial generally causes additional inconvenience to the jury, the witnesses, and/or the parties, and causes additional cost to the parties and/or the taxpayers, paragraph (g) makes unitary trials the presumptive option. Before a court orders a bifurcated trial, the court must find that having a unitary trial

might cause prejudice and that this risk outweighs the additional difficulties associated with a bifurcated trial. Paragraph (g) does not apply when the court serves as trier of fact on sentencing enhancement factors. Whether to bifurcate in that circumstance involves different considerations.

Committee Comments

This amendment gives the trial court the option of formally instructing the jury at the close of the evidence prior to closing arguments. It also expressly authorizes the trial court to orally instruct the jury prior to opening statements concerning cautionary and preliminary matters and on key issues of substantive law, such as the elements of the offense or of an affirmative defense. The amendments also recognize that it may become necessary for the trial court to give appropriate instructions during the course of the trial to guide the jurors in their consideration of the evidence.

Rules 452-470. Reserved

PART D. POST-CONVICTION PROCEEDINGS

Rule 471. Transcripts for Poor Persons Bringing Post-Conviction Proceedings

If a petition filed under the provisions of article 122 of the Code of Criminal Procedure of 1963, dealing with post-conviction hearings, alleges that the petitioner is unable to pay the costs of the proceeding, the trial court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings resulting in the conviction delivered to petitioner in accordance with paragraph (b) of Rule 607.

Committee Comments

This is paragraph (1) of former Rule 27--1 with necessary minor changes but no changes of substance.

Rules 472-500. Reserved

1. *The committee comments to Rules 401, 402, and 403 are those of the special committee appointed by the court to recommend rule revisions in the areas covered by those rules.