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## GUILTY PLEA NEGOTIATIONS AND THE EXCLUSIONARY RULE OF EVIDENCE: A CASE STUDY OF CHICAGO NARCOTICS COURTS\*

J.A. GILBOY\*\*

The exclusionary rule makes inadmissible at a criminal trial evidence obtained by law enforcement officers in violation of the defendant's constitutional rights.<sup>1</sup> However, a very large number of criminal cases are terminated not through trials but rather through pleas of guilty.<sup>2</sup> An examination of the way in which the exclusionary rule operates in these latter cases is critical to an understanding of the actual impact of the rule on the criminal justice system.

Some legal commentators have speculated that in guilty plea negotiations the prosecutor may frequently offer the defendant a more attractive, that is more lenient, sentence if the defense agrees to forego

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<sup>1</sup>The exclusionary rule, as applied to unlawful searches and seizures, was first enunciated in *Weeks v. United States*, 232 U.S. 383 (1914), wherein the Supreme Court held that in a federal prosecution the fourth amendment barred the use of evidence obtained through an illegal search and seizure. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the rule was extended to the states through the due process clause of the fourteenth amendment. This article deals only with the application of the exclusionary rule to narcotics cases in which searches and seizures fail to comply with fourth amendment requirements.

<sup>2</sup>It is estimated that guilty pleas constitute approximately 90 per cent of all convictions. See generally D. NEWMAN, *CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 9 (1967).

the filing of a motion to suppress evidence illegally obtained by the police.<sup>3</sup> It has been suggested that such practices may lead to a wholesale abandonment of motions to suppress illegal evidence even where the motions have substantial merit because "when the benefits of a guilty plea are made attractive enough, even the slightest doubt concerning the validity of a procedural defense may lead to compromise."<sup>4</sup> Such practices may be regarded as unfair because "[a]lleged infringements of vital constitutional rights ought not be the occasion of reduced sentences that give a discount to the guilty and an almost irresistible bargain to those who probably could not be convicted."<sup>5</sup> The alleged existence of such practices also has a bearing on the current debate concerning the impact of the exclusionary rule in deterring illegal police practices.<sup>6</sup> For example, the absence of a demonstrable deterrent impact may be explained by defenders of the rule as attributable in part to wide-spread "evasion" of effective judicial enforcement by plea bargaining practices.<sup>7</sup>

In 1970 Professor Dallin Oaks stated that "[t]he

<sup>3</sup>See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 79-82 (1968) [hereinafter cited as Alschuler]; Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80, 96 (1969); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 748-49 (1970) [hereinafter cited as Oaks]; Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 73 (1967). See generally H. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 221-26 (1968).

<sup>4</sup>Alschuler, *supra* note 3, at 81.

<sup>5</sup>Oaks, *supra* note 3, at 748. For a contrasting opinion see White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 458-62 (1971).

<sup>6</sup>For a 1970 survey of research on the effectiveness of the exclusionary rule in deterring illegal police behavior see Oaks, *supra* note 3. A more recent examination of this issue appears in Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). See also Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973) and a thorough critique of this recent research in Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

<sup>7</sup>See, e.g., Alschuler, *supra* note 3, at 82, 83.

numerical importance and current interest in the question of plea bargaining and sentencing should be a strong incentive for empirical inquiry to determine the true relationship between these subjects and the exclusionary rule."<sup>8</sup> However, no such studies have appeared.<sup>9</sup> This article examines the subject with respect to events in Chicago's two narcotics courts.<sup>10</sup> The focus is on the nature of the relationship between plea negotiation and the exclusionary rule of evidence as it is portrayed in the comments and actions of prosecutors in those courts.

The materials on which this study is based were gathered during 1974 as part of a larger study. They are composed of thirty-one days of observations of court hearings and plea negotiations,<sup>11</sup> and interviews with six prosecutors who were associated with the court during the period of research. These prosecutors were asked to discuss their specific practices in cases which had been observed and to describe their general approach to prosecuting cases with evidentiary issues. The interviews were open-ended, focusing, among other things, on the prosecutors' personal views and practices. Additional materials about the practices of prosecutors were gathered from contacts with defense lawyers, whose descriptions of practicing law in the narcotics courts were an invaluable source of information.

#### THE SETTING OF PLEA NEGOTIATIONS IN THE NARCOTICS BRANCH COURTS

In Chicago two "branch" courts have been specially created to handle narcotics offenses.<sup>12</sup> Prelimi-

<sup>8</sup>Oaks, *supra* note 3, at 749.

<sup>9</sup>There is very little information concerning the waiver of procedural defenses as an object of guilty plea negotiations. Fragmented information from Los Angeles suggests the litigation of procedural issues in that city precedes, and is independent of, guilty plea negotiation. See Alschuler, *supra* note 3, at 82 n.73 and Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 LAW & SOC'Y REV., 187, 193 (1974).

<sup>10</sup>In considering the relationship of plea negotiation and the exclusionary rule in Chicago, several commentators have suggested that the litigation of procedural issues appears to precede plea negotiation in that city. See Alschuler, *supra* note 3, at 81 n.73; Oaks, *supra* note 3, at 688.

<sup>11</sup>The observations of plea negotiations in the narcotics courts were conducted during February, March, April, and June 1974. Interviews with the prosecutors in the narcotics courts were held during this period as well as in subsequent months of 1974.

<sup>12</sup>Branch Court 25 hears cases from the south side of Chicago as well as cases of the police department's vice control unit. Branch Court 57 hears cases from the north side of Chicago and cases of the Illinois Bureau of Investigation and the Metropolitan Enforcement Group.

nary matters in felony narcotics cases—preliminary hearings, the setting of bond, motions to suppress evidence on constitutional grounds—are heard in these branch courts. Pleas of guilty to felony informations and to felony charges reduced to misdemeanors also occur in the branch courts. Trials in felony cases take place in different courts. In misdemeanor narcotics cases, however, bench trials as well as preliminary matters take place in the branch courts.<sup>13</sup>

The Cook County state's attorney's office assigns to these two narcotics branch courts one supervisor and a total of four to five assistant state's attorneys. The assistants are authorized by the supervisor to handle plea negotiations in misdemeanor cases and certain lesser felonies. In more serious felony cases, plea negotiation is handled by the supervisor.<sup>14</sup>

Plea negotiations with the supervising state's attorney usually occur on the day in which the preliminary hearing or the hearing on a motion to suppress evidence takes place in the narcotics courts. Occasionally, however, the supervisor is approached a few days earlier. The negotiation takes place in a small room adjacent to one of the courts.<sup>15</sup> The room houses the desks of the state's attorney supervisor, his assistants, and the court police sergeant; it is usually crowded and noisy. Since the assistants carry out almost all of the work in the courtroom itself in both felony and misdemeanor cases, when a defense attorney approaches the supervising state's attorney about a possible guilty plea the supervisor usually has no idea what the case is about.<sup>16</sup> The supervisor refuses to discuss any case until he has before him the defendant's "rap sheet," a list of the defendant's prior arrests and convictions. Copies of the police reports and search warrant, if any, are also consid-

<sup>13</sup>Defendants requesting a jury trial are sent to one of the two misdemeanor jury trial courts. It should be pointed out, however, that such transfers are seldom requested.

<sup>14</sup>The bulk of plea negotiations by the assistant state's attorneys involved marijuana cases. In "controlled substances" cases, the supervising state's attorney conducted the plea negotiations. See generally Cannabis Control Act, ILL. REV. STAT. ch. 56½, §§ 701 *et seq.* (1975) and Controlled Substances Act, ILL. REV. STAT. ch. 56½, §§ 1100 *et seq.* (1975).

<sup>15</sup>Plea negotiations were observed for fifteen days in the supervising state's attorney's office. Verbatim notes of plea negotiations and other conversations were made during this period.

<sup>16</sup>The assistant state's attorneys conducted the preliminary hearings in felony cases, and hearings on motions to suppress evidence and quash search warrants in misdemeanor and felony cases. The outcomes of these proceedings were then made known to the supervisor through a check sheet attached to the state's attorney's office file on each case.

ered essential. In addition, the arresting police officer is usually present; he may be asked questions by the supervisor and sometimes by the defense lawyer as well.

During the supervisor's review of the case the defense lawyer will often add comments elaborating on a point or modifying the police officer's statements with information supplied by his client, sometimes relaying a story completely different from the police officer's. Occasionally the defendant may be brought into the office on the request of the supervising state's attorney or on the initiative of the defense lawyer. When this occurs there usually has been some suggestion by the defense lawyer that the defendant be treated differently than the "usual" defendant in such a case. The supervisor will listen to the defendant's special plea, such as a serious illness which would create a hardship if he went to the penitentiary for a lengthy period. The defendant is then asked to leave the office and the supervisor will give the defense attorney the state's offer if the client will plead guilty.<sup>17</sup>

The setting for plea negotiation with the assistant state's attorneys is different and in most cases takes place in open court.<sup>18</sup> When a case is called, the defense lawyer, his client, and the arresting officer will approach the bench. The assistant state's attorney will briefly read to himself the police officer's arrest report and direct any questions he has to the officer who is standing next to him. He may then lean over and whisper to the defense lawyer or vice versa. The case may be delayed for a few minutes

<sup>17</sup>Plea negotiations directly between the prosecutors and defendants were not observed. One special form does exist, with the police officer in the case as an intermediary. It may be suggested by the police to the defendant that if he cooperates in revealing the identity of his dealer or other persons in the chain of supply, the prosecutor may offer him a lesser sentence or altogether drop the charges pending against him. In this regard, it should be noted that plea negotiation between prosecutors and defendants, prior to the appointment of counsel, is not unusual in certain areas of the country. See Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 904 (1964). Whether plea negotiations with defendants in these jurisdictions are used by the prosecution to avoid scrutiny and litigation of evidentiary claims by defense lawyers cannot be stated with certainty at this time.

<sup>18</sup>Observations of court proceedings and the work of assistant state's attorneys were made on seven days in Branch Court 25 and eight days in Branch Court 57. In both courts, court proceedings were observed from a seat next to the judge's bench. During court recesses, when prosecutors and defense lawyers were not being interviewed about specific cases that had been observed, this observer was in the judge's chambers listening to conversations between the judge and prosecutors and an occasional defense lawyer who came back to the chambers.

until the assistant has had more time to talk with the defense lawyer, or the assistant may immediately announce the results of their previous plea negotiations, either that an agreement has been reached and the defendant will plead guilty, or that they are unable to reach any agreement on an acceptable sentence. While cases are being prosecuted by one assistant state's attorney, the other may be standing back a little way from the judge's bench discussing cases with defense lawyers who have approached him or whom he may have approached about offers in their cases. The sentencing offers made by the assistants are not totally discretionary. Guidelines for plea negotiation are established by the supervising state's attorney which set forth the minimum amount of probation and jail time the assistant may offer in certain types of cases and also set forth the routine reductions from felony to misdemeanor charges which will be allowed to defendants.<sup>19</sup>

#### VOLUNTARY DISMISSALS OF CASES APART FROM PLEA NEGOTIATIONS

As a preliminary matter, it may be noted that, even before any plea negotiations had taken place, prosecutorial policies observed in the Chicago narcotics courts to some extent reflected the existence of prospective claims that the evidence had been illegally seized. The screening of cases for such claims

<sup>19</sup>The existence of guidelines is itself a limit on the "attractiveness" of a sentence the assistant state's attorneys could offer a defendant on a guilty plea in a marijuana case. The following are guidelines for marijuana actions:

##### *Marijuana possession*

- (1) Possession of 30 to 250 grams of marijuana to be reduced to a Class A misdemeanor (from a Class 4 felony) whether or not there is a plea of guilty.
- (2) Possession of 250 grams to approximately 1000 grams of marijuana to be reduced to a Class A misdemeanor (from a Class 4 or 3 felony) in cases for plea of guilty only. A minimum sentence of straight probation to be given to the defendant.
- (3) Possession of over 1000 grams to 5 pounds to be reduced to a Class A misdemeanor (from a Class 3 felony) in cases for a plea of guilty only. A minimum sentence of straight probation and jail time of 30 days of jail or more to be given.

##### *Marijuana Deliveries*

(At the beginning of the research the state's attorney's office policy was to seek jail time. Later they were allowed to accept pleas of guilty to straight probation in some cases.)

Plea negotiation guidelines are unusual for a prosecutor's office. In one questionnaire study 70 per cent of the prosecutor's offices responding had not established any formal rules or procedures with respect to plea negotiation. See Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 900 (1964).

occurred at two stages: (1) after the police had filed charges in the branch court but prior to any court hearing in the case; and (2) after a finding of probable cause at a preliminary hearing in a felony case but prior to the case being bound over for consideration by the grand jury.

Approximately 55 per cent of all charges initially filed in the narcotics courts were voluntarily withdrawn from further prosecution by the state's attorney.<sup>20</sup> This high proportion of cases voluntarily dismissed reflects in part the absence in Chicago of any prosecutorial screening of cases prior to the time the police file charges in the narcotics courts.<sup>21</sup> In a handful of the observed cases defense lawyers went to the supervisor, who was in his office, to ask that a case be dismissed.<sup>22</sup> Most of the screening and dismissal of cases, however, was done in court by the assistants who performed this function in all cases, regardless of the seriousness of the charge. From one to as many as seven cases a day, involving one or more defendants and charges, were observed to be

<sup>20</sup> An examination of charges disposed of during November-December 1973 reveals that of the 4460 ordinance, misdemeanor and felony charges disposed of, 2460 or about 55 per cent of the charges were dismissed by the state's attorneys in the narcotics branch courts. Statistics were calculated from the Daily Court Sheets of the Municipal Department of the Circuit Court of Cook County. On these sheets judges daily record their findings and dispositions for every defendant heard by the court that day. See Table I.

Some of the 4460 charges dismissed by the prosecutor in the narcotics courts would probably have never reached the courts if a pre-charge screening process existed. Charges with substantial evidentiary issues, for instance, could be recognized at the pre-charge screening stage. Other dismissals of charges, however, would probably not be affected by pre-charge screening, as where charges are dismissed after a laboratory analysis of the alleged drug discloses no narcotic content or the defendant produces a prescription. No study exists which evaluates the relative importance of these various reasons in the dismissal of charges in Chicago's narcotics courts. For such a study of dismissals in New York City see S. Cooper, *Dismissal of Narcotics Arrest Cases in the New York City Criminal Court, 1970* (paper reproduced by the Rand Corporation).

<sup>21</sup> For many years the state's attorney's office in Cook County did not review any felony charges prior to the filing of the complaints in court. See McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968). At the time of the study, the police needed the approval of the state's attorney's office before filing felony charges in cases of "violent felonies" such as rape, murder, aggravated battery, and armed robbery. However, they did not need this approval in narcotics, auto theft, and forgery cases.

<sup>22</sup> See Table II (c). In eight of the cases observed, defense lawyers either prior to or after the preliminary hearing approached the supervising state's attorney to have the case dismissed.

TABLE I  
DISPOSITION OF ORDINANCE, MISDEMEANOR AND  
FELONY CHARGES IN CHICAGO'S NARCOTICS BRANCH  
COURTS 25 AND 57, NOVEMBER-DECEMBER 1973

	No.	Per Cent
Held to the Grand Jury	136	3.05
Dismissed		
Dismissed for Want of Prosecution	151	3.39
Leave to File Denied	172	3.86
Non-Suit	472	10.58
Discharged	2	.04
Negative Lab Report	257	5.76
Nolle Prosequi	25	.56
Stricken on Leave to Reinstate	1381	30.96
TOTAL	2460	55.15
Discharged		
Motion to Suppress/to Quash Sustained	674	15.11
No Probable Cause at a Preliminary Hearing	96	2.15
Misdemeanor Trial-Discharged	65	1.46
TOTAL	835	18.72
Findings and Pleas of Guilty, Supervision		
State's Attorney Drug School-Supervision	239	5.36
Misdemeanor Trial-Finding of Guilty	61	1.37
Pleas of Guilty		
Felony Informations	173	3.88
Misdemeanor Pleas of Guilty	556	12.47
TOTAL	1029	23.08
TOTAL	4460	100.00

voluntarily dismissed by the assistants. Typically after a case was called by the court clerk, the assistant state's attorney read through the police officer's case report and directed questions to the officer. In many cases where charges were dismissed, the defendant had not yet retained or been appointed counsel and the screening of cases was initiated entirely by the prosecutor.<sup>23</sup> In some instances the assistant announced the decision to dismiss the case with a brief explanation to the judge such as "a bad search" or "because of the manner in which the police gained the contraband."<sup>24</sup>

<sup>23</sup> The judge in Branch 25 was also observed initiating review of the police officer's arrest and search in a handful of cases. After reading the complaint against the defendant and questioning the police officer about the case he would tell the defendant, "If you had an attorney he'd make a motion to suppress and I'd sustain it." The state immediately dismissed the charges in such cases.

<sup>24</sup> But time pressures may operate to limit the number of cases in which the prosecutor can review and dismiss charges involving illegal searches and seizures. One assistant reported to the researcher that the court call in one of the narcotics courts moved along so quickly it was some-

The screening of cases by the prosecutor frequently occurred at a later stage in a case. In several of the observed cases questions about how the police had conducted their search emerged after testimony at the preliminary hearing. For example, the police officer might have made one statement at the preliminary hearing and another in his written police reports. In such a case the defense lawyer might bring his case to the supervisor's office and the supervisor would review the matter and decide to dismiss the case.<sup>25</sup>

Prosecutors indicated that they were generally cautious about "sticking their necks out" to voluntarily dismiss a case, and that if there was any question about it they were inclined to allow the case to go to trial. Each day the assistants were required

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times difficult for him to read through all of the police reports carefully and to question the police officer before the judge disposed of the case. What occurred in these cases was that the judge, after looking at the complaint against the defendant (who was not represented by counsel at the time) and seeing that the case involved, for instance, a small amount of marijuana, would offer the defendant a dischargeable misdemeanor probation if he would plead guilty. Cannabis Control Act, ILL. REV. STAT. ch. 56½, § 710 (1975). If the assistant had not reviewed the case in time he would allow the defendant to decide for himself whether "he was guilty" rather than attempt to apply any standard of the admissibility of the evidence at trial. Interview with an assistant state's attorney, Mar. 25, 1974.

<sup>25</sup>As illustrated in the following interview with an assistant state's attorney, a blend of considerations underlies the practice of dismissing cases with evidentiary claims prior to any plea negotiations, including: fairness to defendants, the expectation that defense lawyers will proceed on their motions regardless of an offer, and lack of time by prosecutors to conduct widespread plea negotiations.

Q: "How do you decide whether to "SOL" a case?"

A: "Well, it's based on your criminal law course in law school. Do you have the evidence? Does the state have the evidence, based on your knowledge of working in the courts as to whether you'd win the case. It's a matter of expedience. These are cases that if they were put on, the judge would sustain the motion."

Q: "Is it not possible to give a very good offer to encourage a plea of guilty?"

A: "Most defense lawyers know. They'd put on their motion, what do they have to lose if they put on their motion? Now if we made one offer if he put on the motion and one offer after he put it on, but we're not playing games with defense lawyers. We're fair to them. This isn't a poker game, we're not playing games, 'I'll give you this if you do this.' We don't have the time to do that, to be playing games."

Interview with assistant state's attorney, Nov. 7, 1974.

to prepare a list of the final dispositions of cases in court and give a one-line explanation for the particular disposition. Several assistants stated that if there were too many voluntary dismissals they would receive complaints from their superiors who review these sheets. Nevertheless, whatever the limitations on these practices it is clear that, apart from any plea negotiations, some cases with clearly substantial evidentiary claims were winnowed out and voluntarily dismissed by the prosecutors.<sup>26</sup>

#### PROSECUTORIAL POLICIES ON PLEA NEGOTIATIONS IN RELATION TO THE EXCLUSIONARY RULE

The supervisor of the two branch courts stated flatly that he rarely requires as a condition of his plea bargain offer that the defense forego making a motion to suppress evidence in the case. The supervisor's position on the subject was that his offers were based on the type of offense the defendant has committed, the defendant's personal background, prior criminal record, and any other mitigating and aggravating circumstances in the case:

Usually I do not object (if the lawyer proceeds on his motion to suppress evidence in court after being given an offer) because I'd be discriminating. If I gave an offer after the preliminary hearing and after the motion to suppress, taking your question to the logical conclusion those offers should be harsher. I don't think that's fair. The offer should be based on the type of case and the aggravating and mitigating factors.<sup>27</sup>

There are independent sources of information, apart from the stated policy, to warrant a similar conclusion about the practices of the supervisor. An important feature of plea negotiation was that the supervisor did not maintain control over its initiation. Assistant state's attorneys, for example, were

<sup>26</sup>In other cities, the exclusionary rules of evidence may also have an effect at the earlier stage of pre-charge screening. See F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 23, 40-41 (1970).

<sup>27</sup>Interview with the supervising state's attorney, June 5, 1974.

In a later conversation this supervisor again reiterated his attitude:

I'm going to be a defense lawyer some day. You have to give the defendant some leeway even though he's guilty. He has rights, and he should be allowed to have his motion to suppress heard. Now I know state's attorneys in the office who don't think so and won't even negotiate after a preliminary hearing. They send it to the trial level. I don't feel this way. My offer stood until the case went to the grand jury.

Interview with the supervising state's attorney, Sept. 24, 1974.

TABLE II

	No.	Per Cent
<i>Evidentiary Motions Litigated Prior to Plea Negotiations</i>		
(a) Prosecutor tells defense lawyer that if he had negotiated the case before the motion was made his client would not now be being penalized for making the motion.	0	0.00
(b) Prosecutor does not discuss the sentence implications of having made the motion prior to plea negotiations.	6	19.35
<i>Evidentiary Motions Available to be Litigated</i>		
(c) Possible motion discussed, case dismissed without any plea negotiation.	8	25.81
(d) Possible motion discussed, case dismissed after attempt at plea negotiation.	0	0.00
(e) Possible motion discussed, a sentencing offer made if the defendant pleads guilty, and defense told to make his motion in court if he wants to.	7	22.58
(f) Possible motion mentioned by defense, prosecutor does not mention offer based on foregoing motion.	5	16.13
(g) Possible motion discussed, defense told that guilty plea sentence based on foregoing motion.	5	16.13
	31	100.00

not instructed to, nor did they, intervene and pressure defense lawyers to take their cases to the supervisor to be negotiated before making motions to suppress evidence in court. Such a practice might be expected to exist if the supervising state's attorney was intent on negotiating pleas in all cases with motions to suppress. In practice, the cases negotiated were those brought to his attention by defense lawyers who came to his office. This role of the defense lawyer limited the number of cases with evidentiary issues which reached the plea negotiation stage.

In cases which were brought to his office by defense lawyers, the supervisor mentioned to the lawyers his reasons for the particular sentence offered—for instance, that the defendant had an extensive criminal record, or had been in possession of or had been selling a large amount of narcotics. The fact that the lawyer had already proceeded in court with a motion to suppress was never mentioned as part of these rationales.<sup>28</sup> If the supervisor were in fact interested in utilizing plea bargaining to control the number of motions to suppress filed in court, it might be expected that he would communicate to defense lawyers the policy of making a harsher sentencing offer after such motion was made.<sup>29</sup> Furthermore, in most cases where the defense lawyer had not yet made such a motion, but planned to do so after the offer was advanced, and made this known to the prosecutor, the supervisor did not attempt to

discourage the lawyer from doing so by indicating that his offer was based on the lawyer's agreement to forego such motion.<sup>30</sup>

A similar conclusion about the practices of the supervisor could be drawn from other observations of plea negotiation between defense lawyers and the supervisor. The defense lawyers, for instance, were prevented by the supervisor from basing their plea negotiations on the argument that they might prevail on a motion to suppress. If the supervisor was faced with such an argument, he was likely to encourage the defense lawyer to go to court and present his motion.<sup>31</sup>

Despite the supervisor's stated policy and the practices which are described above, in three of the observed cases the supervisor conditioned his sentencing offer on the defense lawyer's agreement to forego the motion to suppress evidence.<sup>32</sup> Upon questioning, he explained that in one of the cases he was very irritated with the lawyer and his client because they were "playing games" with him; the lawyer in particular demonstrated that he was "untrustworthy" when he told the supervisor he was going to do one thing in the case and then proceeded in court to do something entirely different. In the second case, the police indicated a special desire to obtain a conviction; and in the third case, the supervisor's own desire to assure a conviction appeared to be a motivating factor. The existence of such deviant cases is not unexpected given that the plea negotiation policies involved are entirely a creation of the supervisor. The standards are individ-

<sup>28</sup>The plea negotiations in ninety cases were observed. In thirty-one of these either the supervisor or the defense lawyer mentioned during negotiations that there was pending in the case a motion to quash a search warrant or a motion to suppress. The prosecutor's responses to this information appear in Table II.

<sup>29</sup>See Table II (a).

<sup>30</sup>See Table II (e), (f), as compared to (g).

<sup>31</sup>See Table II (e).

<sup>32</sup>These three cases involved five defendants as recorded in Table II (g).

ually set by him without review by his superiors and without fear of censure if he deviates from them.

While it seemed clear that the supervisor had a stated policy concerning plea negotiations in narcotics cases, the approaches and practices of his assistants in court varied significantly. Practices of some assistants were very similar to those of the supervisor. These assistants indicated that their sentencing offers were based on the defendant's background and the offense which he had committed, and not on whether a motion to suppress had been or would be made. One assistant explained his practice not in terms of fairness but by saying that he had no opportunity to do otherwise. Defense lawyers in court were accustomed first to litigating their motions to suppress in narcotics cases, and then to approaching him to discuss an offer only after they had lost on the motion. This assistant indicated that in cases where he might be interested in making a better offer because of the unlikelihood of success on the motion, the fact that defense lawyers approached him only after the motion was lost prevented him from doing so:

In one case a lawyer came up to me after he had lost his motion. It was a motion that could have gone one way or another, and there was a lot of drugs involved. I was talking about 5 years probation. If he had come up to me before the motion I probably would have been inclined to give him a better offer so that I'd be assured of the outcome of the case. But as I said we don't always get an opportunity to do this.<sup>33</sup>

While the practices of some assistants seem to parallel those of the supervisor, a contrary policy of conditioning sentence offers on the foregoing of evidentiary motions was seen by one assistant as absolutely essential to controlling the caseload in a court in which he worked. He noted that when he first worked in the court, he and the new judge serving in the court found themselves facing hundreds of charges to be heard each day. In a concerted effort to relieve the court of this burden, the assistant state's attorney took a stand that "you can't have your cake and eat it too." The defense lawyer could not put on his motion, and then expect his client to be treated the same way as if the motion had not been heard.<sup>34</sup>

It is, of course, not surprising that standards gen-

erated by the assistants on this matter would vary substantially in the absence of an established, comprehensive policy. The differing practices reflect different personal temperaments and attitudes, as well as different assessments of the practical necessities of the situation.

In sum, prosecutorial practices regarding plea negotiation and evidentiary claims in the Chicago branch courts do not fit into any simple pattern. The supervisor, who handles plea negotiations in major cases, had a stated policy of conducting such plea negotiations independently of evidentiary claims; his offers were not dependent on or affected by whether motions to suppress were or were not made. Other evidence indicates that the supervisor generally follows this policy. However, since it is entirely his own policy he is free to, and occasionally does, disregard it. The assistants who handle plea negotiations in less serious cases felt free to devise their own policies, despite the fact that their supervisor had formulated a stated policy. The results ranged from practices consistent with the supervisor's to a directly opposite approach of deliberately inhibiting and penalizing the making of motions to suppress through offering harsher sentences if they were made.

#### "SITUATIONAL" CONCESSIONS INHERENT IN FELONY PLEA NEGOTIATION AT THE BRANCH COURT LEVEL

The foregoing discussion is incomplete because it focuses on the branch court as a self-contained unit of the criminal process. In addition to examining the question of whether the prosecutor conditions sentencing offers on the foregoing of motions to suppress at that stage, it is necessary to consider the general pattern of plea bargaining practices in the criminal process which cause the issue to be raised at the branch court level in the first place. While prosecutors may "allow" motions to suppress to be litigated at the branch court level, this may be of less significance than the impact of plea bargaining practices which severely inhibit a defense lawyer from litigating such evidentiary issues at the trial level.

One very distinctive characteristic of the Chicago narcotics branch courts is their role as the court of final disposition for felony cases.<sup>35</sup> This includes not

<sup>33</sup> Interview with an assistant state's attorney, Oct. 10, 1974.

<sup>34</sup> Interview with an assistant state's attorney, Sept. 30, 1974. The attractiveness of a guilty plea offer which an assistant may make is restrained by the supervisor's plea negotiation guidelines. See note 19 *supra*.

<sup>35</sup> Table I contains data useful in answering the question as to what extent the branch court serves as the court of final disposition for narcotics felony charges. Although the number of felony charges not disposed of in the branch court is known (*i.e.*, the 136 charges bound over to the grand jury), the total number of felony charges initially filed in the branch court can only be estimated. This is

only the dismissal and discharge of felony cases, but also a use of the branch court as a central forum for pleas of guilty to felony informations and to misdemeanor charges reduced from felony charges.<sup>36</sup> This characteristic of narcotics cases in the branch court reflects in part the pervasive influence of the prosecutor's policies concerning plea negotiation. The state's attorney's office has a well-known policy of making its most attractive sentence offers at the branch court level, and it is generally agreed that prosecutors at the trial level will not "undercut" offers made at the branch level.<sup>37</sup> Defense lawyers anticipate that if their client does not take the state's sentencing offer on a plea of guilty at the branch level, they may sometimes receive the same, but in no event a more lenient, offer at the trial level; in most cases the offer at the trial level will be more severe.

These plea bargaining practices which tend to force disposition of felony narcotics cases at the branch court level of the criminal justice system, as

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because the categories of "dismissal" and "motions to suppress/to quash sustained" in Table I include both felony and misdemeanor charges. An estimate of the number of felony charges disposed of at the branch court level can be obtained by examining three categories containing only felony charges: (1) cases "held to the grand jury," (2) pleas of guilty to "felony informations," and (3) cases with a finding of no probable cause at a preliminary hearing. Using this data as a conservative estimate it can be stated that 66 per cent of the felony charges were disposed of at the branch court level.

Available for one court (Branch Court 25) from the Daily Court Sheets for November-December 1973 is information on the number of felony charges reduced to misdemeanors in the branch courts. Using this information, as a conservative estimate 84 per cent of the felony charges were disposed of in the branch court. See Table III.

<sup>36</sup>*Id.*

<sup>37</sup>During plea negotiations this policy was articulated by the supervisor to defense lawyers who hesitated about their client taking a particular offer at the branch court level. It is a general office policy, and mentioned as such during a speech by Geno De Vito (Deputy State's Attorney Criminal Prosecutions Bureau, Cook County State's Attorney's Office) at the Seminar on Plea Bargaining presented by the Chicago Council of Lawyers and the Lawyer's Committee for Civil Rights Under Law, Oct. 2, 1974, at the Midland Hotel, Chicago, Illinois.

Intensified plea negotiation at this stage is only one reason cases are negotiated and motions litigated. Public defenders and private lawyers indicated to the researcher that there is no reason to pursue cases at the trial court level if the case isn't very serious, *e.g.*, a minor offense and a defendant with a minor criminal background. It is expected in such cases that probation or probation with time served will be offered by the prosecutor in return for a guilty plea and that this will be acceptable to the accused.

TABLE III  
BRANCH 25 FELONY CHARGES DISPOSED IN THE BRANCH  
COURT OR BOUND OVER TO THE GRAND JURY

	No.	Per Cent
Held to the Grand Jury	57	16.29
Pleas of Guilty to Felony Informations	108	30.86
Findings of No Probable Cause	71	20.29
Pleas of Guilty to Misdemeanors Reduced from Felonies	114	32.57
	350	100.01

opposed to the trial court level, may significantly weaken the threat of excluding evidence illegally seized by the police. In cases in which evidentiary motions are litigated at the branch court stage the defense lawyers' opportunity to familiarize themselves prior to the hearing of the motion with facts relevant to the allegedly illegal search is substantially reduced. This is particularly true when attempting to identify possible police perjury and bring it to the attention of the court.

In raising motions to suppress in the branch court defense lawyers are initially hampered by the absence of formal discovery at that stage.<sup>38</sup> In narcotics cases probably the most important item to be "discovered" by the defense is the police officer's case report, which is a one-page or longer narrative explaining why the defendant was arrested and searched. Without having seen this report it is difficult for a defense lawyer to make a motion to suppress because he does not know the circumstances of the arrest and search, except for his client's limited knowledge, and cannot foresee the possible problems.

<sup>38</sup>Discovery in felony criminal cases in Illinois is governed by provisions of the Illinois Supreme Court Rules. These provisions specifically state that the discovery rules "shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing." ILL. REV. STAT. ch. 110A, § 411 (1975). If a defense lawyer's motion to suppress evidence is denied at the branch court level he may be allowed by the trial judge to again raise the motion if new information has come to his attention from the formal discovery. ILL. REV. STAT. ch. 38, § 114-12 (1975). In the absence of this new information a lawyer may not re-litigate the issue. *People v. Holland*, 56 Ill. 2d 319, 307 N.E.2d 380 (1974). The problem for defense lawyers is that if at the branch court level they do not have the police reports, for example, they will be unaware of discrepancies, if any, between the contents of the reports and the police officer's testimony on the motion to suppress evidence. As a result, they might encourage a client to plead guilty at that stage when the person might otherwise have a substantial issue to litigate in the trial court.

Further, the possession of this report allows a comparison of the written report with the oral testimony of the police officer, thereby providing some means of determining and possibly challenging the officer's credibility.<sup>39</sup> Given the indications of widespread police perjury in narcotics cases, this is by no means a small matter.<sup>40</sup>

While there are no formal rules governing discovery at the branch court level in Illinois, there have emerged a set of informal discovery practices of the prosecutors in the narcotics court which rest entirely upon prosecutorial discretion so that discovery may be granted or withheld depending on the prosecutor's assessments of the type of case, the defendant, and the defense lawyer. As a result, some lawyers are more handicapped than others in litigating motions to suppress in the branch courts. The state's attorneys always give the public defender copies of the police reports.<sup>41</sup> Some private lawyers are able to obtain the reports directly from the arresting or other police officers.<sup>42</sup> Assistant state's attorneys in the narcotics

court will also give private defense lawyers the reports. However, the defense lawyer must be knowledgeable enough to know that he may request the report, since the report is usually not offered to him by the prosecutor.<sup>43</sup> Further, not every defense lawyer will have the opportunity to see the police reports even if he requests them. Some state's attorneys mentioned the names of defense lawyers to whom they would not give the reports because they believed the defense already had an advantage since these lawyers were veterans of the court, and were litigating against fairly inexperienced prosecutors. Other assistants mentioned that they refused to give reports to lawyers they felt had been "difficult" to deal with in court.

Even for defense lawyers who do obtain the police reports, the practice of pointing up discrepancies between the report and what the officer has testified to on the motion to suppress is almost unheard of in the branch court. Some defense lawyers are reluctant to do so because they are unwilling to acknowledge that they have access to these reports when they have not obtained them from the prosecutor. But even where the prosecutor has provided the reports, as in the case of the public defender, it is understood that the reports are not to be used in court for impeachment purposes, since the defense lawyers are not legally entitled to have the reports at this stage. Nevertheless, the reports may still have some impact in dealing with possible perjury. In some of the observed cases the question of the officer's veracity was considered after the preliminary hearing by the defense lawyer, the prosecutor, and the judge in the judges' chambers on the basis of the police report in an attempt by the defense lawyer to have the case dismissed. In other cases defense lawyers were observed discussing with the supervisor in his office a comparison of the police report and the police officer's testimony in the hope of getting the supervisor to dismiss the case.<sup>44</sup>

When defense lawyers raise their evidentiary claims at the branch level, there is a second impor-

<sup>39</sup>The police report, however, may also be written so as to conceal or reveal certain aspects of the arrest and search situation. See Manning, *Police Lying*, 3 URBAN LIFE & CULTURE 283, 297-98 (Oct. 1974).

<sup>40</sup>See generally P. CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 180-218 (1969); J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 214-15 (1966); Cohen, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363 (1972); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1033 (1974); Oaks, *supra* note 3, at 739-42; Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 95-96 (1968); Comment, *Police Perjury in Narcotics "Dropsey" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971). For a discussion of the types of lies common to police work see generally Manning, *supra* note 39.

<sup>41</sup>Various reasons were given to the researcher by different prosecutors for this practice. Some mention "courtesy," reflecting an appreciation of the pressure placed on the public defender since he represents defendants on the day of his appointment to the case. Others acknowledge that public defenders may choose to continue cases in order to prepare their case unless the state's attorney provides such a "courtesy." Some assistants mentioned the naiveté of the public defenders and their willingness to believe what their clients say. If shown the police report they have a more realistic view of the case against their client and are more likely to settle the case at the branch court stage.

<sup>42</sup>It was commonly acknowledged by prosecutors that some defense lawyers were able to obtain police reports through their "contacts" in the police department. The prosecutors in the narcotics court took the position that where this happened it was not important since the attorneys were going to receive the reports shortly at the trial level in any event.

<sup>43</sup>In some cases where the prosecutor is particularly interested in the conviction of the defendant but feels he has a weak case, he may attempt to encourage plea negotiation discussions at the branch court level by offering the police reports to the defense lawyer.

<sup>44</sup>The supervisor did not object to continuances between the time there was a finding of probable cause and a binding over for presentment to the grand jury if the defense lawyer wanted to have time to obtain a copy of the preliminary hearing transcript for the purpose of pointing out to the supervisor the discrepancies between the police officer's reports and testimony at the hearing.

tant disadvantage—the preliminary hearing is usually not used to prepare the motion.<sup>45</sup> In contrast, when motions to suppress are made at the trial level the preliminary hearing is used in two ways.<sup>46</sup> First, at the hearing there is an attempt by the defense lawyer to better familiarize himself with the case by eliciting information from witnesses about potentially illegal aspects of the arrest or search. Second, the questioning is used to elicit testimony by the police officer relating to the motion to suppress which may be a more spontaneous and truthful narration than is possible after the police officer has been coached by the prosecutor at the trial court level.<sup>47</sup>

The inability to utilize police reports and the preliminary hearing as a means of dealing with potential perjury may be of particular significance in narcotics cases. Police perjury has most often been

<sup>45</sup>In narcotics cases if a plea of guilty is expected to be entered at the branch court stage by the defendant, usually the preliminary hearing is not used by the defense as a discovery tool for preparation in making a motion to suppress. Instead, counsel proceeds directly to a hearing on the motion and waives the preliminary hearing. Apart from a very small number of lawyers, most practitioners do not proceed with the preliminary hearing; consequently, they do not at some point during that hearing after the officer's testimony relating to the arrest and search, make a motion to suppress the evidence. The reason for this is not altogether clear. Some apprehension was expressed to the researcher by one defense lawyer regarding the reaction of judges and prosecutors to a regular usage of the preliminary hearing by defense counsel to develop a better sense of the case before making a motion to suppress during the preliminary hearing. He felt that these persons would be upset with him because they prefer to handle only one matter, either the hearing or motion, at a time.

Moreover, another barrier to utilizing the preliminary hearing as a discovery device in making motions at the branch level is that at least one of the two judges considers the motion "untimely" if made after the preliminary hearing in the branch court. If the case is continued to another date after the preliminary hearing, the judge will not allow attorneys to make their motions on that later date.

<sup>46</sup>If the defense anticipates that a case will be bound over for presentment to the grand jury, it will usually delay the filing of any motions to suppress in order to use the preliminary hearing to prepare the motion, and will litigate the issue after full discovery at the trial level.

<sup>47</sup>Its use as a means of "discovering" the prosecutor's case and "perpetuating" testimony for impeachment purposes are well recognized collateral functions of the preliminary hearing. See generally F. MILLER, *supra* note 26, at 72-74; Wald, *Poverty and Criminal Justice*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 143 (1967); Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A.L. REV. 916-31 (1971).

identified and discussed in connection with the fabrication of grounds for street arrests in narcotics cases. Particularly, police testimony in court that defendants abandoned the contraband has led a number of commentators to conclude that the police are constructing a set of circumstances to circumvent the requirements of the fourth amendment.<sup>48</sup> Others fear police perjury may be involved in the process of issuing warrants to search houses for contraband. To establish the "probable cause" necessary to have a warrant issued, it is believed that a police officer may lie in a sworn affidavit about the existence of an informant or may fabricate information about the informant's actual reliability.<sup>49</sup>

#### CONCLUSION

This study of practices in the Chicago narcotics branch courts clearly does not support the speculation and fear of some commentators that prosecutors may be inclined to use the plea bargaining process as a means of inducing wholesale abandonment of claims under the exclusionary rule. The supervising state's attorney in the branch courts had a stated policy, which he appeared to follow in almost all cases, of making sentencing offers independent of whether motions to suppress evidence would or would not be made at the branch court level. The supervisor's assistants who handled plea bargaining in less important cases followed various practices and were not subject to any overall policy directive.

Of possibly greater significance is the overall policy of the state's attorney's office of inducing plea bargaining at the branch court stage. Thus, while defendants may not be induced to forego their motions to suppress at that stage, they are clearly induced to make the motions only at that stage. This means that motions may have to be made without the benefit of police reports, as well as the testimony recorded at the preliminary hearing. This, in turn, makes it more difficult to deal with the problem of police perjury. If that problem is a serious one, as many suggest, then it is possible that the plea bargaining process—by compelling the litigation of evidentiary issues at a stage where the means to deal with them are unavailable—may have a significant effect on the efficacy of the exclusionary rule.

<sup>48</sup>Cohen, *supra* note 40, at 365-67; Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, *supra* note 40; Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, *supra* note 40.

<sup>49</sup>P. CHEVIGNY, *supra* note 40, at 215-17.