
P. Scott Courtin

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INTRODUCTION

The topic of criminal discovery has engendered much controversy resulting in varied and distinguished debate. The battlefield of controversy has set the traditionalists, those who oppose such a measure, against the more progressive faction, those who feel such a measure would enhance the criminal trial. Professor Wright analyzes the arguments on both sides and concludes that, irrespective of their merits, the proponents of discovery are gaining support with the courts.\(^1\) As evidence of this proposition, Illinois enacted revised rules for criminal discovery on October 1, 1971.\(^2\) Under the auspices of the Illinois Supreme Court, the defendant has gained more effective means for discovering the prosecution's case. At the same time, however, he has paid a high price constitutionally because of increased prosecutorial discovery. By embodying in the rules the proposition that criminal discovery must be a two-way street, the Rules Committee has virtually stripped criminal defendants of their constitutional protections guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. This article will analyze these guarantees and their application to prosecutorial discovery in Illinois.

A BRIEF HISTORICAL PERSPECTIVE

The unavailability of criminal discovery at English common law was merely a concomitant of the generally restrictive policy toward the rights of criminal defendants. Criminal discovery was viewed as a measure without precedent and one which would subvert the system of criminal justice.\(^3\) Late in the 18th century this attitude shifted and in England today legislation grants the defendant an extended, thorough, preliminary hearing at which each witness who is to testify for the Crown must divulge all his information and be subject to defense cross-examination.\(^4\) In essence, the defendant has nearly complete discovery while the Crown has none.

Initially, both the courts and legislatures of this country

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\(^1\) C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 252 (1969).
\(^2\) ILL. REV. STAT. ch. 110A, PART B DISCOVERY (1971).
hesitated to follow England's lead. The courts' refusal was surprising in light of John Marshall's pronouncement that discovery by the defendant was allied with the Sixth Amendment, which guaranteed the right to compulsory process and the right to prepare a defense.\(^5\) Justice Cardozo epitomized conventional thinking when he held that formal defense discovery could only be granted in the most unusual and exigent circumstances, absent remedial legislation.\(^6\) This attitude was based upon the fact that nearly every state granted defendants limited statutory discovery in the form of a right to procure a list of prosecution witnesses.\(^7\) It was thought that this limited right satisfied discovery needs and manifested the intent of the legislature to fix the outer limits of defense discovery.

As dissatisfaction with the American system of criminal justice grew, so did the arguments in regard to increased defense discovery. The opponents of criminal discovery argued that disclosure of the prosecution's case would result in manufactured evidence and perjury.\(^8\) On the other side, proponents maintained that this measure would not have the anticipated effect because perjury could be committed even without discovery.\(^9\) Another argument advanced against discovery was that the government's sources of information would be inhibited because of unnecessary publicity and intimidation.\(^10\) Advocates contended that only the hardened criminal would indulge in such intimidation, which could be accomplished without discovery and, even if there were problems, protective orders offered a ready solution.\(^11\) A key

\(^5\) United States v. Burr, 25 F. Cas. 30, 32 (No. 14,692d) (Cir. Ct. Va. 1807): On motion, prior to indictment, the defendant requested the court to issue a subpoena duces tecum to the President so that a better material to his defense could be proffered at trial. In response to the prosecution's argument that the accused was not entitled to the court's aid in this matter, Justice Marshall stated:

So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. ... The right of an accused person to process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual.

\(^6\) People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84, 219 N.Y.S. 892 (1928).


\(^8\) State v. Rhodes, 81 Ohio St. 397, 423-24, 91 N.E. 186, 192 (1910).

\(^9\) ZAGEL & CARR, supra note 7, at 561.


The factor which militated against defense discovery was the undue procedural advantage of surprise to the prosecution at trial because of earlier invocation of the Fifth Amendment. This aspect of discovery was thought to be unfair in light of the existing advantages of the accused. The foregoing contention was rebutted by pointing to the prosecutor's comparative advantages in investigative resources and abilities, the right to seize evidence, and the grand jury. The opponents further posited that the accused himself controlled the most valuable source of information concerning the truth of the charges, and if he refused to speak, the information remained unavailable to the state thereby rendering defense discovery unnecessary. The proponents answered that such an assumption was unfounded because the accused is presumed innocent and, therefore, presumed to have no knowledge of the crime. Finally, proponents of defense discovery urged that since civil defendants are granted this measure with relatively little at stake, there should be a parity in their criminal counterparts when life or liberty is jeopardized.

Despite the apparent balance of these arguments, defense discovery developed and expanded primarily because of dissatisfaction with the criminal process. This evolution was facilitated by the assumption that defense discovery was a step toward improvement of the system, and even if it failed, there could hardly be further depreciation of the existing system. The increasing liberality of defense discovery brought a demand that discovery be made a two-way street, and some states reacted by allowing the prosecutor to discover certain aspects of the defendant's case.

Illinois was not unaffected by the national trend for enlarging the scope of prosecutorial criminal discovery. Prior to the adoption of the revised Supreme Court Rules, the major distinction between Illinois and other states was that Illinois was relatively liberal in affording discovery to both adversaries. By statute, both the defense and prosecution were granted limited pre-trial discovery and the former also had supplemental method.

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14 Brennan, supra note 11, at 287.
15 Id.
16 See generally Goldstein, supra note 13.
17 ZAGEL & CARR, supra note 7, at 560.
18 See ZAGEL & CARR, supra note 7, at 573.
The major difficulty with Illinois practice was the inconsistency with which the courts of the various circuits and districts exercised discretion in granting discovery. This discretion and consequent lack of uniformity created great disparities in the amount of material available to both parties. In sum, the prior Illinois practice was uncertain and thus, codification was necessary. The immediate impetus for this codification and expansion was the case of People v. Crawford. In response to the state's arguments, the Illinois Supreme Court exercised its inherent rule making power and appointed a committee to draft discovery rules. The result of this committee's efforts on behalf of the prosecution is embodied in Rules 413 and 415 (g).

A complete analysis of every fallacy and weakness inherent in the new rules will not be attempted. However, any difficulties encountered in such an endeavor would be minuscule when compared to the Herculean constitutional problems confronting the state when it utilizes Rules 413 and 415 (g).

**The New Rules and the Fifth Amendment**

The most eloquent indictment of prosecutorial discovery generally and one which is appropriate to the Illinois rules is that contained in the dissenting opinion in Williams v. Florida. Justice Black poignantly described the effect of prosecutorial discovery by stating:

> [T]he decision opens the way for a profound change in one of the most important traditional safeguards of a criminal defendant.

... The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. ... These cases are sufficient evidence of the inch-by-inch, case-by-case process by which the rationale of today's decision can be used to transform radically our system of criminal justice into a process requiring the defendant

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21 People v. Crawford, 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969). On oral argument the State pointed out that within a single circuit some judges were granting discovery of the State's entire file while other judges were denying discovery as an item by item basis.

22 Id.

23 ZAGEL & CARR, supra note 7, at 576.

After the Illinois Appellate Court for the Fourth District held that the trial court had inherent power to grant discovery, the State appealed to the Supreme Court of Illinois. On appeal the State did not resist discovery but requested uniform rules so that inconsistencies could be eliminated throughout the various circuits. The state asked the supreme court to exercise rule making power so that uniform rules could be established in order to eliminate the inconsistencies of a case by case development.

to assist the State in convicting him, or be punished for failing to do so.\textsuperscript{25} Justice Black's prophecy is embodied in Rule 413 (c) and (d). Rule 413 (c) allows the state to discover, on written motion, "reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests . . . or comparisons, or any other reports or statements of experts . . . .\textsuperscript{26} If the defendant does not intend to use these reports at trial, his statement therein may be excised, but otherwise they remain fully discoverable.\textsuperscript{27} It should be noted that the reports themselves are always discoverable, whether or not the accused intends to use them at trial. Pursuant to Rule 413 (d), the defense is required to notify the state of any affirmative or nonaffirmative defenses he intends to use at trial.\textsuperscript{28} As part of this scheme, the state is entitled to:

\begin{quote}
[\textit{t}]he 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 . . . any books, papers, documents, photographs or tangible objects he intends to use as evidence or for impeachment. . . .\textsuperscript{29}
\end{quote}

In order to determine the viability of a Fifth Amendment attack on the citadel of Rule 413, the following considerations must be examined: (1) whether discovery by the prosecution is within the historical purview of those interests which the Fifth Amendment was designed to protect; (2) whether the Fifth Amendment is applicable to evidentiary production as contem-

\textsuperscript{25} Id. at 114-15.

\textsuperscript{26} ILL. REV. STAT. ch. 110A, § 413 (c) (1971) provides:

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, \textit{except that those portions of reports containing statements made by the defendant may be withheld if defense counsel does not intend to use any of the material contained in the report at a hearing or trial. } (emphasis added).

\textsuperscript{27} ZAGEL & CARR, supra note 7, at 583.

\textsuperscript{28} ILL. REV. STAT. ch. 110A, § 413 (d) (1971) provides:

(d) \textit{Defenses.} Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements; any record of prior criminal convictions known to him; and

(ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial.

\textsuperscript{29} Id.
illinois revised rules of criminal discovery

plated by the rule; and (3) whether the state's interests in discovery are sufficiently compelling to justify intrusion into the defendant's privilege.

The answer to the first consideration can be found by examining the historical development of the Fifth Amendment. The privilege against self-incrimination developed closely with the political and religious disputes of early England.\textsuperscript{30} Prior to the early 1200's, ecclesiastical judges ex officio would summon an individual into court, utilize an inquisitorial oath, and force him to respond to broad inquiries into his affairs.\textsuperscript{31} While this procedure could only be employed if there was some presentation of a charge, no regard was given to the nature or strength of the accusations.\textsuperscript{32} The Court of Star Chamber employed a similar oath, but this body was not even limited by the requirement of some presentation of a charge and, consequently, opposition to the oath reached its apogee with this tribunal.\textsuperscript{33} The use of self-incrimination was not endemic to the foregoing tribunals and in criminal trials the accused, not under oath, was expected to take an active part in the proceedings.\textsuperscript{34} In sum, irrespective of the use of an oath or a presentation, the accused could be made to participate in the proceedings and this mandate could be enforced by torture.\textsuperscript{35}

While there is disagreement as to whether the privilege was designed to protect the abuse of the oath, lack of presentation of a charge, extraction of information from the accused, or a combination of the foregoing, the common law courts finally accepted the principle that it was improper to compel the accused to respond to any interrogation whatever.\textsuperscript{36} The historical background of the privilege indicates an objection to the use of testimonial information extracted from the accused as the basis for a criminal proceeding.\textsuperscript{37}

Present day prosecutorial discovery offends several historical interests protected by the Fifth Amendment. While the danger of torture is almost nonexistent, modern society is likely

\textsuperscript{30} Griswold, The Fifth Amendment Today 2 (1955) [hereinafter cited as Griswold].


\textsuperscript{32} § Wigmore, Evidence § 225g at 277 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore].

\textsuperscript{33} Id. at 278.

\textsuperscript{34} Id. at 289.

\textsuperscript{35} Griswold, supra note 30, at 3.

\textsuperscript{36} C. McCormick, McCormick on Evidence 241 (2d ed. 1972) [hereinafter cited as McCormick].

\textsuperscript{37} Id.
to view incarceration for contempt or preclusion from presenting a defense as its equivalent.38

Another interest invaded by prosecutorial discovery is the defendant's right to be free from unwarranted, wholesale intrusions upon his privacy.39 These invasions would result because prosecutorial discovery is only available following an indictment or the filing of an information.40 This aspect of the rules creates an incentive for the state to initiate proceedings with unreliable evidence that would not be sufficient to sustain a conviction, but which would suffice for a finding of probable cause.41 The quantum of evidence necessary to sustain a finding of probable cause makes it likely that the accused would be brought to a stage in the criminal process where discovery would be available to the state and the prosecutor could then procure from the accused the evidence necessary for a conviction. This process is reminiscent of the exploratory searches undertaken by the Court of Star Chamber and similarly would result in the same unjustified, deplorable intrusions of privacy. If the state had no discovery available, there would be a greater likelihood that more reliable evidence would be gathered in order to avoid the unnecessary waste involved in commencing a prosecution where there is a minimal possibility of conviction. If, after its investigation, the state decided not to proceed, the accused would be spared the unjustified invasion of his privacy which attends his appearance before a magistrate or a grand jury. On the other hand, if the state proceeded, there would be justification for the incidental invasion of privacy.

A third interest violated by prosecutorial discovery is "the intrinsic importance and dignity of the individual."42 Compul-

38 Id. at 251.
39 Comment, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994, 999 (1972); see Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 8 (1949).
40 Ill. Rev. Stat. ch. 110A, § 411 (1971) provides: "that the rules shall be available following an indictment or the filing of an information and not in the course of any preliminary hearing."
41 Goldstein, supra note 13, at 1166-69.

According to the author most magistrates look only for some legally competent evidence to sustain a finding of probable cause at this preliminary hearing. It must be kept in mind that the accused has no constitutional right to a preliminary hearing; and whatever efficacy it may have in maintaining an accusatorial system can be lost if the State returns an indictment with a full information of the charge. See Ill. Const. art. I, § 7; People v. Bonner, 37 Ill. 2d 553, 557, 229 N.E.2d 527, 531 (1967).

The accused is afforded no protection by the grand jury, whether he is bound over after preliminary hearing or initially charged by indictment because, in effect, this body is a rubber stamp for the prosecution. The same weak evidence that will suffice before a magistrate will satisfy the grand jury and thus the accused will surely reach the stage when discovery is available. For an interesting discussion of the demerits of the grand jury see Calkins, Abolition of the Grand Jury Indictment in Illinois, 1966 U. Ill. L.F. 423, 431-33.
42 Griswold, supra note 30, at 7.
sory self-incrimination confronts the accused with the dilemma of being punished whether he lies or tells the truth. This results in an affront to his personal dignity. Discovery by the prosecution, with its concomitant sanctions for noncompliance, squarely presents the accused with a dilemma in that he will suffer irrespective of obedience to the state's command.

Finally, the Fifth Amendment privilege has established the preferred position of the accused when confronted by the state. By equalizing the position of the lone suspect, the privilege tends to balance the advantages. Discovery by the prosecution tends to upset the balance by adding to the state's already superior investigating power, tactical advantages, and financial resources. Defense discovery cannot redress this disparity because in many cases it affords only minimal advantages. The prosecution may

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43 United States v. Grunewald, 233 F.2d 556, 591 (2d Cir. 1956) (dissenting opinion).
44 If the defendant disgorged the necessary evidence he may be convicted. If he fails to comply he could be prevented from introducing this evidence in support of his defense or otherwise punished. See ILL. REV. STAT. ch. 110A, § 415(g) (1970).
45 GRISWOLD, supra note 30, at 8.
46 ILL. REV. STAT. ch. 110A, § 412(A) (i) (1971) provides:

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 or oral statements shall be disclosed to defense counsel. (emphasis added).

The defendant may have no more than a right to discovery for the following reasons:
A. Section 412 (i) provides for denial of disclosure to the accused:
   (i) Denial of disclosure. The court may deny disclosure authorized by this rule and Rule 413 if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to counsel.
B. The witnesses may properly refuse to speak to the accused and this is most likely if they are closely allied with the prosecution. Section 415(a) provides in part:
   (i) [N]either 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 the opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.
Witnesses have a right not to cooperate as long as this non-cooperation is not instigated by the prosecution. Gregory v. U.S., 369 F.2d 185 (1966). The witnesses are under no obligation to grant interviews or to discuss the testimony unless they choose to do so.
be in the same position, but their existing advantages allow them to more adequately effectuate whatever discovery they gain.

Since the scope of the privilege does not coincide with the "complex of values it helps to protect," inquiry cannot cease merely because prosecutorial discovery violates protected historical interests. It must therefore be determined whether the evidentiary production required by Rule 413 meets the standards of the Fifth Amendment protection. The phrase "No person . . . shall be compelled in any criminal case to be a witness against himself" has been interpreted to include only legal compulsion whereby incriminating evidence of a testimonial or communicative nature is procured. Statements, including conduct equivalent thereto, are testimonial or communicative when their relevance depends upon truth content. A statement will be used as evidence of its truth when the accused is required to communicate consciousness and knowledge of facts, so that the state must rely on his moral responsibility for telling the truth. Succinctly stated, there must be a revelation of the cognitive processes of the accused so that the evidence derives its value from his credibility.

In order to apply this definition to the fruits of discovery

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48 U.S. Const. amend. V.
49 8 Wigmore at 401.
50 Id. at 369-78.
52 Id. at 763, 767.
53 See McCormick at 586. The court rejected Wigmore's view that the privilege applied only to words spoken out of the accused's mouth. In regard to discovery, the accused may be required to do more than list witnesses or evidence he will use. He may be required to actually produce certain items of evidence; this could be classified as conduct which is equivalent to a statement. See McCormick at 586, where the author refers to this type of conduct as assertive.
54 See 8 Wigmore at 370.
under Rule 413 (c) and (d), the evidence subject to the rule must be re-examined. Pursuant to Rule 413 (c), the accused may be required to produce various test results and experts' reports.66 Rule 413 (d) (i) requires the accused to produce the names and addresses of witnesses in support of his defense(s).57 As part of 413 (d), subsection (ii) makes it mandatory to disgorge books, papers, photographs, documents and tangible evidence which will be introduced to support the defense.58

Compliance under 413 (c) is testimonial whether or not the items produced contain statements of the accused. At a minimum, there is testimonial disclosure implicit in production because the accused is authenticating preexisting documents59 and informing the prosecutor that such items have relevance to the case.60 In addition, disclosure is testimonial because the accused is informing the prosecution of the existence and location of the items sought.61 It would seem that the state implicitly admits its ignorance of these facts merely by seeking discovery because, were it otherwise, they could procure the items by means of a search warrant.62 Discovery pursuant to Rule 413 (d) (i) and (ii) follows the identical rationale underlying 413 (c), except that disclosure in compliance with 413 (d) (i) is testimonial for the additional reason that the accused is labeling the witness as a person familiar with the defendant's activities at particular times.63

Restated, disclosure in accordance with Rule 413 (c) and (d) is testimonial because it involves a communication from the defendant to the prosecutor, the veracity of which depends on the accused's credibility.

In addition to being testimonial or communicative, produc-

56 ILL. REV. STAT. ch. 110A, § 413 (c) (1971).
57 Id. § 413 (d) (i).
58 Id. § 413 (d) (ii).
59 WIGMORE at 380.
61 See note 19, supra.
63 California v. Byers, 402 U.S. 424 (1971). In this case a statute requiring motorists involved in an accident to stop and identify themselves was upheld against a Fifth Amendment attack. Four of the majority felt that the "stop" requirement was not testimonial on authority of United States v. Wade, 388 U.S. 215 (1967). The remaining justices, including Justice Harlan who upheld the statute on other grounds, felt that the act of stopping was testimonial because it amounted to an admission by the accused. They properly distinguished Wade because in that case the police already suspected the accused of the crime and his appearance in the line-up added nothing to their knowledge. In Byers, the act of identification revealed to the authorities the name of a suspect previously unknown. To the extent that the reasoning of the remaining five justices prevails, the act of identification required by Rule 413 (d) (ii) would be testimonial because the accused would be adding to the knowledge of the police by informing them that certain persons are familiar with his activities.
tion under the rules is almost certain to be incriminating. Proponents of prosecutorial discovery contend that compliance with the rules requires the defendant to identify evidence he intends to use at trial, and therefore, it is highly unlikely that such evidence will be incriminating. An examination of Rule 413(c) indicates that production is not limited to items the defendant intends to introduce at trial. The fact that the accused chooses not to use this evidence in support of his case is indicative of the fact that it may be incriminating. Even if production under Rule 413(c) and (d) initially revealed only exculpatory matter, this evidence could be damaging because it may provide leads to a source of evidence that might be used or a link in the chain of proof necessary for conviction.

Further consideration of the rules will demonstrate that the use of the word “intends” as a talisman for constitutionality is unfounded. The accused may intend to call a witness whose testimony is totally exculpatory, but it does not necessarily follow that such testimony will retain its initial character when finally introduced at trial. The defendant can never predict how this testimony will be adduced when finally exposed to questioning and cross-examination by the prosecution. In other situations, the accused may not know what evidence he intends to introduce until either the state has sustained its burden of proof or other issues have resolved at trial. Accelerated disclosure, coupled with sanctions for noncompliance, forces a defendant to reveal possibly incriminating evidence in order to preserve his right to introduce this same evidence at trial. Analysis of this situation with respect to various types of evidence effectively illustrates the defendant’s dilemma.

Evidence may be exculpatory on one element of a crime, but incriminating on another. For example, a witness may testify that the defendant killed the victim, but that he did so in self-defense. Normally, the defendant would not introduce this evidence until the state had proved that he committed the crime. By forcing disclosure prior to trial, the state is provided with incriminating evidence. The results are identical if experts’ reports, documents, photographs or tangible evidence supportive of a defense are disclosed prior to trial.

Other evidence may be exculpatory or incriminating concerning one element of a crime, depending on the resolution of

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64 See text accompanying notes 26 and 27 supra.
67 Some examples to illustrate the point follow:
A. Expert reports — In a murder trial the accused has a report of a doctor who treated him after the killing. In the report the ac-
certain issues at trial. For example, the effect of a document, witness, photograph or expert report placing the defendant in a particular location at a certain time might depend on resolution of conflicting theories as to when the crime was committed. Ordinarily, the defendant would not reveal such evidence until the state proved when the crime occurred. Forced disclosure would prematurely provide the state with potentially incriminating evidence.

While it is true that not all evidence in the foregoing discussion would be incriminating, any determination of its inculpatory character could not be made until after the state's case in chief. Therefore, the need for a rule denying all such discovery is obvious.

Conceivably, the incriminating effect of all discovery as heretofore discussed could be mitigated by limiting the use of such evidence. In other words, the state would only be permitted to use this evidence for impeachment or rebuttal. The efficacy of this solution is doubtful as it would necessarily rely heavily on the use of appropriate jury instructions. Any solution involving such instructions would be more theoretical than real, for in all likelihood the jury would consider the evidence on the issue of guilt. A second possible solution would be to limit the use of the evidence to the state's case in chief if such evidence were not a fruit of discovery. To be effective, this proposal would require constant judicial intervention which in turn would negate the effect of discovery as a time and problem saving device.

Even though evidence is testimonial and incriminating, the Fifth Amendment will be applicable only if there is some legal compulsion directed toward the defendant to produce this evidence. Once again, it is necessary to discuss the effect of the word "intends" as used in the Illinois Rules. The Supreme Court

B. Photograph — In a trial for reckless homicide the accused has a photograph which tends to show he was in an accident but which also demonstrates that he was not at fault.

C. Tangible evidence — In a trial for murder the accused has a blood stained shirt which he wore when the crime was committed. This shirt contains his blood and the deceased's. This item of evidence may be relevant to prove self defense.

70 Doherty, Total Pretrial Disclosures to the State: A Requiem to the Accusatorial System, 60 Ill. B.J. 534 (1972) [hereinafter cited as Doherty]. In this article Mr. Doherty points out that prosecutorial discovery will cause more problems than it will solve. Perhaps the constant judicial intervention was one of these problems. See Strayhorn, 56 J. AM. JUD. SOC'y 279 (1973). In the article Judge Strayhorn views discovery as a time saving device but judicial intervention whenever the prosecutor discovers evidence would certainly militate against this feature.
in *Williams v. Florida*\(^7\) held that because the defendant is required to reveal only evidence he intends to introduce at trial, accelerated disclosure deprives him only of time and not of rights. The Court justified this dogma by analogizing the defendant's pre-trial choice — to open a source of potentially incriminating evidence or to be precluded from doing so — with the choice he must face at trial.\(^7\)

Through Justice White, the Court based its reasoning on an analysis of the Fifth Amendment in light of its purpose. Traditionally, it was stated that the accused had an absolute right to silence until the prosecution had made out a prima facie case against him.\(^7\) This pronouncement, however, was not borne out by judicial decision because the protection was dealt with only in terms of the accused taking the stand\(^7\) and the permissible inferences which could be drawn from his failure to do so.\(^7\) If the accused were granted a pretrial absolute privilege not to disclose the evidence he would eventually reveal at trial, the Fifth Amendment would merely afford an opportunity to surprise the prosecution.\(^7\) Even if the defendant were afforded the more limited right of a witness, the right not to be compelled to give incriminating responses, the effect would be identical. The privilege would still be absolute because any pretrial statement could be incriminating.\(^7\) The procedural advantage of surprise at trial would militate against the concept of a criminal trial as "[a] search for the truth."\(^7\) The accused has no constitutionally protected right to denigrate a trial and, therefore, the Fifth Amendment cannot be used as a vehicle to carry out this purpose.

While the Court's interpretation of the Fifth Amendment is hardly open to question, it is based upon the assumption that an accused will eventually introduce at trial the evidence which is subject to accelerated disclosure. This assumption can never be reduced to a certainty, but the Court was concerned with a lesser standard. The majority, in effect, held that if the election the accused must make prior to trial — either to open a source of potentially incriminating evidence or to be foreclosed from doing so — is the same as the choice he must face at trial, then

\(^7\) *Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 AM. CRIM. L.Q. 3, 17 (1969)* [hereinafter cited as *WILD*].

\(^7\) *Williams v. Florida, 399 U.S. 78, 83-84 (1970)*.

\(^7\) *Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962)*.

\(^7\) *United States v. Housing Foundation of America, 176 F.2d 665 (3d Cir. 1949)*.

\(^7\) *Griffin v. California, 380 U.S. 609 (1965)*.

\(^7\) *Wilder, supra* note 71, at 15.

\(^7\) Cases cited notes 65 and 66 *supra*.

\(^7\) *Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962)*.
the assumption would be justified. Justice White concluded that the choice was identical. Herein lies the weakness of his logic as evidenced by the Court's subsequent decision in *Brooks v. Tennessee*.79

In *Brooks* the Court struck down a state statute which required the accused to testify, if at all, prior to other defense witnesses, concluding that the accelerated disclosure embodied in the statute was an impermissible restriction on the defendant's right against self-incrimination.80 In reaching this result the Court examined the interplay of two factors: (1) consequence of the accused's choice to testify and (2) the point at trial when this choice was required by statute. The defendant's decision to testify risks the admission of impeachment evidence otherwise impermissible and serious consequences in cross-examination.81 Each poses a threat to a successful defense. The Tennessee statute requiring the accused to testify immediately after the state's case in chief confronted the defendant with a decision involving much uncertainty in predicting the strength of his evidence.82

Justice Brennan recognized this dilemma when he stated: Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses.83

Since the strength of his case is a determinative factor in the accused's choice, he cannot make an enlightened judgment until he is relatively certain of the impact of his defense. This certainty will be manifest only after his witnesses have testified and have been exposed to cross-examination. Therefore, the defendant can adequately weigh the pros and cons of his decision only after the time specified by the statute. The thrust of the Court's decision was that while accelerated disclosure enables the accused to make his choice, he is not in a position to make as realistic or as intelligent an evaluation as he would be after other events occurred at trial. The vagaries and uncertainties thrust upon the accused by accelerated disclosure deprived him of rights, forcing him to disclose testimony he might otherwise not have revealed had he been afforded an adequate opportunity to

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80 *Id.* at 611.
81 *Id.* at 609. In this regard see *Harris v. New York*, 401 U.S. 222 (1971), which approved the use of confessions obtained in violation of *Miranda* for use as impeachment.
82 406 U.S. at 609.
83 *Id.*
evaluate his decision at a later time. The weakness of Justice White’s reasoning in Williams becomes palpable when the accelerated disclosure mandated by Rule 415(g)\textsuperscript{84} is examined in light of Brooks.

The consequence of the accused’s choice to reveal a defense is equally deleterious to its success because disclosure provides an opportunity for the prosecution to gather rebuttal witnesses. Illinois does not allow defense discovery of these witnesses and thus the accused runs a substantial risk of having every piece of evidence refuted at trial.\textsuperscript{85} The Illinois scheme does not afford the accused the same opportunity to make an informed judgment concerning disclosure as he would be afforded at trial. By testing the strength of the state’s case through a motion for a directed verdict, the at-trial choice allows the accused an opportunity to ascertain whether or not the state has sustained its heavy burden of proof. Even if his motion is denied, the accused is relatively certain that he must introduce his evidence. Prior to trial, the accused only knows what the strength of the state’s evidence \textit{might} be and he can never be certain that the state will sustain its burden. This position is borne out by Justice Black’s dissent in Williams \textit{v. Florida}:

When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State’s case \textit{might} be. Before trial there is no such thing as the ‘strength of the State’s case’; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at the trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.\textsuperscript{86}

The state’s burden of proof is a determinative factor in the ac-

\textsuperscript{84} ILL. REV. STAT. ch. 110A, § 415(g) (1971) provides:

\begin{itemize}
  \item [(g)] Sanctions.
  \begin{itemize}
    \item [(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.
    \item [(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.
  \end{itemize}
\end{itemize}

\textsuperscript{85} Doherty, supra note 70, at 546; see ILL. REV. STAT. ch. 110A, § 412 (a) (i) (Smith-Hurd 1971) Committee Comments and ILL. REV. STAT. ch. 38, § 114-9 (c) (1971).

cused’s choice to reveal a defense. It is conceivable that he
would introduce no evidence if the state failed in its burden, but
it is certain he would not introduce evidence with both exculpa-
tory and incriminating characteristics. Thus, by accelerating
disclosure to an earlier time, the accused is forced to reveal evi-
dence he might not disclose if he had an adequate opportunity to
evaluate the state’s evidence at trial. This consequence indicates
that the accused is being deprived of rights, and not merely of
time or procedural advantage.

This analysis of prosecutorial discovery leads to the conclu-
sion that an accused is deprived of rights and, therefore, the
Fifth Amendment protection is applicable. The question of
whether he is afforded the more limited protection of a witness
or the traditional right of the accused at trial, is academic. In
either case, the privilege is absolute. Even the most ardent op-
ponents of prosecutorial discovery might resist this application
of the Fifth Amendment privilege because of a fear of surprise
at trial. Even though surprise at trial may be a necessary
incident of the absolute privilege, the state can surely protect
itself adequately by means other than the present discovery rules.
These means will be discussed later in this article.

But surprise is only one factor which may detract from the
desired objectives of a criminal trial. Another possibility for
abuse occurs when a witness or a defendant is afforded an oppor-
tunity to adapt his testimony “to meet the necessities as laid
open by prior witnesses. . . .” 87 This latter evil was relied on
to justify the Tennessee statute at issue in Brooks. The state’s
argument that accelerated disclosure assured honest testimony
and minimized the chances that a witness would adjust his
version of the facts to fit what others had said, was deemed
insufficient to overcome the defendant’s Fifth Amendment
right. 88 If the Fifth Amendment protections are available prior to
trial, then the accused cannot suffer legal compulsion to reveal
evidence. The Supreme Court has defined compulsion in the
following terms:

[The accused has the right] to remain silent unless he chooses to
speak in the unfettered exercise of his own will, and to suffer no
penalty . . . for such silence. 89

Rule 415(g) imposes a preclusion sanction on a defendant by
providing that a party may be deprived of the ability to present
evidence at trial by failure to comply with a discovery order.
In order to preserve his ability to introduce at trial, the accused
is forced to reveal the evidence prior to trial. The sanction thus

88 Id. at 612.
89 Malloy v. Hogan, 378 U.S. 1, 8 (1964).
operates on his free will by exacting a penalty for noncompliance. Therefore, the preclusion sanction provides the necessary legal compulsion to complete the trilogy of elements comprising the basis of the Fifth Amendment protection.

Since the Fifth Amendment is applicable to prosecutorial discovery, it is necessary to consider whether the state's interests in preventing surprise at trial, diminishing the possibility of perjury and reducing the trial load, outweigh the constitutional interests of the accused. In order to prevail, the state's interests must be urgent and discovery must be the only viable means of fulfillment.

First, preventing surprise at trial is a legitimate state interest because it enhances the prosecutor's ability to present his case. The element of surprise could be dealt with in an equally effective manner by granting the state a continuance at trial. The disadvantage of disrupting the trial process is slight when compared to constitutional interests of the accused. Also, more effective use of the state's vast investigative resources would significantly mitigate the evil of surprise. Other proposals for increasing the prosecutor's access to information include both a motion for a bill of particulars and pre-trial conferences.

In California v. Byers, 402 U.S. 424 (1971), the plurality, consisting of Chief Justice Burger and Justices White, Stewart, and Blackmun, balanced the state's interests against those of the individual within the framework of a discussion of the attenuated risk of incrimination. 402 U.S. 427-31. Justice Harlan, who provided the swing vote, confronted the balancing issue directly. He saw the statutorily required disclosure as protected by the privilege as a definitional matter; but he thought the state statutory goals so paramount as to preclude applicability of the Fifth Amendment. Id. at 434-48.

The Court has been less willing to consider countervailing state interests where they have been in areas traditionally controlled by the criminal law. See Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968) (both involving the control of gambling). In Byers, both the plurality and Justice Harlan relied on the fact that California's interest in providing compensation for victims of automobile accidents is of a noncriminal nature. See 402 U.S. at 429-31, 458. Such a distinction is reasonable; it is easier to assert that the authors of the Fifth Amendment have already structured a balance of interests when the state's interest is enforcement of its criminal laws.

The state interests of preventing surprise at trial, minimizing the likelihood of perjury and reducing the trial load lie somewhere in the middle of the criminal/non-criminal spectrum. They are not directly related to the control of a particular crime as are laws which control gambling, but they do relate to the control of crime generally by providing the prosecutor with a better opportunity to secure convictions.


FED. R. CRIM. P. 17.1 states:

At any time after the filing of the indictment or information the court
other alternative involves statutes based on reciprocal discovery. Such statutes pass constitutional muster because discovery by the defense constitutes a waiver of his privilege\(^9\) and only permits the accused an opportunity to discover after he consents to a mutual opportunity in the prosecution. Reciprocal discovery has been criticized,\(^9\) but it is premised on a waiver of constitutional rights by the accused. The present Illinois rules are not reciprocal. Each party can discover from the other without regard to conditioning the right on the accused’s consent.\(^9\) Furthermore, statutes providing for notice of a proposed defense absent a list of witnesses or documents, would appear to mitigate the level of surprise at trial. Because these alternatives are available to the state and are equally effective in reducing surprise, present prosecutorial discovery under Illinois rules cannot be so justified.

Second, the extent of the state’s interest in preventing perjury is proportional to the likelihood that false testimony will be offered. Studies have demonstrated that the alibi defense is subject to this evil.\(^7\) The likelihood of perjury is increased in the case of an alibi because of the relative ease with which the defense can be fabricated and the difficulty of rebuttal.\(^8\) Defenses based on expert testimony and scientific experiment are not as susceptible of fabrication in light of the professional character of the witnesses involved. Defenses involving the use of other witnesses or documents are also not as easily fabricated and therefore the likelihood of perjury is reduced. With tangible evidence the danger of perjury is non-existent. It follows that the state’s interest in preventing perjury can be justified only with respect to the alibi defense. Even though this interest may be sufficiently urgent, the present scheme of discovery should yield if the state can effectuate this interest by other means. Studies of the alibi defense illustrate that perjury is reduced where there is a statute requiring mere notice of the defense without a list of witnesses.\(^9\) Further, statistics do not support a conclusion that a list of witnesses has any greater effect in

\(^9\) See FED. R. CRIM. P. 16(c).
\(^9\) ZAGEL & CARR, supra note 7, at 587.
reducing perjury than does mere notice.\textsuperscript{100} Since the state can reduce the incidence of perjury by a statute requiring only notice, the portion of the Illinois rule requiring a list of witnesses should be vulnerable to constitutional attack.

Finally, there is no indication that pre-trial discovery will have the effect of reducing the trial load in overburdened courts.\textsuperscript{101} Whatever increase occurs in the state's dismissal rate can be attributed to defendants who voluntarily come forward and reveal totally exculpatory evidence. In such cases, discovery by the state should be unnecessary. It is unlikely that discovery would increase plea bargaining because the state already has superior investigative abilities to discover incriminating evidence and thereby induce a defendant to plead guilty. In rare instances, if a defendant is not forced to disclose evidence, he may try to bluff the strength of his case, but it is highly improbable that he would follow through and go to trial.

In summary, it is likely that nonreciprocal prosecutorial discovery violates the Fifth Amendment, and that the state interests in prosecutorial discovery either are not urgent or can be effectuated by means other than Rule 413(c) and (d).

**THE NEW RULES AND THE FOURTEENTH AMENDMENT**

Even if prosecutorial discovery were deemed not to violate the Fifth Amendment, a cogent argument can be presented that it contravenes the due process clause of the Fourteenth Amendment.

According to the committee comments, Rule 413(d) is designed to eliminate surprise by allowing the prosecutor to ascertain the truth or falsity of defenses.\textsuperscript{102} The committee has eschewed the issue of surprise to the defendant by failing to provide for discovery of state rebuttal witnesses.\textsuperscript{103} To determine the effect of this disparity in light of the Fourteenth Amendment, the concept of due process must be examined. Courts have adhered to the theory that due process "is a requirement that cannot be deemed to be satisfied by mere notice and

\textsuperscript{100} Id.
\textsuperscript{101} ZAGEL \& CARR, supra note 7, at 597-98.
\textsuperscript{102} ILL. REV. STAT. ch. 110A, § 413(d) (Smith-Hurd 1971). Committee Comments provide:
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.
\textsuperscript{103} Doherty, supra note 70, at 546; ILL. REV. STAT. ch. 110A, § 412(a) (i) (Smith-Hurd 1971). Committee Comments provide in part:
[This provision] enlarges upon the Code of Criminal Procedure § 114-9(a). In addition to requiring production of a list of intended witnesses . . . the State will also be expected to produce these witnesses'
1974 Illinois Revised Rules of Criminal Discovery 383

hearing . . .” 104 While these elements are essential, the concept also encompasses rudimentary demands of justice in the treatment of the accused. In this regard, due process, while not achieved solely by winning or losing at trial, is reflected by the manner in which the trial is conducted. The majority opinion in Brady v. Maryland expressed this sentiment eloquently:

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. 105

The Supreme Court, in accordance with this view, has been circumspect of state procedures which provide non-reciprocal benefits to the state, shifting the balance of forces so as to interfere with the accused’s ability to secure a fair trial. 106

For example, in Washington v. Texas 107 the Court held that a statute which prohibited persons charged or convicted as co-participants in the same crime from testifying for one another, violated the Sixth Amendment. 108 The Court noted in reaching its decision that there was no similar bar to the state’s use of these same witnesses to prove its case. 109 The Court concluded that as applied to the accused and the state, the statute operated to preclude a fair trial. In Gideon v. Wainwright 110 the Court held that the accused was denied a fair trial because he was indigent and was denied counsel. 111 Implicit in the Court’s holding was the recognition of the imbalance in financial resources between the indigent defendant and the State.

Until 1973 the Court had no occasion to definitively apply this view to state criminal discovery schemes. Prior to this time the Court, in dictum, obliquely suggested that its conclusions as to the validity of certain notice defense statutes under the due process-fair-trial standard might depend upon “an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.” 112 This pronouncement, in Williams v. Florida, was not definitive because the Florida discovery scheme actually provided for reciprocal discovery of both the witnesses the state planned to call in its case in chief and its

prior statements. . . . Nothing herein changes the types of material that are to be provided; only the time of their disclosure is changed. It is apparent from this comment that the Rules only modified Section 114-9 to require production of prior witnesses’ statements and the time when this production must be made. Section 114-9 remains unmodified in every other respect so that rebuttal witnesses still cannot be discovered.

108 Id. at 17.
109 Id. at 23.
111 Id. at 344.
rebuttal witnesses. The worst effect of this statement was its ambiguity; for the Court failed to clarify whether reciprocal discovery against the state referred to either or both types of witnesses.

The only Illinois case to consider the due process issue in this context was People v. Holiday where the court stated by way of dictum:

Nevertheless, we do not feel that the discoverability of alibi-rebuttal witnesses is an essential element of due process where the defendant is otherwise accorded substantial discovery of prosecution witnesses. Indeed, the true parallel in the State's case to the alibi witness is the eyewitness, who is readily discoverable by the defendant. We hold, therefore, that the requirements of the alibi-notice statute, considered in conjunction with the defendant's discovery rights, are consonant with the fundamental-fairness-due-process concept.

At best, these decisions provided little guidance to sustain an attack on discovery schemes as violative of due process. In 1973 the United States Supreme Court was presented with a fact situation requiring a definitive, unambiguous pronouncement on this issue. Because of his failure to comply with an Oregon notice of alibi statute, Dale Wardius was forbidden to offer his alibi defense and was subsequently convicted.

The Oregon statute provided for prosecutorial discovery of alibi witnesses, but the accused was not afforded any discovery.

The Court emphasized the absence of a provision which required the state to reveal the names and addresses of witnesses it planned to call to refute the alibi defense. As evidence of their emphasis on the disparity in regard to rebuttal witnesses, the majority stated:

Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars. More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.

This statement indicates that the flaw in the Oregon scheme was particularly manifest in its treatment of rebuttal witnesses.

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113 Fla. R. Crim. P. 1.220(f) provides for the taking of discovery depositions by the defense. Fla. Stat. Ann. § 906.25 (Supp. 1971) provides for discretionary discovery of prosecution witnesses' grand jury testimony. Fla. R. Crim. P. 1.220(e) allows the defense to obtain a list of prosecution witnesses provided the defense furnishes a list to the prosecution. Fla. R. Crim. P. 1.200 allows the defense to discover the names and addresses of prosecution rebuttal witnesses when the defendant is required to comply with the notice of alibi requirements.

115 Id. at 304, 265 N.E.2d at 636.
117 Id. at 475.
118 Id. (emphasis added).
The fact that no other discovery was afforded merely compounded the unfairness of the statute's operation.

The Court's emphasis on the lack of discoverability of rebuttal witnesses is borne out by the facts of the case as applied to the concept of due process. Where a defendant is denied any discovery, there is a nonreciprocal benefit which inures to the state. This benefit shifts the balance of forces in favor of the state and obstructs the fairness of trial in that the accused encounters a substantial risk of surprise by having every piece of evidence in support of his defense refuted by a non-discoverable witness. The Court struck down the Oregon procedure as being fundamentally unfair in terms of due process. The statute in question involved an alibi defense, but since surprise at trial is not unique to revelation of any particular defense, the due process standard in *Wardius* should be applicable irrespective of the type of defense disclosed.\(^{119}\)

An analysis of the Illinois Rules is somewhat hindered because the situation of an accused in Illinois is not as extreme as that in *Wardius*. To evaluate the Illinois scheme in terms of due process, it is necessary to examine the effect of defense discovery pursuant to Rule 412.\(^{120}\) If this provision enables the accused to secure a fair trial, due process is satisfied; otherwise it is not.

The Illinois Supreme Court's reasoning in *Holiday* indicates what might be termed a lack of judicial realism. The court's dictum is based on an assumption that the accused's opportunity for discovery places him on a parity with the state. This reasoning is only theoretical since the defendant's right to discovery may be nothing more than a judicially endorsed amenity. Even assuming that the accused is afforded an opportunity to discover the state's case,\(^{121}\) there is nothing in the rules requiring state's witnesses to speak to the accused or to his attorney. The rules only prohibit counsel for either side from actively encouraging

\(^{119}\) Although the accused is subject to discovery pursuant to Rule 413(d), he has no opportunity to discover the state's rebuttal witnesses. This statement holds true for defenses other than insanity, incompetence, etc. It is probable that if the accused must reveal these defenses, he will have an opportunity to discover the state's rebuttal witnesses because Rule 412(a)(iv) allows the accused to discover reports or statements of experts made in connection with the particular case, including results of physical or mental examinations. Discovery is not limited to those statements or reports the state intends to use at trial and it is highly unlikely that the state will use one expert prior to trial and a different expert at trial. Therefore, the accused will discover rebuttal witnesses unless disclosure is denied pursuant to Rule 412 I.


non-cooperation. Certainly no one would be naive enough to believe that witnesses closely allied with the prosecutor will voluntarily cooperate for the sake of a fair trial. Even if the witnesses resist discovery, the accused is still entitled to discover their recorded statements. If there are no such statements in existence, the accused is denied another avenue of discovery. There is no mandatory recordation of grand jury testimony in Illinois nor is the accused entitled as of right to a free preliminary hearing transcript. Thus, the accused may often be denied effectuation of his discovery right. Substantially verbatim memoranda reporting or summarizing oral conversations are of little use to the accused because the inaccurate methods of police reporting militate against the substantially verbatim criteria.

If the Illinois Rules are examined in regard to the prosecution, there is an ostensible similarity in respect to the problems encountered. This similarity is spurious because even if defense witnesses refuse to cooperate and there are no statements available, the state can always discover the defendant's witnesses and the nature of his defense(s). This minimal knowledge is capable of focusing the state's investigative power so that rebuttal evidence can be gathered. The accused, lacking the necessary investigative resources, would find discovery of no value in a similar situation. Restated, any discussion of discovery must reckon with investigative abilities. This factor necessarily weighs heavily in determining the balance of forces between the accused and his accuser when the Illinois Rules are utilized.

If the theoretical right granted to the accused by Rule 412 cannot be effectuated, it is a mere token and the situation of the accused in Illinois becomes identical to that of Mr. Wardius in Oregon. The realities of defense discovery in Illinois do nothing to adjust the balance of advantages in terms of the accused's ability to secure a fair trial.

Thus far discussion of defense has been premised on the tacit assumption that if the right granted by Rule 412 comes to fruition, then somehow the accused will be afforded a fair trial even without discovery of rebuttal witnesses. In Wardius the court found this latter disparity "more significant" than the lack of other discovery provisions in the Oregon Code. To determine why the Court focused its attention on this aspect of the case,

122 See note 46 supra concerning ILL. REV. STAT. ch. 110A, § 415 (a) (1971).
124 ZAGEL & CARR, supra note 7, at 579.
126 ZAGEL & CARR, supra note 7, at 597.
it is necessary to analyze the Illinois procedure in terms of the inequity caused by this disparity and the rectification, if any, provided by effectuation of discovery under Rule 412. In discussing the due process violation of the Oregon procedure the Court held:

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.\textsuperscript{127} Similar surprise by undiscoverable rebuttal witnesses is inherent in the Illinois Rules. The ability of the accused to discover witnesses supportive of the state's case in chief would protect against this surprise only if the defendant were able to forestall the state from sustaining its burden of proof. If this were accomplished, surprise would be eliminated in that it would be unnecessary for the accused to present evidence to support his defense. The likelihood that the accused would be granted a directed verdict depends on a myriad of factors; for in a majority of cases, he would have to introduce evidence to support his defense. To require due process to hinge on so speculative an event would, in effect, render the due process clause a chimerical mandate. If the actual ability to prevent surprise at trial pursuant to Rule 412 is so minimal, then the mere right to discovery in this regard is equally ineffective. Further, if the opportunity to obtain a directed verdict were deemed to satisfy due process, then in reality due process could depend entirely upon either an ineffective prosecutor or a diligent defense counsel. Courts have stated that for purposes of due process "the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel."\textsuperscript{128} It is probable that the majority in \textit{Wardius} emphasized the lack of discoverability of rebuttal witnesses because they realized that this paucity fostered surprise and thereby prevented a fair trial. The tenor of the Court's opinion indicates that the absence of other discovery provisions compounds the due process violation, while their presence relieves the injustice without totally curing it.

**THE NEW RULES AND SIXTH AMENDMENT**

The previous sections have been concerned with the constitutionality of the enabling rules granting prosecutorial discovery. This section will be devoted to a discussion of the enforcement procedures which implement discovery. Rule 415(g)(i) states in relevant part:

\begin{enumerate}
\item If at any time during the course of the proceeding it is brought to
\end{enumerate}

\textsuperscript{127} 412 U.S. 470, 476 (1973) (emphasis added).

\textsuperscript{128} Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).
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 . . . exclude such evidence. . . .

The operation of this "preclusion sanction" is most devastating when applied to the defendant because it vitiates any attempt to present a defense. The sanction is justified upon two theories. First, the only effective means by which the state can enforce pre-trial discovery is to punish the delinquent party. Second, the failure to comply with discovery makes the evidence presumptively unworthy of belief and this incompetence justifies inadmissibility.

The first theory views the preclusion sanction as an effective punitive measure for enforcing pre-trial discovery. Because the emphasis of this section concerns constitutionality, this theory will be dealt with only briefly. In view of the drastic and harmful consequences of the sanction when applied to the accused, various alternatives should be utilized if they are equally as inexpensive and effective in deterring non-compliance. The alternatives available under Rule 415(g) comply with these criteria.

The second theory gained credence in State ex rel. Simos v. Burke. This case sustained the exclusion of evidence after the defendant failed to comply with notice of alibi requirements. In its ruling, the Wisconsin Supreme Court stated:

What is constitutionally protected is the right of a defendant to testify truthfully in his own behalf . . . . These decisions, [prior holdings by the Wisconsin Supreme Court upholding the preclusion sanction] and the statute on which they are based, do not limit in any way the right of a defendant to testify truthfully in his own behalf. The condition of prior notice as to alibi testimony, like the test as to materiality and relevancy, does not invade the right of a defendant to testify in his defense.

The presumption upon which the sanction operates was tested by the United States Supreme Court in Washington v. Texas. In a state murder trial defendant Washington desired to have Fuller, who had already been convicted of the same crime, testify that the accused had not participated in the killing. Clearly this testimony was relevant and material to Washington’s defense. In spite of this, the trial court prevented Fuller from testifying in reliance on a Texas statute prohibiting co-prin-

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130 44 F.R.D. 481, 488 (1967).
131 State ex rel. Simos v. Burke, 41 Wis. 2d 129, 137-38, 163 N.W.2d 177, 181 (1968).
133 Id. at 1356-60.
134 41 Wis. 2d 129, 163 N.W.2d 177 (1968).
135 Id. at 137-38, 163 N.W.2d at 181 (emphasis added).
cipals from testifying in each other's behalf. The statute, like the Illinois preclusion sanction, created an irrebuttable presumption that certain evidence was incompetent because it was untruthful. The court held that the statute violated defendant's Sixth Amendment right to "compulsory process." On the surface, this ruling seems erroneous because "compulsory process" literally speaks of the right to obtain witnesses and the statute in question did not prevent this, but only barred the accused from examining his witnesses. Nevertheless, Justice Warren held that the accused was denied his Sixth Amendment right to compulsory process because he was unable to present testimony relevant to his defense in the form of competent witnesses. In so holding, the Court first established that the right to "compulsory process" epitomized the right to present a defense:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. . . . This right is a fundamental element of due process of law.

This conclusion was the result of Justice Warren's extrapolation from the literal terms of the Sixth Amendment. To accomplish this task, the Court examined the historical purpose of the Sixth Amendment and the intention of the framers of the Constitution.

At common law there were numerous restrictions on defense witnesses who were physically and mentally capable of testifying. The restrictions took the form of disqualification based on interest. The unstated premise of this disqualification was that:

the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured. . . .

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137 Id. at 17.
138 U.S. CONST. amend. VI provides that the accused shall "have compulsory process for obtaining witnesses in his favor. . . ."
139 Tex. Penal Code, Art. 82 and Tex. Code Crim. Proc., Art. 711 provides:
Persons charged as principals, accomplices or accessories, whether in the same or different indictments, can not be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others.
Tex. Penal Code, Art. 82:
Persons charged as principals, accomplices or accessories, whether in the same or different indictments, can not be introduced as witnesses by one another, but they may claim a severance; and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others.
141 Id.
142 Id. at 21; Benson v. United States, 146 U.S. 325, 336 (1892).
In 1918 the case of *Rosen v. United States*,\textsuperscript{143} decided on non-constitutional grounds, held that the truth could be more readily arrived at by hearing the relevant testimony of all competent persons involved in a case. The issue of credit and weight of such testimony was to be determined by the court or jury.\textsuperscript{144} In concluding that the reasoning of *Rosen* was required by the Sixth Amendment, Justice Warren also relied on *United States v. Reid*.\textsuperscript{145} Reid expressly recognized that the Sixth Amendment was designed to abrogate common law rules which refused to allow the accused in criminal cases to present witnesses in his defense. This analysis was further bolstered by the fact that "the Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."\textsuperscript{146}

After finding that the defendant had a right to examine his witnesses, the Court sought to afford some protection against their arbitrary exclusion based on statutory disqualification. In this regard the Court stated:

\begin{quotation}
[1]t could hardly be argued that a State would not violate the clause [compulsory process] if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of \textit{a priori} categories that presume them unworthy of belief.\textsuperscript{147}
\end{quotation}

In *Washington* the Court did not rule against the usual evidentiary requirements of testimony, but held only that exclusion of otherwise qualified evidence based upon an irrebuttable presumption of untrustworthiness was unconstitutional.\textsuperscript{148} The focus of the Court's attack on the statute was well grounded if the American system of justice is to retain its adversary character. This goal can only be achieved if the criminal trial is a forum whereby both the accused and the state have an equal opportunity to present material and relevant testimony. The risk of false testimony cannot justify keeping otherwise relevant testimony from the jury because "our adversary system reposes judgment of the credibility of all witnesses in the jury."\textsuperscript{149} In addition to this safeguard, cross-examination and sanctions for perjury are available to prevent false testimony.

A literal reading of the Sixth Amendment indicates that it is couched in terms of compelling the attendance of wit-
nesses.¹⁵⁰ A strict application of this clause would seem to exclude documentary and tangible evidence from the right to present a defense. To interpret this right in terms of form rather than substance is to ignore reality and water down the protection. For these reasons the right to present a defense should not be limited to testimonial evidence. Furthermore, there is authority to support the contention that the right encompasses both documentary and tangible evidence. In regard to documentary evidence, John Marshall, in *United States v. Burr*,¹⁵¹ was presented with the issue of whether a subpoena duces tecum should issue to President Jefferson to compel production of a letter relevant to Burr's defense. Justice Marshall stated:

> This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation.¹⁵²

With respect to its testimonial character, there is greater disparity between tangible evidence and witnesses than between documents and witnesses. Chief Justice Warren's language in *Washington* would indicate that the right to present a defense includes tangible evidence:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.¹⁵³

In light of the language involving "the defendant's version of the facts" it would seem that tangible evidence could be included in "facts" relevant to the accused's defense. Very often a weapon or an article of clothing is useful to a defense and these items are just as much a part of the "facts" as is witness testimony.

The Court in *Washington* was not merely concerned with the common law disqualification aspect of the statute. This is evident from the frequent use of the word "presumed" in connection with "untrustworthiness." While Chief Justice Warren left this facet of the case unenunciated, it is relevant to the discussion to examine the rationality of this presumption of untrustworthiness in light of the preclusion sanction. In order to proceed, the burden of proof necessary to overcome the pre-

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¹⁵⁰ Note 138 supra.
¹⁵¹ 25 F. Cas. 30 (No. 14,692d) (Cir. Ct. Va. 1807).
¹⁵² Id. at 35.
The greater the burden, the stronger the rational connection must be between the proven fact and the presumed fact. In the case of an irrebuttable presumption, which cannot be overcome by any proof, there should be an almost perfect correlation between these facts. Applying this supposition to an irrebuttable presumption of untrustworthiness, it follows that there should be an almost perfect correlation between the class of evidence excluded and the assumption that such evidence is false. In determining the strength of this rational connection, it is relevant and appropriate to examine the reasons which might cause a defendant to withhold such evidence.

The defendant might withhold information because he wants to surprise the prosecutor at trial. A second consideration might be that he fears intimidation of his witnesses through offers of immunity or threats of prosecution. Defendants might wish to protect the privacy of their witnesses or their relationships with them. The accused may feel that any undisclosed witness will commit perjury. Finally, the accused's friendship with a witness may also promote perjury if there is nondisclosure. Certainly any irrebuttable presumption based on moral incapacity or witness interest would fall within the common law disqualifications described in Washington. The other considerations simply do not approach the high degree of correlation necessary to support an irrebuttable presumption of untrustworthiness.

In summary, the preclusion sanction embodied by Rule 415(g) is based on an irrebuttable presumption of untrustworthiness which is arbitrary and therefore violates the defendant's right to present a defense.

Advocates of prosecutorial discovery contend that the irrebuttable presumption involved in enforcement is justified by compelling state interests and, therefore, that infringement of Sixth Amendment rights is justified. As discussed in the section dealing with the Fifth Amendment, such an infringement can be justified only if these interests are urgent and there are no viable alternatives for effectuating them. By virtue of the fact that the preclusion sanction is a means of enforcing pre-trial discovery, the state interests served and the available alternatives are identical to those considered in connection with the Fifth Amendment. Therefore, as with the Fifth Amendment, the state interests are either not sufficiently urgent or they

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155 Id.
156 388 U.S. 14 (1967).
can be effectuated by means other than pre-trial discovery. In effect, the irrebuttable presumption of the preclusion sanction cannot be justified and, thus, the sanction itself violates the Sixth Amendment.

CONCLUSION

James J. Doherty adequately expressed the effect of Rule 413 as "A Requiem to the Accusatorial System." The approach of the Illinois Rules Committee and the United States Supreme Court would seem to afford credence to his statement. Further, prosecutorial discovery is in direct conflict with the Supreme Court's previously expressed sentiment that the Fifth Amendment is the essential mainstay of the American system of criminal justice. This article has attempted to uncover the fallacies which have lead to a dilution of the self-incrimination privilege and consequent subjugation rights of the accused.

If the Illinois Rules regarding prosecutorial discovery are defective constitutionally, there remains the question of whether criminal discovery can survive as a one-way street. The mainstay of prosecutorial discovery is the mutuality argument. The same reasons that are advocated as merits for defense discovery apply to the merits of prosecutorial discovery. Any argument for prosecutorial discovery based on mutuality ignores the fact that the accused has always had certain advantages not afforded to the state. As Justice Peters pointed out in his dissenting opinion in Jones v. Superior Court of Nevada County, the presumption of innocence and the Fifth Amendment militate against the mutuality concept. Critics of the one-way street theory argue that defense discovery does not merely redress certain advantages of the state, but tilts the scale so that the balance of advantages lies with the accused. The weakness of this plea becomes apparent when the advantages of the accused and the state are compared. Besides greater financial and staff resources with which to investigate and analyze evidence, the prosecutor has certain tactical advantages. The state begins its investigation shortly after the crime, when it is more likely that physical evidence will be found and witnesses will be apt to remember events. The accused begins his investigation only after the state has gathered most of this evidence. Even if the accused can remember certain witnesses, generally they have been advised not to speak to anyone. Further, the state can compel witness

157 Doherty, supra note 70.
160 Id. at 62, 372 P.2d at 924, 22 Cal. Rptr. at 84.
cooperation, while the accused cannot. Even without this ability, the state, by virtue of its respected position in the community, engenders cooperation. An indigent defendant is totally overshadowed in this regard. If the accused has been arrested, he can be questioned and searched. While in custody, he can be forced to participate in certain non-testimonial activities where he becomes the source of physical evidence. The accused is supposed to be protected by the preliminary hearing and by the grand jury, but in reality these procedures are extensions of the prosecution. If these advantages inure to the state without discovery, one must ponder the added effect of prosecutorial discovery. Even without discovery, the balance of advantages remains with the state and, rather than upsetting this balance, defense discovery tends to equalize it.

In conclusion, prosecutorial discovery in Illinois effectively places the accused at the total mercy of the state. The road to improvement of the system of criminal justice can be found not by arming the state with added advantages, but by maintaining the status quo while the defendant's position is equalized. Defense discovery is an effective step toward this equalization.

P. Scott Courtin