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Federal Criminal Procedure -- Proposed Rules and Notice of Alibi, Depositions, and Pre-Trial Conference

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Federal Criminal Procedure — Proposed Rules on Notice of Alibi, Depositions, and Pre-trial Conference

The committee on Rules of Practice and Procedure of the Judicial Conference of the United States has submitted to the bench and bar of the country for consideration and suggestion drafts of certain amendments to the Federal Rules of Criminal Procedure.[1] From proposals of the Advisory Committee on Criminal Rules which include the addition of two new criminal rules and changes in twenty-six existing rules, the scope of this note has been restricted to a discussion of Rules 12A and 17A (new), and the amended Rule 15. These rules are largely refinements of pre-trial procedure, each tending to eliminate an "element" in the defendant's case. Rule 12A requires the defendant to give notice to the prosecution of his intention to present an alibi defense; Rule 15 allows the prosecution to take and use depositions for the same reasons as the defense; and Rule 17A authorizes general pre-trial procedure.

These rules might indicate that the tenor of the proposed amendments is that of the oft quoted "Garsson outlook" that, "our dangers do not lie in too little tenderness to the accused. . . . What we need fear is the archaic formalism and watery sentiment that obstructs, delays, and defeats the prosecution of crime."[2] However, the antithetic philosophy that "both doctrinally and practically, criminal procedure as presently constituted does not give the accused every advantage but, instead, gives overwhelming advantage to the prosecution"[3] seems to be the underlying philosophy of various other amendments. The Committee apparently was striving for an objective balance. Fundamental to the conflict of policy there remains the perplexing question: How far can and should even a "balanced refinement" of the judicial process go in the elimination of defendant rights?

I. Notice of Alibi: Rule 12A

Background. — By an act of 1908, Scotland became the first common law jurisdiction to enact a law requiring notice of alibi.[4] Introduced in the United States only two years later by Wigmore,[5] it was not until the early 1920's when Professor Millar's lectures and articles[6] spotlighted the advantages of the rule that it gained attention in this country. In 1927 Michigan became the first state to adopt the "alibi rule" by statute and was followed two years later by Ohio.[7] By 1941, Iowa became the last of 14 states[8] which presently, by statute or rule of court, require that the defendant who intends to present an alibi defense give pretrial notice and particulars to the district attorney in conformity with the rule.

For several years attorneys general recommended that federal procedure re-

1 Administrative Office of the United States Courts, Press Release, Jan. 10, 1963.

2 United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923).

3 Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1152 (1960).

4 Summary Jurisdiction (Scotland) Act, 1908, 8 Edw. 7, C. 65 § 35.

5 Wigmore, Pocket Code of Evidence, § 1331 (1st ed. 1910).

6 Millar, *The Modernization of Criminal Procedure,* 11 J. Crim. L. & C. 344, 350 (1920), and again in his address at Cincinnati before the American Institute of Criminal Law and Criminology; Millar, *The Function of Criminal Pleading,* 12 J. Crim. L. & C. 500 (1921).

7 See Dean, *Advance Specifications of Defense in Criminal Cases,* 20 A.B.A.J. 435 (1934).

8 Ariz. Crim. Proc. Rules 192 (1956); Ind. Stat. Ann. §§ 9-1631—9-1633 (1956); Iowa Code Ann. § 777.18 (1950); Kan. Gen. Stat. Ann. § 62-1341 (1949); Mich. Comp. Laws §§ 768.20, .21(1948); Minn. Stat. Ann. § 630.14 (1957); N.J. Rules 3:5-9 (1953); N.Y. Code Crim. Proc. § 295-1; Ohio Rev. Code Ann. § 2945.58 (Page 1954); Okla. Stat. Ann. tit. 22, § 585 (1937); S. D. Code § 34.2801 (1939); Utah Code Ann. § 77-22-17 (1953); Vt. Stat. Ann. tit. 13, §§ 6561, 6562 (1958); Wis. Stat. Ann. § 955.07 (1958).

quire such a rule.[9] A rule similar to Rule 12A now under consideration was proposed in the 1943 and 1944 preliminary drafts of the Federal Rules of Criminal Procedure,[10] but was never incorporated in the adopted rules.

The present proposed rule,[11] while more concisely stated, is basically the same rule that was rejected in 1946. After a demand to serve notice is initiated by the prosecution the defendant must, within five days after the demand, file notice of alibi stating the place where the defendant claims to have been at the time stated in the demand. The defendant is not required as in seven of the other states[12] to list witnesses, but the notice must be in writing. Like most of the alibi statutes, failure to comply with these requirements may result in exclusion of alibi testimony of persons other than the defendant. Patterning other alibi statutes which either by express provision or construction[13] place the exclusion of alibi evidence within the discretion of the trial judge, the harshness of strict exclusion in 12A is ameliorated by the conclusion, "unless the court for cause shown orders otherwise."

Purpose of Rule 12A. — Although the common law required no alibi notice, modern conditions have manifested, or perhaps merely dramatized, frequent abuses by counsel in manufacturing testimony.[14] The perjured alibi defense has been said to be "one of the main avenues of escape of the guilty."[15] Often "reasonable doubt" has been thrown upon state witnesses by the conflicting testimony of defense witnesses, whisked, a la Perry Mason, into the courtroom at the last minute affording the state little or no opportunity to check either the credibility or accuracy of the witness' statement. It is practically impossible for the state to expose such fabrications without benefit of investigation and sufficient time to prepare a rebuttal. In most cases the accused would not offer perjured alibi testimony with knowledge that the prosecution will have ample time to investigate its veracity.

The proponents of this rule contend that it will also work in favor of the innocent defendant. For in many cases an investigation of the alibi and subsequent determination by the prosecution of the truthfulness of said alibi will result in

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9 See *Annual Report of the Attorney General of the United States* (Cummings) (1933) 1, (1936) 2, (1937) 11, (1938) 9; *id.* (Murphy) (1939) 7.

10 FED. R. CRIM. P., Preliminary Draft 88-97 (1943); FED. R. CRIM. P., Second Preliminary Draft 80-89 (1944).

11 Proposed Rule 12A reads as follows:

> *No less than ten days before the date set for trial, the attorney for the government may serve upon the defendant or his attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the government proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served the defendant, if he intends to rely on the defense of alibi, shall not more than five days after service of such demand, serve upon the attorney for the government and file a notice of alibi which states the place where the defendant claims to have been at the time stated in the demand. If the defendant fails to serve and file a notice of alibi after service of a demand, he shall not be permitted to introduce evidence at the trial tending to show the defense of alibi other than his own testimony, unless the court for cause shown orders otherwise.*

COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 5-6 (1962) [Hereinafter cited as *1962 Proposed Amendments*].

12 ARIZ. CRIM. PROC. RULES 192 (1956); IOWA CODE ANN. § 777.18 (1950); KAN. GEN. STAT. ANN. § 62-1341 (1949); MICH. COMP. LAWS § 768.20 (1948); N.J. RULES 3: 5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1; WIS. STAT. ANN. § 955.07 (1958).

13 CAL. LAW. REV. COMM., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS 11 (1960).

14 6 WIGMORE, EVIDENCE § 1855b (3d ed. 1940).

15 Millar, *The Modernization of Criminal Procedure,* 11 J. CRIM. L. & C. 344, 350 (1920).

a dismissal of the charges before trial.[16] What will be sufficient to dissuade the prosecution, however, is at best debatable and under no circumstances does this rule appear to be defense-orientated.

Constitutional problems. — While there are no federal decisions on the constitutionality of state alibi statutes, state courts have generally held them constitutional under the Federal Constitution.[17] A federal alibi statute, however, must face more than the "due process" attack. The objection has been made that the rule violates the accused's privilege against self-incrimination. However, in *People v. Shade*,[18] it was held that compelling the defendant to yield particular information to the district attorney in order to be eligible to use an alibi defense does not violate the privilege. As recently as 1962 the California Supreme Court in *Jones v. Superior Court*[19] quoted Professor Dean's comments as follows:

> [T]he alibi statutes do not infringe on the privilege of self-incrimination. Rather, they set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent. Rather they say to the accused: If you don't intend to remain silent, if you expect to offer an alibi defense, then advance notice and whereabouts must be forthcoming, but if you personally and your potential witnesses elect to remain silent throughout the trial, we have no desire to break that silence by any requirement of the statute.

There seems to be little reason to believe that such statutes violate the privilege against self-incrimination. The decision to use or not to use an alibi defense is a voluntary determination. The information sought concerns matters which the defendant says will exonerate him; and thus, he is not testifying against himself.[20] The *Shade* opinion that no innocent person could be injured by such a statute[21] seems to be a fair evaluation.

A perplexing question is whether the accused has the constitutional right to surprise the prosecution.[22] No case has been found where such a proposition has been advanced. If a trial is a search for truth and not merely a tournament of technique, it hardly seems that this limitation can be a deprivation of fair trial.

Another constitutional question is whether the accused's right to compulsory process under the Sixth Amendment entitles him to the appearance of any witness he desires to question without prior notice to the prosecution. Such an argument was successful in limiting the scope of a Washington statute similar to the alibi statute[23] but it would seem the rights to compulsory process are not unlimited in scope. For example, geographical restrictions on the right of an indigent to compel the attendance of witnesses without cost before the advent of the Federal Rules, were never held to be unconstitutional on these grounds.[24]

The placing of 12A within the discretion of the court obviates many constitutional infirmities since the courts would still be free to admit testimony or set aside a conviction where the inclusion of alibi testimony would deprive the accused of a fair trial.

Other problems. — Various problems have already been faced on a state level. It is generally held that compliance with provisions of the alibi statute is a prerequisite to the admissibility of the testimony of an alibi witness.[25] Where

16 *Op. cit. supra* note 13 at 9.
17 *E.g.*, State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931).
18 161 Misc. 212, 292 N.Y. Supp. 612 (Queens County Ct. 1936).
19 22 Cal. 879, 372 P.2d 919, 922 (1962) citing Dean, *Advance Specification of Defense in Criminal Cases*, 20 A.B.A.J. 435, 440 (1934).
20 People v. Shade, 161 Misc. 212, 292 N.Y. Supp. 612, 615 (1936).
21 *Id.* at 619.
22 *Op. cit. supra* note 13, at 15.
23 State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931).
24 FED. R. CRIM. P. 17(b).
25 *E.g.*, State v. Parker, 166 Kan. 707, 204 P.2d 584 (1949).

the defendant gave only oral notice,[26] or abandoned one alibi and tried to substitute another,[27] or attempted to introduce a time card where alibi notice was not given,[28] the court refused admission of the evidence. One problem dealt with in some states, viz., whether the defendant should be allowed to give his own testimony as to his alibi without giving notice,[29] is resolved by the exclusion of the defendant's testimony from the notice requirement of Rule 12A. While none of the state statutes make this distinction, there is little reason to include the defendant's testimony, since the prime purpose of the statute is the elimination of the parade of alibi witnesses at the close of the trial and the value of the accused's uncorroborated alibi would be negligible.

In interpretating alibi statutes, state courts have held that these statutes do not shift the burden of proof to the defense.[30] It was also ascertained that under no conceivable theory should a document alleging the intention to use an alibi defense be presented to the jury, when in fact, there has been no evidence of alibi, since such could not do other than prejudice the jury.[31]

Critique. — A survey conducted in 1940 on the practicality of state alibi statutes revealed that they have been of questionable utility.[32] There appears to be general indifference to the alibi rule.[33] In fact, one prosecutor reports that the statute is seldom invoked because it is of little effect in overcoming a well-presented alibi defense.[34] There is also the possibility of indirect disadvantage to the prosecution; a skillful defense lawyer will undoubtedly highlight in summation that this alibi was unshaken, unrebutted — in spite of the fact that the state knew of the testimony long in advance of the trial. Furthermore, a substantial number of prosecutors polled felt that the common law practice is not unjust to the state.[35]

The California Law Revision Commission, after careful study, recommended that a well-drawn and wisely applied alibi statute will be a useful tool in the prosecution of criminals, but (contrary to Professor Millar's opinion)[36] such would be of little value without provision for the disclosure of names of witnesses.[37] One certainly cannot overlook the opposition such an extension would create, but in order to be worthwhile an alibi rule must be effective. Merely designating the "place" will be of minimal value to the prosecutor attempting to test the credibility of the alibi. It also appears that, since the prosecution has deprived the defense of an element of surprise, there should be provisions made for reciprocity. A list of witnesses the prosecution intends to rely upon to establish the defendant's presence at the scene of the crime might be required. Since the invoking of the alibi procedure is discretionary with the prosecution, he might well forego his privilege if such disclosure by the defense is not worth the information he must disclose in return. Such a provision, while limiting the alibi rule as a weapon of the prosecution, goes far to encourage the quest for truth. It also protects the defendant's rights by maintaining the delicate balance of power between the prosecution and the defense.

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26 Balzhiser v. State, 35 Ohio L.R. 120, 10 Ohio L. Abs. 666. (App. 1931).
27 State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952).
28 People v. Longaria, 333 Mich. 696, 53 N.W.2d 685 (1952).
29 People v. Rakiec, 289 N.Y. 306, 45 N.E.2d 812 (1942).
30 State v. Whitely, 100 Utah 14, 110 P.2d 337 (1941).
31 State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943).
32 Stayton & Watkins, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEXAS L. REV. 151 (1940).
33 *Id.* at 158.
34 Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case — A Conversation with a Prosecuting Attorney,* 7 PRAC. LAW. 44, 57 (Nov. 1961).
35 Stayton & Watkins, *supra* note 37 at 157.
36 Millar, *The Statutory Notice of Alibi,* 24 J. CRIM. L. & C. 849, 859 (1934).
37 CAL. LAW. REV. COMM., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS, 20 (1960).

II. Depositions: Amendments To Rule 15

Background. — The previous history of defendants prosecuted and convicted upon ex parte depositions taken in the absence of them and their counsel caused widespread doubt as to the propriety of depositions taken by the prosecution. This resulted in general legislative omission in providing for such authority.[38] Chief Justice Taft expressed the need for a new rule as early as 1905 when he observed:

> Another principle of the law of evidence embodied in the constitutional limitations is that the defendant must be confronted with the witnesses who testify against him. This seems to impose unnecessary hardships upon the government, because it certainly would not injure the defendant if depositions were taken and the defendant or his counsel were permitted to cross-examine.[39]

A remedy was effected in some states by statute and presently some twenty-two jurisdictions[40] permit depositions to be taken by the prosecution, some with limitations as to classes of cases, or with requirements of consent by the defendant.

Both in the preliminary and second drafts to the original Federal Rules of Criminal Procedure, provisions were made for the taking of depositions by the prosecution; measures for the protection of the defendant's rights were therein included.[41] The present amendments to Rule 15[42] do not differ materially from the deleted provisions of the 1943-1944 proposals. They permit the government to take depositions for the same reasons as the defendant, with a subsection for protecting the defendant's right to be present at the taking of the deposition and provision for paying the expenses of the defendant and his counsel when the deposition is taken at the instance of the government or a witness.

Constitutional Problems. — In almost every state constitution recognition has been given to the right of confrontation by clauses requiring that in criminal cases the accused shall be "confronted with the witness against him" or "brought face to face" with him.[43] However, with the exception of certain Texas decisions[44]

38 5 Wigmore, Evidence § 1398 (3d ed. 1940).

39 Taft, *The Administration of the Criminal Law*, 15 Yale L.J. 1, 10 (1905).

40 5 Wigmore, Evidence § 1398, note 6 (3d ed. 1940); Mo. Sup. Ct. Rule 25.13.

41 Fed. R. Crim. P., Preliminary Draft 98-102 (1943); Fed. R. Crim. P., Second Preliminary Draft 90-94 (1944).

42 Proposed amendments to Rule 15 read as follows:

> *(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.*
>
> *(g) At Instance of the Government or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.*

1962 Proposed Amendments 6-7.

43 5 Wigmore, Evidence § 1397 (3d ed. 1940) (note 1 lists the constitutional provisions of all the states.).

44 Kemper v. State, 63 Tex. Crim. 1, 138 S.W. 1025 (1911). Cline v. State, 36 Tex. Crim. 320, 36 S.W. 1099 (1896); *contra* Robertson v. State, 63 Tex. Crim. 216, 142 S.W. 533 (1912).

no case was found in which a statute authorizing the taking of depositions against the accused person has been held unconstitutional. But several state courts have used language indicating that they would regard such statutes as inconsistent with the right to confront witnesses.[45]

There existed at common law the right to read a deposition in court if such deposition had been taken in the presence of the defendant and the defendant's counsel had the right to cross-examine.[46] This right was contingent upon proving to the satisfaction of the court that the witness at the time of the trial was dead, insane, or too ill, to be expected to attend the trial; or, he was kept away by the connivance of the defendant.[47] In *West v. Louisiana*,[48] the Supreme Court extended the common law rule to admit the deposition of a witness who was permanently beyond the jurisdiction of the state. Such an extension was held not to deprive the defendant of due process under the Fourteenth Amendment. The Court avoided the question of violation of the Sixth Amendment by stating that that amendment does not apply to state courts. Rule 15, as amended however, would have to meet this contention head on.

A definitive statement by the Supreme Court on the extent and guarantee of confrontation appears in *Mattox v. U.S.*:[49]

> The primary object of the constitutional provision in question, was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of that advantage of that personal preference of the witness before the jury which the law had designed for his protection. But, general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . The law in its wisdom declares the rights of the public shall not be wholly sacrificed in order that the incidental benefit may be preserved to the accused.

Thus, confrontation has two purposes: to secure for the opponent the opportunity of cross-examination, and the secondary advantage of "demeanor evidence." There is no denial that demeanor evidence is of great value to the accused and should be insisted upon whenever it can be had.

> The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity on the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradiction, the explanations, the intelligence or want of intelligence of the witness, the passions which move or control fear, love, hate, envy or revenge — are all open to observation, noted and weighed by the jury.[50]

But, common law never recognized any right to an indispensable thing called confrontation differentiated from the right of cross-examination.[51] This secondary advantage does not arise from the confrontation of the opponent and the witness. The witness' presence before the tribunal, which secures this secondary advantage,

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45 *E.g.*, Kaelin v. Commonwealth, 84 Ky. 354, 1 S.W. 594 (Ct. App. 1886); State v. Chambers, 44 La. Ann. 603, 10 So. 886 (1892).

46 5 WIGMORE, EVIDENCE § 1398 (3d ed. 1940).

47 *Id.* at §§ 1402-10.

48 194 U.S. 258, 262 (1904).

49 156 U.S. 237, 242-3 (1895).

50 APPLETON, EVIDENCE 220 (1860), quoted in 5 WIGMORE, EVIDENCE § 1395 (3d ed. 1940).

51 State v. Heffernan, 24 S.D. 1, 123 N.W. 87 (1909). 5 WIGMORE, EVIDENCE § 1397 (3d ed. 1940).

is a result tangentially associated with the process of confrontation whose original and fundamental object was to permit the opponent's cross-examination. If the evidence of the witness was taken in the defendant's presence and there was adequate opportunity for cross-examination, it has been held that the defendant has had all the protection which the Constitution and the Bill of Rights were intended to secure for him.[52] This satisfaction of the right to cross-examination disposes of any so-called right of confrontation.[53]

Critique. — The amendment attempts to protect the defendant by giving him the right to face the witness and to cross-examine him. Provision is even made for paying for the expense of travel and subsistence of the defendant and his counsel for the attendance at the examination; but, arguably, there is still an abrogation of a right of the defendant insofar as "demeanor evidence" is excluded.

The question arises whether this so-called "secondary feature" is merely a dramatic garnishment, a preliminary measure appurtenant to cross-examination. There are many nuances aside from the literal import of the testimony, which are impossible to record.[54] It is submitted that there is an invaluable right to this elusive and incommunicable evidence of the witness' deportment while testifying which weighs heavily upon the decision of the judge and the jury. Can a defendant damned by the words of an invisible accuser be said to have been given a fair trial under the Sixth Amendment?

III. Pre-trial Procedure: Rule 17A

Background. — Proposed Rule 17A would establish a basis for pre-trial conferences in criminal cases.[55] Upon the motion of either party or upon its own motion, the court may order the parties to appear before it to consider such matters as will promote a fair and expeditious trial. There are provisions made for protecting some of the defendant's rights: No admission of guilt shall bind the defendant or be admissible in evidence, and the rule shall not be invoked in the case of a defendant not represented by counsel. The fundamental powers of the court are somewhat enlarged by the rule but the real purpose is to foster the utilization of such procedures.

In Missouri and New Jersey there are court rules for pre-trial procedure[56] and even in the absence of a rule, pre-trial conferences have been utilized in both federal and state courts.[57] The pre-trial rule proposed in both preliminary drafts[58] encountered considerable resistance. Some prosecuting attorneys took the position that such a rule would encourage "fishing expeditions" by the defendants while other members of the bar feared that such a rule might operate as a judicial device of subtle intimidation for eliciting confessions and stipulations from the defendant.[59] In face of such opposition the proposal was deleted from the adopted Federal Rule of Criminal Procedure. Proposed Rule 17A differs substantially from the

52 People v. Fish, 125 N.Y. 136, 26 N.E. 319 (1891).

53 5 Wigmore, Evidence § 1396 (3d ed. 1940).

54 See Ryland's dissent in State v. McO'Blenis, 24 Mo. 402, (1857).

55 Proposed Rule 17A reads as follows:

> *At any time after the filing of the indictment or information the court upon motion of either party or upon its own motion may order the parties to appear before it for one or more conferences to consider such matters as will promote a fair and expeditious trial. No admission of guilt at the conference shall bind the defendant or be admissible in evidence. This rule shall not be invoked in the case of a defendant who is not represented by counsel.*

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56 Mo. Sup. Ct. Rule 25.09; N.J. Rules, 3:5-3.

57 See Kaufman, *The Apalachin Trial: Further Observations on Pre-Trial In Criminal Case,* 44 J. Am. Jud. Soc'y 53 (1960).

58 Fed. R. Crim. P., Preliminary Draft 86-88 (1943); Fed. R. Crim. P., Second Preliminary Draft 78-80 (1944).

59 Kaufman, Pre-Trial in Criminal Cases, 42 J. Am. Jud. Soc'y 150 (1959).

earlier proposals. It is of wider scope because it is not limited by a listing of the general areas open to pre-trial procedure; it may also be initiated by either counsel instead of only by the court. But most significantly, the pre-trial procedure is initiated by a court order rather than by a judicial invitation.

Purpose of the Rule. — Fundamental principles of pre-trial procedure seem to be applicable to criminal as well as civil cases. Patterned on the civil pre-trial procedure rule, this proposed rule establishes legal machinery for simplifying, shortening, and possibly avoiding, a trial. It is hoped that pre-trial procedure will: 1) reduce the number of witnesses who must be called for the purpose of verifying records; 2) eliminate the necessity of the time-consuming process of detailed examination by opposing counsel in the courtroom of documents which he has not previously seen; 3) avoid the delay of recording and numbering exhibits during the course of the trial; 4) eliminate the delay and confusion in the examination of witnesses (since each attorney will have an index of exhibits bearing pre-assigned numbers, and therefore can quickly locate the particular exhibit needed in the examination of witnesses); 5) obviate the necessity of discovery motions, or at least reduce the number of such motions and, in general; 6) save time and money while making the job of the trial judges and attorneys easier and more conducive to the promotion of justice.[60] Although the rule's object is not to solicit pleas, the defendant's realization of the strength of the prosecution's case may induce a plea of guilty and eliminate the trial. The benefit of all this elimination and simplification is that there is lesser likelihood of burial of relevant material in a morass of evidence.

The value of pre-trial procedure may be most readily seen by looking at particular cases where it has been successfully used. One illustration[61] of this occurred when the government proposed to introduce eighteen thousand documentary exhibits. At the suggestion of the court the government pre-numbered all the exhibits and made them available to opposing counsel substantially in advance of trial. Upon appraisal of such overwhelming evidence, defense counsel who previously believed the government would not be able to prove its case, conferred with his clients with a resulting plea of guilty. The ultimate result was the saving by the government of between fifty and one hundred thousand dollars and four to six months of court time. A collateral benefit from the expeditious use of court time was the insuring of the right to speedy trial to other litigants.[62] Even the defense counsel was enthusiastic about the use of pre-trial procedure in this case. He is quoted as saying:

> I think pre-trial [proceedings] played a very substantial part in getting the case disposed of in a proper way, without consuming several months of time which I believe would necessarily have been consumed in an actually contested trial. As a result of thousands of exhibits being made available to the defense attorneys for inspection, a proper disposition of the case was brought about, whereas it is doubtful that this could have been accomplished without pre-trial proceedings.[63]

In a conspiracy case the number of defendants was reduced from forty-six to nineteen after pre-trial, and such procedure as choosing one counsel as spokesman, and working out an apportionment of preemptory challenges reduced the trial time to one third of what it would have been.[64] The Apalachin trial[65] which would have taken a minimum of six months was completed in eight weeks due to the expedience of pre-trial procedure. The testimony of over one hundred witnesses, usually concomitant with authentication, was preempted by the defense not pressing its right to have such made during the trial. The government in return showed itself willing to make grand jury minutes and other statements of

60 West, *Criminal Pre-Trials — Useful Techniques,* 29 F.R.D. 436, 438 (1962).
61 *Id.* at 440.
62 Estes, *Pre-Trial Conferences in Criminal Cases,* 23 F.R.D. 560 (1959).
63 *Id.* at 562.
64 Kaufman, *op. cit. supra* note 59 at 154.
65 United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959).

witnesses available in advance of trial. A genuine spirit of co-operation existed and, with no loss of real rights, there was an inestimable gain in speed and efficiency.[66]

It is certain that an informed and resourceful judge can mold available procedures and techniques to fit a particular case. By using his persuasive powers the judge can produce a climate conducive to voluntary agreements, and eliminate an unnecessarily bulky record, thus simplifying and expediting the handling of voluminous documentary evidence and resolving numerous procedural problems.[67]

Constitutional Problems. — There seems to be a serious question of constitutionality in the wording of Rule 17A. While the 1943-1944 proposals and the existing state court rules are voluntary procedures, this new rule is couched in mandatory terms. Because of guarantees afforded criminal defendants under the Fifth and Sixth Amendments, and the inherent pitfalls of self-incrimination and abuse of fair trial latent in pre-trial procedure, any rule effected must be on a voluntary basis.[68] The stipulations that no admission of guilt at the conference shall bind the defendant and "the rule shall not be invoked in the case of a defendant who is not represented by counsel," while insuring some of the defendant's rights, do not seem to completely ameliorate the unconstitutionality of a mandatory pre-trial rule. The securing of admissions of fact and of documents from a defendant without placing the trial judge under suspicion, and in many cases under direct charge of "compelling a defendant to be a witness against himself," is an impossible task.[69]

Critique. — Although there is less precedent for pre-trial conference in criminal than in civil cases, pre-trial criminal procedure has been successfully employed in a sufficient number of cases to manifest its usefulness. Although all attempts reported seem to have been restricted to the "big" or protracted case, there are certainly benefits which might readily accrue to the use of such procedure in any complicated litigation.

Since there seems to be a marked disinclination on the part of federal judges to utilize their existing power to conduct pre-trial conference even in cases demanding such attention, any rule leaving the initiation of such procedure to the judge, as in the 1943-1944 proposals, would render the rule innocuous.[70] Rule 17A, however allows either the prosecution, the defense, or the court to activate the procedure. Thus, if 17A is passed even those judges who are presently hesitant to chance possible encroachments on the rights of the defendant will be obligated to engage in requested pre-trial conferences.

While the possibility of a weak judge catering to the whims of the prosecution turning a particular conference into an inquisition is a conceivable danger, there does not seem to be an imminent threat of the inquisitorial practice replacing the adversary system. Pre-trial procedure actually facilitates the adversary system by eliminating cumbersome evidentiary and procedural digressions. However, while the values of the procedure cannot be denied, its possibilities for encroachment on the rights of the defendant are great. It is felt that such procedure must be carefully circumscribed within fixed limits and, regardless of its advantages, should not be forced upon an unwilling defendant. A great advantage of this procedure is the co-operation between the prosecution and the defense in the search for truth. No such co-operation can be mandated by court order.

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66 Kaufman, *The Apalachin Trial: Further Observations on Pre-Trial in Criminal Cases*, 44 J. Am. Jud. Soc'y 53 (1960).

67 Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 399, 400 (1960).

68 *Id.* at 399-400.

69 Fee, *Pre-Trials in Criminal Cases*, 4 F.R.D. 338 (1946).

70 *Id.* at 343.