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.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

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.