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'Conditional plea' should be an option in Illinois

The Illinois criminal justice system can be frustrating. In the area of search and seizure, for example, the Illinois Supreme Court has unnecessarily adopted almost every bad idea that has come out of the Burger-Rehnquist-Roberts courts. Since the 1980s, a dozen pro-defense Illinois Supreme or Appellate Court search-and-seizure decisions have been overruled by the U.S. Supreme Court. (For a full record of the legal carnage, see my articles *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 Loyola Univ. Chicago Law Journal 745 (2009), and *"Stop Me Before I Get Reversed Again": The Failure of Illinois Courts To Protect Their Criminal Decisions From United States Supreme Court Review*, 36 Loyola Univ. Chicago Law Journal 893 (2005).) Yet instead of trumping the U.S. Supreme Court reversals by insisting that its pro-defense decisions are nonetheless based on adequate and independent state grounds, the Illinois Supreme Court has ceded all its authority in state search-and-seizure law to Washington. The Illinois Supreme Court's use of "limited lockstep" has resulted in unlimited *tsuris* for the privacy rights of Illinoisans.



Criminal Procedure

By [Timothy P. O'Neill](#)

O'Neill is a professor of law at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at www.jmls.edu/oneill.

So what happens when a *good* federal criminal procedure idea comes along? Like the "conditional plea," a device in the Federal Rules of Criminal Procedure making it easy for a defendant to appeal a denied suppression motion? Count on Illinois to ignore it.

But don't listen to me. Read Justice [Jack O'Malley](#)'s thoughtful opinion for a unanimous court in the 2d District's recent decision in *People v. Clendenin*, 2009 Ill. App. LEXIS 781 (Aug. 18).

First, some background.

When a state's attorney loses a suppression motion that jeopardizes a prosecution, Illinois Supreme Court Rule 604(a) (1) allows the state to seek immediate interlocutory review of the issue. (For a good discussion of the rule, see *People v. Marker*, 233 Ill.2d 158 (2009).) The federal analog of this is 18 U.S.C. section 3731.

Criminal defendants, on the other hand, are not allowed interlocutory review of denied pre-trial suppression motions. Instead, they may raise the issue only if they are subsequently convicted.

So what about a drug possession case where the admission of the evidence is tantamount to conviction? In the federal system, Federal Rule of Criminal Procedure 11(a) (2) provides for the

use of a device called a "conditional plea": "With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." Thus, the conditional plea is a streamlined way for a defendant to get a suppression issue reviewed by the appellate court.

Some states have also adopted the procedure. When the U.S. Supreme Court looked at a New York state statute similar to a conditional plea, it applauded it as a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz v Newsome*, 420 U.S. 283 (1975).

Illinois does not use the conditional plea. Instead, it uses a "stipulated bench trial" as the vehicle for preserving the suppression issue for appeal. Nine years ago, the 2d District recommended that Illinois should stop using the "stipulated bench" for the purpose of preserving a suppression issue and should instead adopt the federal "conditional plea." *People v. Gonzalez*, 313 Ill.App.3d 607 (2000). Unfavorably comparing it to the "conditional plea," it referred to the use of the stipulated bench to preserve a suppression issue as an "archaic and often confusing legal anomaly." It described stipulated bench trials used for this purpose as, "[T]ricky creatures prone to mistakes by trial courts and attorneys alike.... To properly preserve the denial of a pretrial motion for review, the stipulation must be only to the existence of the evidence. [Citation omitted] If counsel stipulates that the evidence is sufficient to convict, then the stipulated bench trial mutates into a guilty plea and the suppression issues are waived on appeal. [Citation omitted]," at 617-618.

In the *Clendenin* case, the 2d District spends the bulk of its opinion analyzing the changes in the law concerning stipulations created by *People v. Campbell*, 208 Ill.2d 203 (2003) (holding that defense counsel may waive the client's right of confrontation by stipulating to the admission of evidence "as long as the defendant does not object to or dissent from his attorney's decision, and where the decision is a matter of legitimate trial tactics or prudent trial strategy") and *People v. Phillips*, 217 Ill.2d 270 (2005) (unless a stipulation is the practical equivalent of a guilty plea, it is not necessary for either court or counsel to admonish a defendant on the consequences of a stipulation and the defendant's personal agreement to the stipulation on the record is not required). Noting that *Gonzalez* had called the stipulated bench procedure "tricky" in 2000, Justice O'Malley's opinion in *Clendenin* said that the *Phillips* and *Campbell* cases have now made the stipulated bench "veritably treacherous." *Clendenin* concluded by stating, "We believe the need for a conditional plea option is now more urgent than ever if a defendant facing compelling State's evidence is to avoid waiving his right to appeal a suppression ruling."

And that is all the conditional plea should be — an option. It is meant to provide an alternative to the stipulated bench in certain cases. It is not meant to eliminate stipulated bench trials. Patrick A. Tuite and [Ronald D. Menaker](#) made this point in a 1997 Law Bulletin article. After providing arguments for why Illinois should provide for the conditional plea, they added, "Even so, a stipulated bench trial does have some salutary benefits for those who wish [to appeal the denial of a pretrial motion] but do not wish to plead guilty because of the potential effects a guilty plea may have in civil or administrative licensure hearings down the road. The option for a stipulated

bench trial should still be available. In the vast majority of the cases, however, a conditional plea would serve the purpose." Patrick A. Tuite and Ronald D. Menaker, "State's Plea, Appeal Procedures Outdated," Chicago Daily Law Bulletin, July 30, 1997.

Change is long overdue. Perhaps O'Malley's opinion in *Clendenin* will provide the necessary impetus.

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