Arizona's New Rules of Criminal Procedure: A Proving Ground for the Speedy Administration of Justice

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Arizona's new *Rules of Criminal Procedure* became effective on September 1, 1973. The *Rules* apply to all criminal offenses except certain traffic violations.[1] They incorporate a number of major advances in the field of criminal procedure, including liberal discovery, the omnibus hearing and increased use of summons. While it is too early to attempt any complete assessment of their impact on the system in empirical terms,[2] the rules themselves raise a number of significant analytical questions.

This study of the new *Rules* will explore the goals which they seek to promote and the extent to which these goals are achieved. The potential for conflict between the new Arizona procedures and the constitutional rights of criminal defendants likewise will be examined. Structurally, this inquiry will be divided into three phases; pretrial release of the accused; pretrial proceedings, especially the formalized discovery and plea bargaining provisions; and the trial and post-conviction stages, with particular emphasis on procedures for probation revocation.[3] Throughout this assessment, some proposals for change

1. The new *Rules* do not apply to offenses contained in the following statutes: ARIZ. REV. STAT. ANN. §§ 28-206.01, -302, -321, -324, -326, -692.01, -693, -708, -1009, -1031 (Supp. 1973); -1203, -1283, -1326 (1956); -1361.07 (Supp. 1973); -1380 (1956); -1401.02, -1402, -1403 (Supp. 1973); -1444, -1517 (1956); -1587 (Supp. 1973). *See* ARIZ. R. CRIM. P. 1.1; ARIZ. R.P. TRAFFIC CASES I(a), II.

2. The writers have conducted a number of interviews to assess initial experiences under selected portions of the *Rules*. The results are necessarily fragmentary and subjective, included only to suggest how the theories set forth by the drafters accord with the "real world." Comprehensive, statistically reliable evaluation must of course await further experience after the new system has enjoyed a reasonable shakedown period.

3. The *Rules* also establish a new system for dealing with the issues of competency to stand trial and the defense of not guilty by reason of insanity. ARIZ. R. CRIM. P. 11. For a full treatment of rule 11 and the issues of sanity hearings and self-incrimination, see Berry, *Self-Incrimination and The Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919 (1974).

in the *Rules* will be offered in the hope of providing a method by which the advantages sought by the *Rules* can be preserved.

GOALS OF THE NEW RULES

Two principal goals animate the new *Arizona Rules of Criminal Procedure:* to make the processing of criminal cases more speedy and efficient[4] and to relieve the nonconvicted accused of the hardships imposed by the earlier system.

The committee[5] which wrote the *Rules* contended that there are two advantages to society as a whole under a swift, efficient criminal justice system. The major goal of any criminal justice system—protecting the public—is accomplished by removing from society those persons who have committed crimes and by deterring potential criminals.[6] The more swiftly the process operates, the more effective will be the protection of the public[7] because the dangerous criminal is quickly removed from the streets. Also, the drafters of the *Rules* contended, "swift and certain" punishment has a greater deterrent effect.[8] The societal interest in accurate fact finding is similarly advanced by a speedy criminal process. The committee observed that the further removed the trial is from the occurrence of a criminal act, the less likely is a factually accurate conviction or acquittal.[9]

There are, however, clear disadvantages to a trial system which operates too swiftly:

> Speedy disposition is often assumed to be an objective of the defense, but it may often more correctly be viewed as a detriment to the defense. The ready defendant is, indeed, harmed by a system delay that prevents a trial for which he has prepared, but the unprepared defendant or the defendant in the midst of plea discussion is harmed by being forced to a trial by artificially stimulated

4. ARIZONA STATE BAR COMMITTEE ON CRIMINAL LAW, ARIZONA PROPOSED RULES OF CRIMINAL PROCEDURE Rule 8, Comment, at 32 (1972) [hereinafter cited as PROPOSED RULES].

5. The *Rules* were drafted under the supervision of the State Bar of Arizona Committee on Criminal Law. After revision by the Supreme Court of Arizona, they were promulgated on April 17, 1973.

6. The costs to the community from delays in criminal cases are . . . unacceptable. It costs thousands of dollars of public funds to keep a defendant in jail for a year while he awaits his trial. Furthermore, a speedy trial is the most effective weapon against crime yet developed. Swift trial, conviction and sentencing of the guilty are a major deterrent to crime. Delay destroys this deterrent.

Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., at 33 (1971).

7. PROPOSED RULE 8, Comment, at 32.

8. *Id.*

9. *Id.*

> system pressures toward speedy disposition. Because of this, it is necessary to carefully assess the nature of the state's interest in speed of disposition. Rationales for speedy disposal (such as the possibility that acquittals will occur because of forgetful or influenced witnesses or that released defendants will commit other crimes) must be examined in the light of empirical evidence concerning the system. Measured against such evidence, these interests may appear strong in only a minority of cases.[10]

The drafting committee report does present statistical evidence suggesting that much of the delay in the Arizona criminal system has been a result of systemic imperfection. This delay served no legitimate purpose of protecting either the public or the defendant's rights.[11]

The second major goal is to lessen the hardships to which the nonconvicted accused is subjected.[12] This concept is embodied in the procedures designed to free most defendants from custody before conviction. To achieve this goal the *Rules* give preference to the in-custody accused in scheduling criminal cases,[13] contain liberal release provisions[14] and urge the use of summons instead of arrest warrant.[15]

Speeding Up The Process

The goal of speeding up the criminal process pervades rule 8. This rule, entitled "Speedy Trial," sets the basic time parameters within which the entire system must operate.[16] Several methods of accomplishing the goal of "speedy trial" are outlined in the rule. Rule 8.1 establishes priorities for scheduling cases. Criminal cases are to be scheduled before civil cases, and those cases where the accused is in custody are to be scheduled before those in which the accused

10. R. NIMMER, THE OMNIBUS HEARING: AN EXPERIMENT IN RELIEVING INEFFICIENCY, UNFAIRNESS, AND JUDICIAL DELAY 95 (1971).

11. The committee cited a study by the Behavior Research Center, Inc., which indicated that under the old rules it had taken an average of 144 days from date of initial appearance to disposal of a case by verdict, plea or dismissal and 156 days to the sentencing of those found guilty. Cases that went to trial took 176 days while those that were ended by a plea averaged 177 days.
PROPOSED RULE 8, Comment, at 32.

12. PROPOSED RULE 5.1, Comment, at 10.

13. ARIZ. R. CRIM. P. 8.1(b).

14. *Id.* RULES 7.2, 7.3.

15. *Id.* RULE 3.1(b).

16. *Id.* RULE 8.2. An example of the commitment of the judiciary to speedy process can be found in *Cullinan v. Avalos*, 20 Ariz. App. 454, 513 P.2d 1337 (1973). In that case, an "initial appearance" commenced the day after arrest and then continued until a later date *within the 5-day limit of rule 5.1* was held inadequate. Judge Howard said that "[t]o permit such over-literal construction of rule 5.1, subd. d would be tantamount to paying lip service to it and would subvert the very purpose of the new rules." He said the state must provide the hearing "as soon as practicable" when the accused so demands. 20 Ariz. App. at 456, 513 P.2d at 1339.

is out of custody on release.[17] These provisions seek to promote both goals of the system, speed and decreased burden on the accused.

The essence of the rule 8 speedy trial concept is found in rule 8.2. The accused is to be tried within 150 days after the arrest warrant or summons is issued.[18] A defendant in custody must be tried within 90 days of his initial appearance or 60 days of his arraignment before the trial court, whichever is less.[19] If the accused is released pursuant to rule 7, the time period is shifted to the lesser of 120 days from the initial appearance or 90 days from arraignment.[20] The court is required to release an in-custody defendant whose trial is not begun within the required time period.[21] If the other outer time limits are violated,[22] then the court may, either on motion of defendant or on its own initiative, dismiss the prosecution with prejudice.[23]

These time limits may present a number of problems.[24] The most significant portion of the rule, however, is not the setting of time limits but rather rule 8.2(e), which provides that the time limits may be extended only by court-granted continuance, not by waiver or stipulation of the parties.[25] The logic of strict adherence to this provision is highly questionable. If both parties are willing to delay the trial, whose interest is hurt by a stipulation which postpones the trial date?

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17. ARIZ. R. CRIM. P. 8.1. Some parties engaged in civil litigation have complained that civil cases are suffering from delays caused by the great increase in judicial time spent on hearing criminal matters under the *Rules*. Interview with the Hon. Ben C. Birdsall, Presiding Judge, Pima County Superior Court, in Tucson, Ariz., Feb. 25, 1974.

18. ARIZ. R. CRIM. P. 8.2(a).

19. *Id.* RULE 8.2(b).

20. *Id.* RULE 8.2(c).

21. *Id.* RULE 8.6(a).

22. *See id.* RULE 8.2(a), (c), (d); *id.* RULE 8.3(a), (b)(2), (b)(3).

23. *Id.* RULE 8.6(b). One attorney interviewed indicated that the courts are not dismissing cases where the time period has been exceeded. Interview with John McDonald, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974. Dismissal appears to be discretionary, not mandatory. ARIZ. R. CRIM. P. 8.6(b). The comment to that section, however, is phrased in mandatory terms.

24. The time limits were controversial even before the *Rules* were adopted. ARIZONA STATE BAR COMMITTEE ON CRIMINAL LAW, MINORITY REPORT ON CRIMINAL RULES REVISION PROJECT 8-10 (1972) [hereinafter MINORITY REPORT]. In practice some problems have arisen. Criticism has been leveled at the time limits as being too rigid, with no differentiation between simple and complex cases. Interview with John McDonald, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974. Prosecutors contend that the state, carrying the rigorous burden of proof, has difficulty in preparing for complex cases within these time limits. Interview with W.R. Stevens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974.

25. *See* ARIZ. R. CRIM. P. 8.5. The rule sets limits on both the permissible reasons for the granting of a continuance and the length of any continuance. No continuance is to be granted for a period longer than necessary and in no case will it be granted for more than 30 days. These continuances may only be granted upon a showing that "extraordinary circumstances exist and that delay is indispensible to the interests of justice." *Id.* Clearly, the purpose of this rule is to restrict the type and number of cases where continuances will be granted.

The rule itself seems to imply that the interests of the public in a speedy trial are injured by allowing the trial to be delayed by agreement of the parties.[26] The rationale of the rule is that society's claim to a speedy trial system should not be ignored at the whim of the parties. As noted above,[27] this insistence on a speedy trial may be contrary to the interest of the defendant. Further, when the state, through its agent the prosecutor, has determined that delay will not hurt its interests, it is incongruous to assert that an independent societal interest should limit the defense's preparation time. If the state requires more time for the preparation of its case and the defense has no objection to the extension, there is likewise no reason to believe that society is well served by requiring the deadline of rule 8 to be met without waiver. Such abstract public concerns must be carefully applied or they may both trample the rights of the accused and defeat the goal of effective law enforcement by unnecessarily minimizing time available for investigation of complex and difficult cases.[28]

Another problem may be expected to result from this rule: a greater amount of judicial time will be devoted to hearing continuance motions than was so spent under the old rules. The drafting committee's report indicated that 60 percent of criminal cases under the old rules involved an extension of time period by waiver or stipulation.[29] It is foreseeable that under the new system a large number of these cases will require hearings before the court on unopposed motions for continuance. Although rule 8 seeks to protect society's interest in a speedy criminal process,[30] the result of this continuance provision may be dislocation and delay of the system due to judicial time spent in such hearings. A better approach might be to attempt some sort of varying time limit based on the complexity of the case. Under this procedure, arraignment would be held within the present time limits and counsel could confer with the judge about the nature of the case. The judge could then set a time limit within which the remainder of the process would have to operate. This system would provide flexibility while maintaining judicial control to prevent unnecessary delays.

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26. PROPOSED RULE 8, Comment, at 32.
27. *See* text accompanying note 10 *supra.*
28. In practice, it appears that courts *are* refusing to grant requests for continuances in some cases even though the other party does not oppose the continuance. Interview with John McDonald, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974.
29. PROPOSED RULE 8, Comment, at 33. The committee noted further that 73 percent of all continuances under the old *Rules* were achieved by stipulation; the elimination of this method may well overburden the system.
30. PROPOSED RULE 8, Comment, at 32; *cf.* ARIZ. R. CRIM. P. 8.6, which contains the enforcement sanctions of rule 8.

Use of Arrest Warrants and Summons

Another procedure which seeks to effectuate the goals of the *Rules* during the early stages of the criminal process is the rule 3 provision on arrest warrants and summons. In 93 percent of all criminal cases under the old rules, arrest warrants were employed to assure the presence of the accused.[31] The new rule encourages the use of summons in criminal cases.[32] The purpose is to relieve the burden that the criminal justice system places upon a nonconvicted accused. A summons that does not involve taking the accused into custody is preferable from his point of view to arrest under a warrant. The harmful effects of being arrested are manifold.[33] There is a loss of work time and separation from family,[34] as well as the traumatic experience of spending a day or night in jail.[35] Perhaps the worst harm to the accused comes from the fact that the record of his arrest remains despite subsequent dismissal of charges or acquittal.[36] Recognizing all of these injuries, it is clear that in terms of impact on the individual the summons is preferable.

The summons technique also seems to be a satisfactory means of securing the presence of the accused at trial. The *Rules* promote the use of summons by making the probability of the accused's subsequent appearance in court the principal criterion in determining whether to utilize the summons rather than the arrest warrant.[37] This replaces the nature-of-the-crime criterion emphasized under the former Arizona rules.[38] Empirical evidence indicates that the summons is extremely effective in obtaining the presence of the accused.[39] Police man-hours are also saved when the summons technique is employed as a regular alternative to the arrest warrant.[40] It appears,

31. PROPOSED RULE 3.1(b), Comment, at 5.
32. ARIZ. R. CRIM. P. 3.1(b).
33. VERA INSTITUTE OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM 46 (1972) [hereinafter cited as VERA PROJECT].
34. *Id.* at 19-20.
35. *Id.* at 46.
36. Seventy-five percent of the employment agencies sampled by the New York Civil Liberties Union do not make a referral when the applicant has an arrest record. The Commercial Office, and Trades and Industrial Office of the U.S. Employment Service reports it is unable to place 85% of those applicants with records of arrest or conviction.
Comment, *Arrest Records as a Racially Discriminatory Employment Criterion: Gregory v. Litton Systems*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 165, 174 (1970) (footnotes omitted).
37. ARIZ. R. CRIM. P. 3.1(b).
38. ARIZ. R. CRIM. P. 11, 155 (1956) (abrogated 1973). *See* PROPOSED RULE 3.1(b), Comment, at 5.
39. A 4-year study of the use of the summons technique in New York observed that of those issued summons approximately 5 percent failed to appear. VERA PROJECT, *supra* note 33, at 53.
40. The use of summons in place of warrants in New York City resulted in a savings of 10 patrol hours for each summons issued. The total savings in police man-

then, that the summons system works to the advantage of both the accused and society.[41]

Release

The liberal release provisions set out in rule 7 also seek both to speed up the system and to relieve the burden on the accused. The basic purpose of a bail system is to provide a method by which the state may obtain assurances of the defendant's presence at trial. The system attempts to balance the interest of the individual in his own freedom against the state's interest in the effective administration of justice.[42]

Recognizing that there is a definite harm to the accused who remains in custody,[43] almost all criminal justice systems provide some sort of release provisions. The drafting committee urged the use of release on recognizance wherever possible,[44] since that device places the least possible burden on the accused while providing an effective guarantee of his appearance at future proceedings.[45]

The basic tenet of rule 7 is that release is a matter of right. This concept is derived from the Arizona constitution, which provides:

> All persons charged with crime shall be bailable by sufficient sureties, except for:
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> 1. Capital offenses when the proof is evident or the presumption is great.

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hours in a single year amounted to $6.7 million. *Id.*

A more conservative estimate of a 5 hour savings was reported in another study. U.S. TASK FORCE ON LAW & LAW ENFORCEMENT, THE RULE OF LAW—AN ALTERNATIVE TO VIOLENCE 442 (1970).

41. The practice so far under the *Rules* has been disappointing. The summons technique is not being utilized to its fullest potential by Arizona courts. One reason advanced for not increasing the use of summons is that it will warn the accused, enabling him to flee the jurisdiction. Interview with W.R. Stevens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974. It has been suggested that magistrates are not employing this technique in more cases because the prosecuting authorities favor use of arrest warrants and urge judges to employ such warrants. Interview with John McDonald, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974. However, some observers claim that there has been at least some increased use of summons. Interview with the Hon. Ben. C. Birdsall, Presiding Judge, Pima County Superior Court, in Tucson, Ariz., Feb. 25, 1974; interview with Stephen D. Neely, Deputy County Attorney, Criminal Division, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974.

42. P. WESTON & K. WELLS, THE ADMINISTRATION OF JUSTICE 99 (1967).

43. The defendant in jail pending the outcome of his case is in a kind of limbo. He has been convicted of no crime but is detained, often in conditions much worse than those afforded to convicted criminals. He is isolated from his family and friends and from his attorney, He is not in a position to work to support his family nor to assist his attorney in the preparation of his defense. He is an object, shuttled back and forth from jail to court for numerous appearances that often amount to nothing.

J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 66 (1972). *See also* VERA PROJECT, *supra* note 33, at 19-20; U.S. TASK FORCE ON ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 38 (1967).

44. PROPOSED RULE 7.2(a), Comment, at 26-27.

45. *Id.*

2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.[46]

The accused, at least before conviction, is not to be looked upon as a beggar with hat in hand at the bar of judicial mercy, but as an individual who is to be released under the least onerous conditions likely to secure his return.[47] This concept of release as a matter of right is reinforced by the *Rules*' creation of what is in effect a presumption of release; the prosecution bears the burden of producing evidence that provides a valid reason for refusing release to the defendant.[48] Furthermore, the basis on which release is to be determined is not the multiple criteria of the old Arizona statutory provision[49] but the probability that the accused will return for future proceedings.[50]

The new rule contemplates the release of most defendants on their own recognizance [ROR].[51] While the ROR technique was available before the *Rules* were adopted, it was not being used to its full potential.[52] The *Rules* encourage greater use of ROR.[53] There seem to be two principal considerations in the employment of this technique: its effectiveness and its preferability from the point of view of the accused. Empirical evidence indicates that release on recog-

46. ARIZ. CONST. art. 2, § 22.

47. ARIZ. R. CRIM. P. 7.2(a).

48. The minority on the drafting committee felt that placing this burden on the prosecution was an unnecessary extension of rights to the accused. MINORITY REPORT, *supra* note 24, at 7.

49. ARIZ. REV. STAT. ANN. § 13-1577 (Supp. 1973) (superseded in part by ARIZ. R. CRIM. P. 7.1 *et seq.*, 1973) adopted several criteria, some of which are directed at the issue of likelihood to appear. The main change in the new rule appears to be one of emphasis and clarification.

50. *See*, ARIZ. R. CRIM. P. 7.2(a); PROPOSED RULE 7, Comment. This appears to be a much more rational criterion than the nature of the offense. *See* A. SMITH & H. POLLACK, CRIME AND JUSTICE IN A MASS SOCIETY 142, 143 (1972). Smith and Pollack suggests that the bail system is irrational when courts set bail according to the seriousness of the crime and not to the likelihood of appearance. Because it is addressed to the crime and not to the likelihood of appearance, such a system in no way guarantees the presence of the defendant. The result is that the rich defendant goes free and the poor defendant stays in jail. There has been some comment that, while some Arizona magistrates employ the likelihood-of-return criterion, a number of them have continued to use the various criteria of character, nature of offense, and other similar factors. Interview with John McDonald, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974.

51. *See* PROPOSED RULE 7.2(a), Comment, at 26. The committee observed that in Arizona in recent years 22 percent of the cases resulted in release on the defendant's own recognizance (ranging from a high of 44 percent in Pima County, where all justices of the peace are attorneys, to a low of 14 percent in two-judge counties). Another 13 percent of the defendants generally had bond set at less than $1,000, but the majority (65 percent) had bond set at $1,000 or more. *Id.*

52. *Id.*

53. Since Pima County already employed the ROR technique more extensively than most other counties, there has not been a large increase in its use since the adoption of the *Rules*. Interview with William Callaway, Deputy Ass't Public Defender, Pima County, in Tucson, Ariz., Feb. 20, 1974.

nizance is effective in securing the presence of many defendants.[54] Since the only valid societal interest in a bail system is to secure the presence of the accused,[55] the ROR technique properly applied meets society's requirements as effectively as does a money bail system.[56] From the point of view of the accused, the ROR system is better. A system of money bail works to the disadvantage of the poor.[57] Statistics indicate that in most jurisdictions a large percentage of those accused of bailable crimes are not released because of financial inability to make bail.[58] The typical result is that the impecunious defendant is effectively sentenced to up to 120 days before any determination of guilt or innocence.[59] In light of the harm inflicted upon the accused while in custody awaiting trial,[60] there is no justifiable basis for a money bail system except where absolutely necessary to secure the defendant's return for trial.[61]

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54. VERA PROJECT, *supra* note 33, at 35. Where some screening method was employed to determine those who were to be released on recognizance, only 1.6 percent of those so released failed to appear at trial. At the same time 3 percent of those released on secured bail failed to appear. Approximately one-third of the defendants screened were considered "safe" enough to be released ROR.

55. *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835); Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970); Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951); Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

56. Some have argued that a bail system meets an additional societal value of keeping dangerous persons off the street. The *Rules* avoid this sort of rationale for keeping people in custody. The danger of any standard based on seriousness of the charge or dangerousness of the party is that there may be a tendency toward prejudgment of guilt or preventive detention.

57. Former President Lyndon Johnson observed:

> The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial . . . .
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> . . . .
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> He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—because he is poor.

2 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS Pt. 1, at 819 (June 27, 1966). *See* ARES & STURZ, *Bail and the Indigent Accused*, 8 CRIME & DELINQUENCY 12 (1962). Under the present system of professional bail bondsmen there are further inequities. An Assistant United States Attorney for the District of Columbia emphasized that the bondsman can discriminate as he pleases.

> A bondsman is invested with sole discretion as to whether he will write even the smallest bond, and his decision is not reviewable by a court of law. The bondsman's discretionary power not to act as surety for an accused is, in effect, a veto power over both the defendant's ability to obtain bail and the court's determination that an accused is qualified for release.

Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 28-29 (1969). *See also* Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 115 (1966); Ryan, *The Last Days of Bail*, 58 J. CRIM. L.C. & P.S. 542 (1967).

58. "A study of New York bail practices indicates that 25 percent of all defendants failed to make bail at $500, 45 percent failed at $1,500, and 63 percent at $2,500." U.S. TASK FORCE ON ADMINISTRATION OF JUSTICE, *supra* note 43, at 37; *see* Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621, 626-27, 630-31 (1966).

59. PROPOSED RULE 7.2(a), Comment, at 27.

60. *See* note 43 *supra*.

61. Another controversial concept in the area of bail and release is the concept of "dead time." The principal question here is whether a convicted accused should be given credit against his sentence for time spent in jail while awaiting trial. Several

Problems with the Release Procedure

While the release provisions of rule 7 appear superior to prior law in most respects, certain details may give rise to constitutional questions. The basic form which the accused must fill out before release is *Form IV* which accompanies the *Rules.*[62] One question in the form calls for responses from the defendant relating to his past criminal record.[63] This may present a self-incrimination problem. Of course, a party cannot be directly incriminated with regard to an offense for which he has already been convicted. This, however, is only the narrow view of what is meant by self-incrimination. Under Arizona's recidivist statute,[64] the fact that an accused has been convicted of prior offenses may be used to lengthen his sentence.[65] Where an accused is compelled to provide information of past convictions which can then be used to lengthen his sentence, serious questions arise under the self-incrimination clause.[66]

In defense of the use of such a question, it has been asserted that bail is not a matter of absolute right but is rather subject to con-

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states have addressed this problem either by statute or court decision. At present there appears to be no federal constitiutional right to have such days counted in the sentence. Further, where a party after long pre-trial detention is found innocent, even this recompense is lacking. *See* White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972) (3 judge court); Stacy, *Constitutional Right To Sentence Credit For Pre-Trial Incarceration,* 41 U. CIN. L. REV. 823 (1972).

In Arizona, it is within the discretion of the sentencing court to grant or not grant credit for time spent by the defendant in jail before trial. *See* State v. Kennedy, 106 Ariz. 190, 472 P.2d 59 (1970); State v. Phillips, 16 Ariz. App. 174, 492 P.2d 423 (1972).

62. ARIZ. R. CRIM. P. Form IV.

63. *Id.* at Pt. II, question 4.

64. ARIZ. REV. STAT. ANN. §§ 13-1649, -1650 (1956).

65. Arizona does recognize that there may be some fifth amendment restriction on use of admission of past offenses. Rule 17.6 mandates that where a defendant who is being proceeded against as a recidivist has a hearing (either before or after his trial on the subsequent offense) at which he must plead as to the status of his prior offenses, he must be given all warnings required for a guilty plea under the provisions of rule 17 and *Boykin v. Alabama,* 395 U.S. 238 (1969), before the court can accept an admission that he has past convictions. *See also* State v. Thomas, 109 Ariz. 399, 510 P.2d 45 (1973).

66. In *Wright v. Craven,* 325 F. Supp. 1253 (N.D. Cal. 1971), petitioner admitted his prior convictions without being told of the possible effect of these convictions under the California recidivist statute. He was found guilty of the principal offense and was sentenced as a recidivist. Petitioner filed a federal habeas corpus action. The district court held that his admission of past offenses was, under the recidivist statute, the equivalent of a plea of guilty to a separate charge and could not be accepted unless the accused understood the consequences of his admissions. The court of appeals affirmed this decision. Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972). While the California recidivist statute is not identical to the Arizona Statute, the self-incrimination rationale of *Wright* seems applicable to both. Under this decision, whenever a party may be given an additional sentence under a recidivist statute, the privilege against self-incrimination applies to admissions of past convictions.

For a definitive discussion of the procedures and practices under the Arizona recidivist statute, see "Sentencing," 11 ARIZ. L. REV. 61, 123 (1969). A discussion of the constitutional aspects of recidivist proceedings and their effect on post-trial relief can be found in Wexler, *Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims,* 11 ARIZ. L. REV. 629, 632-34 (1969).

ditions upon its granting in the manner of a privilege.[67] Therefore, they argue that it is permissible for the state, as a condition of its release process, to require the defendant to answer such a question. This position is untenable on three grounds. The United States Supreme Court has held that the right-privilege distinction is no longer valid, and that the receipt of a privilege cannot be conditioned upon the waiver of a constitutional right.[68] The theory that release from custody can be conditioned upon a defendant's waiver of his right to remain silent is untenable on another ground. The Supreme Court stated as long ago as 1897 that " 'a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises . . . .' "[69] The release questionnaire uses this type of proscribed enticement of a defendant to tell about his past offenses in hope of receiving release from custody. There is yet a third ground, at least with respect to the Arizona situation, for rejecting the argument that bail is a matter of privilege which may be conditioned upon the waiver of a right. As noted above, the Arizona constitution and rule 7.2 make release a matter of right, not of privilege. In many situations, the Supreme Court as well as lesser federal courts have held that the exercise of one right cannot be conditioned upon the waiver of another.[70] It follows, therefore, that release, a matter of right in Arizona, cannot be conditioned upon the waiver of an accused's fifth amendment privilege against self-incrimination.

The basic thrust of the self-incrimination privilege is the right of the accused to remain silent. As the Court has observed, "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringe-

67. *See* Brown v. Fogel, 387 F.2d 692 (4th Cir. 1967). A number of federal courts have held that as a function of their right to grant bail judges may impose restrictions upon the right of the accused to travel freely. *See,* Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959); Estes v. United States, 353 F.2d 283 (5th Cir. 1966); United States v. Foster, 278 F.2d 567 (2d Cir. 1960). In other areas of the law some courts have argued that the exercise of the "police power" enables the state to require the waiver of a right in order to gain a privilege. *Cf.* "Constitutional Implications of Arizona's Implied Consent Law," 13 ARIZ. L. REV. 313, 426 (1971).

68. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398 (1963). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

69. Bram v. United States, 168 U.S. 532, 542 (1897), *quoting* 3 W. RUSSELL, CRIMES 478 (6th ed. 1896); *see* Brady v. United States, 397 U.S. 742, 753 (1970); Malloy v. Hogan, 378 U.S. 1, 7 (1964).

70. *See, e.g.,* Simmons v. United States, 390 U.S. 377, 392-94 (1968); Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring); Grunewald v. United States, 353 U.S. 391, 425 (1957) (Black, J., concurring); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); United States v. McKinney, 379 F.2d 259, 262 (6th Cir. 1967); Ivey v. United States, 344 F.2d 770, 772-73 (5th Cir. 1965).

ment—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[71]

The effect of the presence of questions, including one about prior convictions, on a release form is to encourage the accused to answer them. Whether the release practice under rule 7 will provide adequate safeguards must be considered. The basic safeguard provided by the rule is the statement at the beginning of the defendant's portion of Form IV: "You are not required to answer any question if you feel the answer might be harmful to you."[72] The protection afforded by this caveat is largely illusory. The mere presence of the question on the form must lead to harmful results for the accused with a past conviction. He is given three choices: answer the question about his past conviction honestly and thereby incriminate himself with regard to the recidivist statute; answer dishonestly by stating that he does not have any prior convictions and face harsher release conditions or no release should the false answer be discovered; or leave the statement blank—but only where he has past convictions which "might be harmful" to him. If he exercises the third option, the effect will be the same as a positive answer. It will alert the prosecution to the fact that he has past offenses which they should investigate.[73] Thus an exercise of his right to remain silent would be the equivalent of an admission of past offenses. He therefore has three totally inadequate alternatives—two involve incriminating himself and the third presents danger of harsher release conditions or no release at all. Where questions are phrased so that either an affirmative answer to the question or an election not to answer it are equally inculpatory in effect, a party's right to remain silent is rendered meaningless. Such questions used on bail release forms may violate the fifth and fourteenth amendments.[74]

Further, the warning as to the form's potential for self-incrimi-

71. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

72. ARIZ. R. CRIM. P. Form IV, Pt. II.

73. The prosecution receives these forms as a matter of course, thus clearly opening them up to the uses suggested here. Interview with W.R. Stevens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 20, 1974. Arguably, under the fruit of the poisonous tree doctrine, when a defendant by action *or silence* indicates that certain information should be examined by the police, and the action or silence was elicited in violation of the fifth amendment, evidence resulting from that police activity must be excluded. *Cf.* Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972) (testimony of a witness whose name was obtained from defendant in violation of his right to *Miranda* warnings was excludable as fruit of the poisonous tree).

74. Arizona may have some legitimate interest in obtaining information necessary to make a proper judgment as to likelihood of defendant's reappearance at trial. This interest is probably important enough to overcome the general privacy interest of the defendant with regard such questions as occupation and family ties. The interest is not sufficiently compelling to overcome the defendant's fundamental fifth amendment right to remain silent. See text & note 66 *supra*.

nation appears to be inadequate. The form contains a warning that "[A]ny information you may give may be used against you in this or any other matter."[75] As a practical matter, this warning does not adequately apprise the accused of the possibility that information he supplies in answering the question could be used to increase his sentence under the recidivist statute. The statement is so general and could refer to so many potential uses of the various kinds of information the defendant may provide in the course of filling out the entire release form that he cannot be expected to consider the possibility of problems that will occur as far in the future as sentencing.

There is, then, great potential for self-incrimination with regard to the recidivist statute under *Form IV*. The form itself and the procedure under rule 7 offer inadequate protection to prevent this incrimination. Since the state has the burden of proving a prior conviction to invoke the recidivist statute, the question concerning prior criminal record should be deleted.

Failure to Appear

Once the accused has been released the next logical consideration is the effect of his failure to appear for subsequent proceedings. Rule 9.1 retains the prior Arizona rule that a voluntary absence of the accused acts as a waiver of his right to be present at trial.[76] The rule permits an inference of voluntary absence if the defendant "had personal notice of the time of the proceeding, his right to be present at it, and a warning that the proceeding would go forward in his absence should he fail to appear."[77] This principle was challenged and upheld in the case of *State v. Tacon*.[78] However, the *Tacon* decision raises grave constitutional questions under the concepts of due process and equal protection, particularly as regards the efficacy of the "waiver" in a case where the accused was not voluntarily absent due to flight or hiding but rather was financially unable to return.[79] The concept of voluntary waiver under rule 9 must be clarified to prevent further problems or manifest injustice as occurred in *Tacon*.

75. ARIZ. R. CRIM. P. Form IV.
76. ARIZ. R. CRIM. P. 231(b) (1956) (abrogated 1973).
77. ARIZ. R. CRIM. P. 9.1.
78. 107 Ariz. 353, 488 P.2d 973 (1971), *cert. dismissed*, 410 U.S. 351 (1973). In *Tacon* the accused was released, went to New York, and was financially unable to return to Arizona for his trial. He subsequently returned to Arizona, but upon arrival found he had been tried, convicted, and sentenced in absentia. 107 Ariz. at 356, 488 P.2d at 976. *See also* Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir. 1973); State v. Davis, 108 Ariz. 335, 498 P.2d 202 (1972).
79. Tacon v. Arizona, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting).

DISCOVERY AND AFFECTED PROCEEDINGS

The most significant—and controversial—change embodied in the new *Rules* is the creation of a thorough system of criminal discovery.[80] Arizona is one of the first jurisdictions to adopt a comprehensive system of discovery.[81] Many states have adopted only limited discovery or individual discovery techniques rather than a comprehensive system.[82]

The proponents of the new *Rules* cited several advantages to the adoption of a system of criminal discovery. They contended that adoption of discovery would produce a fairer and more accurate fact finding process in three ways: discovery of constitutional issues at an earlier date so that trial error due to such problems can be reduced; fewer confused trials and fewer motions for continuance at trial due to surprise; production of better informed and probably increased plea bargaining.[83] The drafting committee also contended that the system of discovery would increase the speed of the fact finding process by reducing pretrial delay due to time consuming alternative methods of information gathering by defense counsel,[84] and by enabling presentation of almost all necessary motions in a pretrial hearing. The committee viewed these advantages as far outweighing any possible problems that might arise from use of discovery. Basically the opponents of discovery are of two classes, those who oppose prosecutorial disclosure and those who oppose defense disclosure. Their criticisms will be considered in that order.[85]

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80. This area in which the minority of the committee most sharply differed from the majority was the new discovery system. MINORITY REPORT, *supra* note 24, at 14-17. For a discussion of various problems of consent and criminal discovery, see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557. For a discussion of discovery in Arizona before the new rules see "Discovery in Criminal Cases," 13 ARIZ. L. REV. 313, 384 (1971).

81. Some other states have rather comprehensive discovery statutes although differing in detail from the Arizona rules. *See, e.g.*, ARK. STAT. ANN. §§ 43-2011.1-43.2011.4 (Supp. 1973); N.M. STAT. ANN. §§ 41-23-27 to -32 (Supp. 1973); N.Y. CODE CRIM. PRO. § 240 (1971); W. VA. CODE ANN. § 62-1B (1966); WIS. STAT. ANN. § 971.23 (1971); COLO. R. CRIM. P. 12.1, 16; DEL. R. CRIM. P. 16; FLA. R. CRIM. P. 3.200, 3.220; OHIO R. CRIM. P. 12, 16; PA. R. CRIM. P. 310-12.

82. *See, e.g.*, ALASKA STAT. § 12.45.050 (1972); CONN. GEN. STAT. REV. § 54-86a, 86b (Supp. 1973); KY. R. CRIM. P. 7.24.

83. PROPOSED RULE 16, Comment, at 66.

84. *Id.*

85. Some particular criticism of the system of discovery does not divide itself into a particular prosecution or defense point of view. Some foes have suggested that the entire system is too costly. MINORITY REPORT, *supra* note 24, at 1. The time that the system allows for completion of the discovery process is thought by some members of the judiciary to be too short. Interview with the Hon. Ben C. Birdsall, Presiding Judge, Pima County Superior Court, in Tucson Ariz., Feb. 25, 1974.

Prosecutorial Disclosure

Some opponents to the adoption of criminal discovery argue that disclosure of prosecution-gathered material beyond the requirements of *Brady v. Maryland*[86] has four potential bad effects: (1) witness intimidation and bribery;[87] (2) disclosure of identity of undercover agents and informants; (3) distortion of the balance of advantage in a criminal prosecution;[88] and (4) possible perjury and defense fabrication.[89] These arguments do not withstand analysis. Although the possibility of witness intimidation or bribery is real, it can be minimized through the use of protective orders which the court may grant under the new rules.[90] Disclosure of the identity of any informer is strictly regulated by rule 15.4(b)(2), thereby reducing any potential harm. There is no destruction of a balance between state and defense where discovery is allowed; the state with its vastly greater investigative appartus enjoys a preferred position, creating an imbalance which defense discovery can only begin to correct.[91] Further, since criminal justice is not a game between balanced sides but a search for truth, such considerations are at least arguably irrelevant.[92] Finally, fears

86. 373 U.S. 83 (1963). For a discussion of the requirements of *Brady*, see text & notes 160-62 *infra*.

87. Interview with Stephen D. Neely, Deputy County Attorney, Criminal Division, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974. Mr. Neely observed that potential witnesses are reluctant to testify in criminal cases and that further impositions upon them tend to exacerbate this problem, especially in the case of rape victims.

88. Judge Learned Hand, speaking in particular of inspection of grand jury minutes, observed:

> [Discovery] is said to lie in discretion, and perhaps it does, but no judge of this court has ever granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

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

89. Note, *Prosecutorial Discovery Under Proposed Rule* 16, 85 HARV. L. REV. 994, 1014 (1972). Under current practice in Pima County the state is providing to the judge the entire case file and permitting the court to review the file and provide any possible *Brady* material to the defense. The reason for this practice is said to be the inordinate amount of time the prosecution would have to allocate to such determinations if they undertook the task. Interview with Stephen D. Neely, Deputy County Attorney, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974.

90. PROPOSED RULE 16, Comment, at 66-67.

91. Note, *supra* note 89, at 1018.

92. In People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), Justice Traynor stated this view:

> Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the

of perjury and fabricated testimony are largely groundless. Similar charges were raised at the initiation of civil discovery but have never proven to be of much substance.[93]

The new rules set out very specific requirements of disclosure by the prosecution. Under rule 15.1(a)(1), the prosecution must disclose the names and statements of all witnesses to be produced as part of the case-in-chief.[94] This expands on prior Arizona law, which required disclosure only of the identity of these witnesses.[95] Under rule 15.1(a)(2), the prosecution must make available to the defendant copies of any statements he made to the police or other prosecutorial agents and statements of any other defendants to be tried with him.[96] Under 15.1(a)(3), the names and reports of experts who will examine the defendant must be disclosed. The material allowed to be discovered under 15.1(a)(4) and 15.1(a)(5) does not represent a significant change from previous Arizona practice.[97]

Rule 15.1(a)(7) presents another aspect of the prosecutorial duty to disclose. It requires the prosecutor to divulge any information that may tend to mitigate or negate the defendant's guilt or to reduce his punishment.[98] Rule 15.2(b) requires that the prosecution disclose

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case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of the prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.

Id. at 586, 305 P.2d at 13.

93. PROPOSED RULE 16, Comment, at 67. Some opponents of criminal discovery argue that there is greater impetus for the defendant to fabricate evidence in a criminal action than in a civil action. No empirical evidence has ever been found to support such allegations, although the dearth of criminal discovery systems may be the reason such proof is lacking.

94. The committee recommended disclosure of rebuttal witnesses as well. It gave several reasons: (1) the conceptual difficulty of identifying "impeachment" or "rebuttal" witnesses; (2) the unworkability of a "case-in-chief" standard; (3) the desirability of eliminating surprise; (4) the need for an opportunity to impeach or rebut rebuttal witnesses; (5) the constitutional risk involved in excluding rebuttal witnesses from disclosure; and (6) the lack of need for a rebuttal witness exception. *See* PROPOSED RULE 16, Comment, at 70-71. It should be noted that no such limitation is applied to a party's witnesses in the area of civil litigation. *See* Zimmerman v. Superior Court, 98 Ariz. 85, 402 P.2d 212 (1965). Had the court adopted the rule as proposed by the committee it might have been able to avoid the problem that Wardius v. Oregon, 412 U.S. 470 (1973) presents. *See* text accompanying notes 117-142 *infra.*

95. Ariz. R. Crim. P. 153 (1956) (abrogated 1973).

96. This represents a change from the old Arizona standard, which allowed the court to release such statements at its discretion. *See* State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962); State v. Superior Court, 81 Ariz. 127, 302 P.2d 263 (1956). The method adopted by the new rules was recommended as the better practice by the United States Supreme Court. Cicenia v. LaGay, 357 U.S. 504, 511 (1958).

97. These rules provide for discovery of: papers, documents, photographs or tangible objects to be used at trial or obtained from the defendant, and a list of all prior felony convictions to be used at trial. The model for the present rule also allows discovery of grand jury minutes. ABA, STANDARDS RELATING TO: DISCOVERY AND PROCEDURE BEFORE TRIAL, Rule 2.1 (iii) (approved draft 1970). This discoverv was already mandated by Arizona law. ARIZ. REV. STAT. ANN. § 24-411(a) (Supp. 1973-74).

98. Defense attorneys have suggested that the greatest difficulty they have in dis-

any information on such collateral issues as use of wiretapping, issuance of a search warrant and use of informers.[99] The prosecutor's disclosure duties are limited by *Giglio v. United States*[100] to information under his personal control or that of his staff. While the exact meaning of the limit established by *Giglio* has not been completely clarified,[101] it appears that the basic thrust of the limitation is to prevent the burden of making investigations for the defense from being placed on the state.

There are two basic limitations on these discovery obligations.[102] First, work product is not discoverable.[103] The second limitation relates to the discoverability of the identity of informants used by the prosecution.[104] The rule allows the prosecutor to refuse to disclose

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covering material is under this provision. Because the material is only generally described in the rule, controversy often arises over whether particular material has to be disclosed. Background information on prosecution witnesses (arrest records and similar items) are one area of controversy. Interview with William Callaway, Deputy Ass't Public Defender, Pima County, Tucson, Ariz., Feb. 20, 1974; interview with Michael Grayson, Felony Lawyer, Pima County Public Defender's Office, in Tucson, Ariz., Feb. 20, 1974. The Pima County Attorney's office contends that it gives its entire file in each case to the judge, who then decides what material should be given the defense under this rule. Interview with W.R. Stephens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974. The requirements of the rule parallel those established by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). For a discussion of the requirement of *Brady* and subsequent interpretation of that case, see text and notes 160-62 *infra*.

99. The minority of the committee felt that the *Rules* as proposed (and to a certain lesser extent as enacted) were unnecessarily broad in scope:

> We would require the prosecutor to provide: (1) The names and addresses of all witnesses to the act or event giving rise to the charge; (2) The right to inspect and/or examine and/or copy any physical evidence the prosecutor intends to introduce at trial; (3) Those particulars of the offense not specified in the pleadings which are necessary to enable the defendant to understand the nature of the charges against him; (4) A list of the names and addresses of the experts the prosecutor will call at trial, together with a summary or report of the results of any examinations or tests they may have conducted; (5) A copy of any written or recorded statements made by the defendant or by a codefendant who will be tried with the defendant, where those statements are in response to interrogation by law enforcement officers; (6) A Designation of the method of identification of the defendant; (7) A statement specifying whether or not there has been any electronic surveillance of any conversation to which the defendant has been a party, or of his residence or other premises; and (8) All "*Giles* and *Brady*" material. The prosecutor's obligation to disclose under our proposal would be defined by material within his possession or control, or material which is readily accessible to him.
>
> We recommend against providing the defendant with: (1) Police reports of any kind; (2) Statements of witnesses; (3) Names and addresses of witnesses who will be used solely for rebuttal purposes; and (4) Any physical evidence, reports, or material which will be used for rebuttal. We use the term "rebuttal" to define a stage in the proceedings, and not a type of testimony.

MINORITY REPORT, *supra* note 24, at 14-15.

100. 405 U.S. 150 (1972).

101. *See* United States v. Tashman, 478 F.2d 129 (5th Cir. 1973).

102. ARIZ. R. CRIM. P. 15.4(b).

103. The concept of work product as employed by the criminal rule apparently is intended to be identical to the parameters evolved under the federal and Arizona rules of civil procedure. *See* FED. R. CIV. P. 26; ARIZ. R. CIV. P. 26. *See also* Hickman v. Taylor, 329 U.S. 495 (1947).

104. *See* McCray v. Illinois, 386 U.S. 300 (1967).

the identity of an informant who will not testify at trial "where disclosure would result in substantial risk to the informant or to his operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused."[105]

Defense Disclosure

Those who oppose prosecutorial discovery of material in the possession of the defense often cite the danger of exploratory prosecution, undertaken merely to obtain information for future use.[106] The main objection, however, is based on values implicit in the fifth amendment privilege against compelled self-incrimination. Those opposing defense disclosure claim that the essence of the fifth amendment right is to prevent the defendant from having to provide the prosecution with *any* evidence against himself.[107] The question of the efficacy of a fifth amendment challenge to criminal discovery was presented in *Williams v. Florida.*[108] Williams contended that the notice of alibi statute which required him to inform the state of his defense prior to trial made him a source of testimonial evidence against himself. The Supreme Court rejected the idea that evidence resulting from a notice of alibi statute is "compelled" within the meaning of the self-incrimination clause. Rather, said the Court, the notice of alibi statute merely advances the time at which the defendant must decide whether or not to present an affirmative defense and therefore his rights are not violated. The notion that the fifth amendment does not bar prosecutorial discovery which merely advances the time of defense disclosure, does not provide a suitable rationale for discovery of material the defense will not present at trial.[109] Rather, discovery in such instances creates disclosure where none would otherwise exist. The result of such discovery is to make the defendant a source of evidence against himself. Thus *Williams* does not answer the argument that certain defense materials which may be discovered under the Arizona *Rules,*[110] are protected by the fifth amendment.

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105. ARIZ. R. CRIM. P. 15.4(b)(2).
106. Note, *supra* note 89, at 999-1000.
107. *Id.* at 1001-11.
108. 399 U.S. 78 (1970).
109. Some courts have upheld fifth amendment challenges to other forms of prosecutorial discovery. *See, e.g.,* United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973) (refusing to allow discovery of defense investigator's reports).
110. ARIZ. R. CRIM. P. 15.2(f) allows additional discovery by court order from the defendant. This rule does not limit discoverable material to that which will be presented at trial.

Williams and the Arizona *Rules* both seem to possess another flaw, that of inadequately limiting the use of materials obtained under the notice of alibi rule. The problem is that once the alibi and list of witnesses have been disclosed to the prosecution, they can be sources of evidence for both case-in-chief and rebuttal purposes. Hence

The discovery obligations of the defense are embodied in rule 15.2. Part (a) requires that the defendant participate upon written request in various procedures to obtain physical evidence.[111] Rule 15.2(b) continues the requirement that defendant notify the prosecution if he intends to employ an affirmative defense.[112] The final basic defense disclosure requirements, embodied in 15.2(c), are similar to the prosecutorial disclosure duties of 15.1(a)(1), (3) and (4): the defendant must disclose witnesses' names and statements, names and addresses of experts, and a list of documents and tangible objects to be used at trial.[113] Like the prosecution, the defense need not disclose material that is "work product."[114]

Possible Constitutional Problems of the Criminal Discovery Rules

Possible constitutional conflicts created by the new criminal discovery rules are suggested by the Supreme Court's decisions in *Washington v. Texas*,[115] *Williams v. Florida*[116] and *Wardius v. Oregon*.[117] In *Wardius*, the defendant failed to comply with the Oregon notice of alibi statute[118] and then sought to present evidence and call witnesses to support an alibi at trial. The trial court refused to allow Wardius to present his alibi. The Oregon court of appeals held that the defendant's failure to notify the prosecution of his intention to present an alibi was, under the Oregon statute, a waiver of his right to present that defense.[119] The Supreme Court of Oregon denied Wardius'

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the information acquired could be used even if the defendant were to decide not to present his alibi at trial.

The only valid justifications for a notice of alibi statute are preventing perjured alibis and surprise presentation of alibis. Limits appropriate to these purposes should be placed on use of material gained under the notice of alibi statute. Perhaps the best policy would be to limit evidence which the prosecution derives from the notice of alibi statement to use in rebutting defendant's alibi if presented at trial. No such limitation is present in the Arizona *Rules*.

111. Among the actitivities to which the defendant can be subjected are a line-up, finger-printing, a blood test and other similar procedures. These all appear to be nonviolative of his constitutional rights. *See* United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1965); *cf.* Berry, *supra* note 3, at 940-44; Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 908 (1974).

112. ARIZ. R. CRIM. P. 15.2(b). *See also* Ariz. R. Crim. P. 192 (1956) (abrogated 1973).

Some prosecutors seem to feel that certain defense attorneys are failing to live up to the spirit of the *Rules* by not giving timely notice of defenses based on the contention that they are not certain of presenting these defenses at trial. Interview with Stephen D. Neely, Deputy County Attorney, Criminal Division, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974.

113. ARIZ. R. CRIM. P. 15.2(c).

114. *Id.* RULE 15.4(b)(1).

115. 388 U.S. 14 (1967).

116. 399 U.S. 78 (1970).

117. 412 U.S. 470 (1973).

118. ORE. REV. STAT. § 135.875 (1971).

119. State v. Wardius, 6 Ore. App. 391, 487 P.2d 1380 (1971).

petition for review[120] and the United States Supreme Court granted certiorari.[121] In an opinion by Justice Marshall the Court stated first that criminal discovery as a basic proposition is not per se invalid:

> The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams* [*v. Florida*] nothing in the Due Process Clause precludes states from experimenting with systems of broad discovery to achieve these goals. . . .
>
> But although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser.[122]

The majority noted that Oregon provided no discovery right to criminal defendants while requiring notice of alibi under penalty of preclusion. The Court concluded that a state cannot require discovery disclosures from the defendant without granting him significant reciprocal discovery rights as part of a nondiscretionary, institutionalized scheme. Applying this principle, the Court found particularly damning Oregon's requirement of notice of alibi while failing to provide the defendant with the names of witnesses the prosecution would use to refute that alibi.[123]

The basic attitude adopted by the majority of the Court envisions discovery as a two way street.[124] The thrust of this concept seems to require that discovery between the state and defendant be such as to achieve an equitable balance.[125] This proposition, derived by the majority from *Williams v. Florida*,[126] suggests the absence of any absolute right of the defendant to refuse to participate in the discovery process.[127] Such a relativistic view of the fifth amendment privilege as a right to be balanced against the degree of reciprocity of discovery appears to reject the trend followed by the Warren Court, which viewed self-incrimination protection as bordering upon the absolute.[128] Justice Douglas, a proponent of the absolute view, characterized the "balancing" view of the fifth amendment when he observed: "To re-

120. The Oregon supreme court denied petition for review in an unreported order. 412 U.S. 470, 472 (1973).
121. Wardius v. Oregon, 406 U.S. 957 (1972).
122. Wardius v. Oregon, 412 U.S. 470, 474 (1973) (citation omitted).
123. *Id.* at 475.
124. *Id.* at 472.
125. *Id.* at 475-76 n.9.
126. 399 U.S. 78 (1970).
127. Wardius v. Oregon, 412 U.S. 470, 471 (1973).
128. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 479 (1966); Griffin v. California, 380 U.S. 609, 615 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964).

verse . . . because of uncertainty as to the presence of reciprocal discovery is not to take the Constitution as written but to embellish it in the manner of the old masters of substantive due process."[129]

The simplest reading of *Wardius* is that the state cannot require a defendant to disclose whether he will present an alibi unless it assumes the reciprocal obligation of providing him with the names of witnesses it will call to refute his alibi. Under this interpretation, Arizona's rules would have been invalid on their face. As noted earlier,[130] the Supreme Court of Arizona, in adopting the *Rules*, rejected the drafting committee's recommendation that rule 15.1(b)(1) require the prosecutor to provide the defense with the names of witnesses he will call for rebuttal purposes.[131] Thus it appeared that a challenge to rule 15 as requiring notice of alibi while failing to provide the requisite degree of reciprocal discovery could lead to an invalidation of that rule. The results of such an invalidation, due to the nonseverability provision of rule 15.8, would have resulted in an invalidation not only of rule 15.2(b) (notice of defense) but also rules 15.1(a)(1) (discovery of prosecution witnesses), 15.1(b) (disclosure of material relating to possible collateral issues), and 15.1(c) (additional discovery upon request).[132]

The Arizona court was faced with just this problem in *Wright v. Superior Court.*[133] In *Wright*, the defendant had provided notice of alibi but refused to give the names of alibi witnesses because she claimed that the *Rules* did not provide for the sort of reciprocal discovery required under *Wardius.* The court held that the *Rules* do provide adequate reciprocal discovery. The court noted that, while there is no specific provision requiring the prosecution to provide the names of rebuttal witnesses,[134] rule 15.1(e) provides:

> Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.1, and that he is unable without undue hardship to obtain the substantial equivalent by other means. The court in its discretion may order any person to make it available to him. (*sic*) The court may, upon the re-

129. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring). *See also* Williams v. Florida, 399 U.S. 78, 111-14 (1970) (Black, J., dissenting).

130. See note 94 *supra.*

131. PROPOSED RULE 16.1, Comment, at 70-71. Had the court adopted the rule as proposed by the Committee, the dilemma which arose in Wright v. Superior Court, 110 Ariz. 265, 517 P.2d 1261 (1974), would have been avoided. See text accompanying notes 133-42 *infra.*

132. Should the provisions of Rules 15.2(b) or (c) be found unenforceable, then the provisions of Rules 15.1(a)(1) (relating to witness statements), (b), and (c) shall also be inoperable, null and void.

133. 110 Ariz. 265, 517 P.2d 1261 (1974).

134. *Id.* at 111, 517 P.2d at 1262.

quest of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.[135]

The court said that, in light of *Wardius*, a trial court would be guilty of abuse of discretion if it failed to provide a defendant with the names of rebuttal witnesses, should he request them under rule 15.1(e).[136] According to the court, the fact that the defendant must make a motion to gain this discovery does not violate due process as it is a "simple procedural step."[137] This observation was apparently an attempt by the court to foreclose further attacks, based on *Wardius*, against the Arizona discovery procedure. The United States Supreme Court in *Wardius*, however, indicated that the disclosure must be automatic not at the discretion of the judge.[138] The Arizona supreme court in *Wright* interpreted this statement to mean that the material must be available whenever requested by the defendant through proper procedures.[139] This reading of *Wardius* may not be accurate. The Court in *Wardius* may have been establishing a requirement that the prosecution by receipt of a notice of alibi incurs an obligation, even without a request by the defense, to disclose the names of rebuttal witnesses. If this reading of *Wardius* is correct then the Arizona rule, even as interpreted by the court in *Wright*, may not meet the necessary constitutional standards.

An alternative reading of *Wardius* suggests that the roundabout reconciliation achieved in *Wright* may not have been necessary. *Wardius* may simply mean that the state cannot require discovery from the defendant absent *some* significant reciprocal rights of discovery from the state to the defendant. Surely the disclosure required of the prosecution under 15.1(a) is "significant" and "reciprocal." A vast amount of information is given the defendant by the prosecution. While defendant must disclose his defenses, Arizona discovery is very much "a two-way street."[140] Thus the mere failure to provide names of rebuttal witnesses even when notice of alibi is required need not have invalidated the system of discovery. Textual support for this view, as opposed to the symmetric alibi/rebuttal witnesses requirement, is found in both *Wardius*[141] and the earlier case of *Williams*

135. ARIZ. R. CRIM. P. 15.1(e).
136. 110 Ariz. at 267, 517 P.2d at 1263.
137. *Id.* at 268, 517 P.2d at 1264.
138. 412 U.S. at 477-79.
139. 110 Ariz. at 268, 517 P.2d at 1264.
140. *See* 412 U.S. at 475.
141. The Court suggests that mere notice of time and place of alleged offense do not approach the degree of reciprocity required. 412 U.S. at 478 n.12. This may be viewed as indicating that *Wardius* is dealing with a general qualitative concept of "significant, reciprocal" discovery rather than a requirement of disclosure of any specific facts.

v. Florida.[142] However, by holding that *Wardius* mandates the provision of names of rebuttal witnesses whenever notice of alibi is required, the Arizona court took the safer path. Its interpretation of rule 15.1(e) probably saves the Arizona *Rules* from constitutional attack on *Wardius* grounds.

Possible constitutional defects may still exist in the rule 15 enforcement procedures. The *Rules* use preclusion as a sanction to enforce disclosure.[143] The basic issue in this regard is whether the courts may deny a defendant the opportunity to present witnesses or evidence at trial which he earlier failed to disclose to the prosecution. This question was specifically reserved from decision by the Supreme Court in both *Wardius*[144] and *Williams.*[145] In *Washington v. Texas,*[146] dealing with a disqualification of codefendant statute, the Court held that the sixth amendment right to compulsory process to obtain witnesses includes the essential right of the defendant to present witnesses and evidence in his own behalf. The Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[147]

Preclusion as a method of enforcing discovery may conflict with this right.[148] The right of the defendant to present his defense can

142. 399 U.S. 78 (1970). The Court noted that a notice of alibi statute really has a minimal effect on defendant rights, because an alibi will be disclosed at the trial and the state could then be granted a continuance to obtain rebuttal witnesses. *Id.* at 85-86.

143. ARIZ. R CRIM. P. 15.7(d). Among the other sanctions available to enforce discovery are; production orders, continuances, the court's contempt power as well as its power to declare a mistrial.

The courts have apparently utilized the continuance coupled with orders to disclose as their principal enforcement technique. The rationale is that it is better to force disclosure and then allow the other side to prepare to meet the evidence than to preclude relevant evidence from the trial. Interview with the Hon. Ben C. Birdsall, Presiding Judge, Pima County Superior Court, in Tucson, Ariz., Feb. 25, 1974.

144. 412 U.S. at 472 n.4.

145. 399 U.S. at 83 n.14.

146. 388 U.S. 14 (1967).

147. *Id.* at 19; *cf.* United States v. Burr, 25 F. Cas. 30, 32 (No. 14,692d) (C.C.D. Va. 1807); State *ex rel.* Brown v. Dewell, 123 Fla. 785, 789, 167 So. 687, 690 (1936).

148. *But see* State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968). The Wisconsin court upheld the preclusion sanction as applied to the testimony of witnesses offered to establish an undisclosed alibi. The court rejected challenges based on the United States Supreme Court decision in *Washington* and a provision of the Wisconsin constitution giving rights to present a defense and to compulsory process. In distinguishing the *Washington* rationale, the court employed the somewhat question-

be limited by the discovery statutes of the state under only two constitutional theories:[149] the doctrine of compelling state interest and the doctrine of constitutional privilege. The concept of compelling state interest is based on the principle that, where the state has an overwhelming interest in the accomplishment of a goal, minimal infringement of even "fundamental" constitutional rights may be valid.[150] The Court has held in numerous cases that a state infringement of constitutional rights was invalid, because the state interest lacked sufficient urgency.[151] The state interest in prosecutorial discovery—in terms of either speeding up the system or enhancing the accuracy of the fact-finding process—may not be strong enough to override the defendant's interest in presenting his defense.[152] Likewise the doctrine of constitutional privilege fails to provide an adeand preclusion, this theory holds that, by accepting the privilege of prosecutorial disclosure of material, the defendant waives his right to present in his defense material he has refused to disclose.[153] However, the receipt of a benefit or privilege cannot be conditioned upon the waiver of a constitutional right.[154] Thus the receipt of material from the prosecution, under either rule 15 discovery or under *Brady v. Maryland*,[155] cannot be conditioned upon the defendant's waiver of his

able logic that the Texas statute there in question had totally disqualified a whole class of witnesses while the Wisconsin statute only precluded those witnesses of whom no notice is given. This class of witnesses analysis ignores the central concept of *Washington*, the right of the defendant to present witnesses in his own defense. The issue of whether a state can prevent a defendant from presenting witnesses should not depend upon whether a class of witnesses is excluded or only individual witnesses are excluded due to failure to provide notice of their presentation. Preclusion arguably would offend *Washington* if the defendant were precluded from calling all of his witnesses due to failure to give notice of any alibi witnesses or if he were precluded from calling additional witnesses where he had listed only one or two. This reading of *Washington* has not yet been adopted by any court. It should be noted that at least one court has upheld preclusion without any consideration of this issue. *See* State v. Nunn, 113 N.J. Super. 161, 273 A.2d 366 (1971).

149. A full treatment of the concepts of the right to present a defense and preclusion may be found in Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972).

150. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968). This is not a well-settled constitutional doctrine. There has been a strong current of feeling that constitutional rights are absolute and no amount of state interest can override them. *See, e.g*, Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring); California v. Byers, 402 U.S. 424, 463-64 (1971) (Black, J.,dissenting).

151. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

152. For a discussion of the various policies both for and against discovery, see text accompanying notes 83-114 *supra*. *See also* Note, *supra* note 149, at 1344, suggesting that while these two state interests may be strong there are less opressive means than preclusion to effectuate them.

153. Note, *supra* note 149, at 1363.

154. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

155. 373 U.S. 83 (1963). For a discussion of the requirements of *Brady*, see text & notes 160-62 *infra*.

right to present a defense.[156]

If this right of the accused to present his defense does render preclusion unconstitutional as a method of enforcement, practical problems may arise under the *Rules*. The other methods of enforcement provided by rule 15.7 may not be adequate to force the defendant to meet his discovery obligation.[157] Ordering disclosure, granting a continuance, and even declaring a mistrial do not as effectively force the defendant to disclose material to the prosecution as does a power of subsequent preclusion.[158] Only the power to issue a contempt citation against the recalcitrant defendant will be of equal efficacy, and there may be cases where this alternative would be inadequate.[159] Preclusion is a very effective weapon if the judge can use it. Preventing the defendant from presenting at trial any evidence he refused to disclose may well provide sufficient incentive for him to fulfill his discovery obligations. The loss of preclusion as an enforcement method could have dire results.

If there were no system of criminal discovery in Arizona, *Brady v. Maryland*[160] would still mandate certain basic prosecutorial disclosure obligations. The prosecutor need not disclose all that is required by rule 15.1; *Brady* requires only that any evidence under prosecution control that is *favorable* to the accused must be disclosed upon the latter's request. Discovery under rule 15.1, however, is clearly more

156. Note, *supra* note 149, at 1363.

157. Two Arizona prosecutors have indicated that preclusion is probably the only effective way to force the defendant to disclose his alibi and other affirmative defenses. Interview with W.R. Stevens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 20, 1974; interview with Stephen D. Neely, Deputy County Attorney, Criminal Division, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974.

158. Under current practice in Pima County, judges are not employing the preclusion sanction against the accused. The result, according to prosecuting officials, is that the defense sometimes is not effectively forced to disclose. Interview with W.R. Stephens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974. This suggests at least arguably that if preclusion were completely removed as a potential deterrent to defense nondisclosure, discovery by the prosecution would be significantly reduced.

159. It should be recognized that there are two kinds of contempt that may be employed in this regard. The first is criminal contempt where for failure to comply with a court order, a party is given a definite jail sentence or fine after a full hearing. The other is civil contempt whereby a party may be jailed until he complies with an order of the court. Where a defendant faces a life sentence for a crime, it is difficult to believe that he will provide the prosecution with evidence to be used to convict him even under threat of civil or criminal contempt liability. Further, while both civil and criminal contempt have been upheld as applied to the noncomplying witness, the strictures of Rule 8 may prevent civil contempt from interfering with speedy trial. On the validity of contempt power under the due process clause and other constitutional provisions, see Uphaus v. Wyman, 360 U.S. 72 (1959) (upholding state court's power to keep a party in jail until he obeys a court order to disclose evidence); Green v. United States, 356 U.S. 165 (1958) (upholding power to attach criminal contempt liability); Wilson v. United States, 65 F.2d 621 (3d Cir. 1933); Chitwood v. Eyman, 74 Ariz. 334, 248 P.2d 884 (1952); Comment, *Contempt Powers of the Arizona Courts*, 8 ARIZ. L. REV. 141 (1966).

160. 373 U.S. 83 (1963).

advantageous to the defendant than the more limited discovery under *Brady*. First, it appears from the *Rules* that all material required to be disclosed must be given to the defendant whether or not he requests it.[161] This is a clear advantage over *Brady*, which appears to be limited to material requested by the defense. Secondly, *Brady* appears to be limited to material favorable to the defense.[162] Under rule 15.1 a defendant may have access to the information specified whether or not it is favorable to his case. Thus, while *Brady* guarantees certain basic defense discovery rights, rule 15 is superior both in basic fairness to the defense and in assuring a more accurate fact finding process at trial. Efforts should be made to secure the discovery process from sixth amendment attack.

The Preliminary Hearing

If discovery is rendered ineffective, certain other proceedings may also have reduced usefulness. The procedure which has been most affected by Arizona's system of criminal discovery is the preliminary hearing. Although the hearing occurs before discovery under rule 15, it has been altered to accommodate a criminal justice system with adequate devices for liberal discovery.

The preliminary hearing is now strictly limited to the issue of probable cause. Under rule 5.3, the prosecution need only present an adequate case to establish probable cause, and the magistrate may end the preliminary hearing at that point. The defense has the right to cross-examine any witnesses which the prosecution presents, but the right of the defense to present a case is limited. The defendant may make an offer of proof of a defense, which the judge may reject if he determines it would be insufficient to rebut the finding of probable cause.[163] If the judge makes this determination, the defendant may

161. At least arguably, discovery rights under *Brady* are limited to requested material. *See* Moore v. Illinois, 408 U.S. 786 (1972). *Contra*, Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964).

The Supreme Court of Arizona has held that at least where special circumstances exist, the prosecution must disclose Brady material even absent a defense request, *See* State v. Fowler, 101 Ariz. 561, 422 P.2d 125 (1967). The extent to which this rule will be applied is uncertain but it does indicate a positive attitude toward disclosure under *Brady*.

162. *See* United States v. Quinn, 364 F. Supp. 432 (N.D. Ga. 1973), which held that the prosecution must disclose any information which is "arguably favorable to the defense, directly or for impeachment." Where disagreement occurs, the use of court *in camera* proceedings to check for such information is recommended. *See also* Cannon, *Prosecutor's Duty to Disclose*, 52 MARQ. L. REV. 516, 521-30 (1969); Traynor, *Ground Lost and Ground Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972).

163. In State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965), the Supreme Court of Arizona had held that the Arizona constitutional requirement of a preliminary hear-

not present a defense at the preliminary hearing.[164]

The clear effect of the limited scope of the preliminary hearing under rule 5.3 is to eliminate the discovery aspects of the hearing. Under prior preliminary hearing procedure, the defendant had the right to present a full defense and to call any witnesses, as well as to take the stand himself.[165] Because the new hearing is limited to the issue of probable cause, the prosecution need put on only enough witnesses to establish probable cause. The defense will have little opportunity to acquire any additional information about the prosecution's case at this point. Also, since the opportunity to present a defense is limited, the defense may not be able to call non-presented prosecution witnesses to elicit information about the prosecution case.[166] These two changes certainly serve the goal of making the criminal justice system more expeditious and are not deleterious if coupled with an effective discovery system. If, however, the discovery established by rule 15 is reduced significantly, the truncation of the preliminary hearing may become oppressive. If there is no later opportunity to discover possible collateral constitutional issues or statements of witnesses, the removal of the defendant's opportunity to discover this information at the preliminary hearing will result in a criminal system in which defendants are tried without an opportunity to gain this crucial information and thus to frame issues before trial. Clearly, if rule 15 is declared invalid in part, rule 5 will have to be altered to prevent this unjust result.

Regardless of whether the discovery proceedings are upheld, reducing the scope of the preliminary hearing may yet be constitutionally infirm. There is no federal constitutional right to a preliminary

ing includes "the right to produce witnesses and to cross-examination." *Id.* at 233, 403 P.2d at 543. ARIZ. R. CRIM. P. 5.3 expressly overrules *Essman*. Since article 6, § 5(5) of the Arizona constitution gives the supreme court power to promulgate procedural rules for all courts, it appears within the court's competence to repudiate the standards of *Essman* under the new rules.

164. In at least some Pima County cases judges have refused to allow defendants making the requisite offer of proof to present witnesses. Interview with W.R. Stephens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974.

165. The drafting committee suggests that it was the potential for time consuming abuse by defense counsel that led to giving the judge the power to limit the defendant's right to present a defense. The right to present a full defense at preliminary hearing was established by Ariz. R. Crim. P. 26 (1956) (abrogated 1973) and by the decision of the Supreme Court of Arizona in State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965). See PROPOSED RULE 5.3, Comment, at 12.

166. Of course, as a practical matter there are very few cases where a defendant will wish to present a defense at a preliminary hearing. PROPOSED RULE 5.3, Comment, at 12. Eliminating the right, however, will restrict him in those cases where he may wish to present one. Further, the prosecution can circumvent the preliminary hearing entirely by employing indictment through the Grand Jury. *See* Braun, *supra* note 111, at 914-15. Approximately 80 percent of the criminal cases in Pima County go before the county grand jury. Nilsson, *Grand Jury Called Tool of The Prosecutor*, The Arizona Daily Star, Feb. 10, 1974, § A, at 1, col. 3.

hearing.[167] But, under *Hewett v. North Carolina*,[168] if a state chooses to provide a proceeding, the strictures of due process must be observed.[169] Consequently, if a state requires a preliminary hearing as part of its criminal process (Arizona constitutionally requires a preliminary hearing in all cases commenced by information, unless waived by accused[170]), that hearing must be conducted so as to comport to the basic notion of fairness contained in the due process clause of the fourteenth amendment. From various cases there emerges the principle that due process requires that where a party is guaranteed a hearing, he is guaranteed a right to present a defense and confront his accusers. Thus an accused has been held to have a right to present a defense at trial,[171] at a parole revocation hearing,[172] as well as at a criminal contempt hearing.[173] As Justice Black has observed:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel.[174]

The preliminary hearing constitutes an important stage in the defense of the criminal accused. At that point, if the defendant can defeat the prosecution's claim of probable cause, he will avoid the burdens of further involvement in the criminal process, including trial. If the accused is in custody pending trial, a favorable outcome at the preliminary hearing would also spare him further incarceration.[175] Considerations similar to this have led the Supreme Court to grant a right to present a defense at a hearing to determine if there is probable cause to bind a person over for a full scale parole[176] or probation[177] revocation hearing. Those decisions seem to have been based in part on the fact that the parolee or probationer would be returned to custody while awaiting the final revocation hearing. This situation is analogous to the preliminary hearing, at least for the defendant who

167. *See* Ramirez v. Arizona, 437 F.2d 119 (9th Cir. 1971); Barber v. Arkansas, 429 F.2d 20 (8th Cir. 1970); Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965); Dillard v. Bomar, 342 F.2d 789 (6th Cir. 1965).
168. 415 F.2d 1316 (4th Cir. 1969).
169. *Id.* at 1322-23.
170. ARIZ. CONST. art. 2, § 30.
171. Washington v. Texas, 388 U.S. 14, 17 (1967); Specht v. Patterson, 386 U.S. 605, 610 (1967). *See* text accompanying notes 146-147 *supra*.
172. Morrissey v. Brewer, 408 U.S. 571, 487 (1972) (at the *first* hearing to determine whether there is probable cause to believe a violation has occurred, the accused has the right to present a defense).
173. *In re* Oliver, 333 U.S. 257 (1948).
174. *Id.* at 273 (emphasis added).
175. *See* text & notes 33-36 *supra*.
176. Morrissey v. Brewer, 408 U.S. 471, 485 (1972).
177. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

has not been released under the provisions of rule 7. He will be returned to custody to await trial if an unrebutted showing of probable cause is made at the hearing. The right to present a defense at a preliminary hearing is potentially beneficial even to the defendant who is ROR or bailed, because it may enable him to end his involvement in the criminal process.[178]

This issue will ultimately have to be decided by litigation, and if the philosophy embodied in *Washington* and other cases—that a hearing entails a right to a defense—prevails, the prognosis seems unfavorable for the supporters of the rule 5 streamlining of the preliminary hearing.

The Omnibus Hearing

Another key change embodied in the new *Rules* is the rule 16 omnibus hearing,[179] which was established to expedite the criminal process by creating one hearing to deal with all pretrial motions. This new type of procedure has been tested in federal district courts in San Diego and San Antonio. Only a few states have adopted it so far.[180] At the hearing, which is to be held after the discovery process, the parties must present "all motions specified in the Omnibus Hearing form"[181] and any other motion, defense, objection or request which is capable of resolution at that time. Any matter not timely raised

178. In Pointer v. Texas, 380 U.S. 400 (1965), the Court held that there is a right to cross-examine witnesses at a preliminary hearing but did not purport to establish an independent right to present a defense. This failure may be seen as a significant omission indicating that such a right has no basis in the federal Constitution or as a mere exercise of the judicial policy of not deciding issues not essential to the decision of the particular case.

179. For an example of how the omnibus hearing is supposed to work, see the sample transcript from a hearing held in United States District Court for the Southern District of California in ABA, STANDARDS RELATING TO: DISCOVERY AND PROCEDURE BEFORE TRIAL 145-58 (Approved Draft, 1970).

180. *See* IND. ANN. STAT. § 9-1201 (Burns Supp. 1973); TEX. CODE CRIM. § 28.01 (Supp. 1974); VT. R. CRIM. P. 12; Arizona Weekly Gazette, Feb. 19, 1974 § B at 1, Col. 4 (noting the state of Washington's recent adoption of this procedure). Other states have conferences or hearings which are similar but not identical to the omnibus hearing. See N.M. STAT. ANN. § 41-23-36 (Supp. 1973); PA. R. CRIM. P. 311 (Supp. 1973-74).

181. The following motions are specified in the Omnibus Hearing form: (1) to challenge the jurisdiction of the court; (2) to dismiss an information or indictment under Rule 16.7; (3) to review the determination of probable cause under rules 5.5 or 12.9; (4) to disqualify a judge under rule 10.1 or 10.2; (5) to change place at trial under rule 10.3; (6) to withdraw as counsel under rule 6.3; (7) to request a determination of defendant's competency or sanity under rule 11; (8) to amend an information or indictment under rule 13.5; (9) to sever defendants or counts under rule 13.3(c); (10) to consolidate defendants or counts under rule 13.4; (11) to determine the voluntariness of a statement made by defendant; (12) to suppress evidence based on unlawfulness of an arrest; (13) to suppress evidence based on unlawfulness of a search or seizure; (14) to suppress evidence based on unlawfulness of identification; (15) to determine the admissibility of evidence; (16) to modify the conditions of release; (17) to request subpoena of an out-of-state witness; (18) to require a material witness to enter into an undertaking under ARIZ. REV. STAT. ANN. §§ 13-1841 & 1842 (1956). ARIZ. R. CRIM. P. Form XVI (II).

under 16.1(b) will be precluded unless the basis of it was not known and could not have been known by an exercise of reasonable diligence. In such a case the party must raise the issue promptly upon learning of it.[182]

Another procedure adopted to faciliate the omnibus hearing is the mandatory prehearing conference. The idea behind this conference is similar to that behind the pretrial conference in civil cases[183] —to limit the issues for the hearing. At the prehearing conference, issues known to counsel must be disclosed to the opponent or they cannot be raised at any later stage. Again the basic idea is to clarify issues to keep the process both speedy and efficient.

Realistically, however, the omnibus hearing may present only illusory advantages. The architects of rule 16 saw it as a key step in streamlining the criminal justice process.[184] The statistics indicate that the pretrial motion system of the old rules significantly added to the length of the criminal justice process.[185] The new integrated process of rules 15-19, asserted its proponents, would speed up the process by clarifying issues and disposing of preliminary matters before trial.[186]

It has been suggested that the omnibus hearing may not achieve these advantages. A study conducted in San Diego[187] by Raymond T. Nimmer found that where the technique was applied in an already basically efficient judicial system it resulted in an increase rather than a decrease in the amount of judge time per case.[188] While the Arizona judicial system may not be as streamlined and efficient as that of the federal district courts in San Diego, these findings raise at least the possibility that the omnibus hearing will not achieve time saving. The study indicated that the omnibus hearing achieved its best results as applied to selected, complex cases.[189] While rule 16.6 provides

182. ARIZ. R. CRIM. P. 16.1(c).
183. FED. R. CIV. P. 16; ARIZ. R. CIV. P. 16.
184. PROPOSED RULE 17, Comment, at 84.
185. Forty-six percent of all criminal trials under the old rules were preceded by pretrial motions. In cases where no pretrial motions were filed completion averaged 116 days. If one or two motions were filed this average increased to 202 days. In cases of three to five motions the period was extended to 279 days, for six to nine motions an average period of 269 days was required and for 10 or more motions the period extended to 333 days. *Id.*
186. *Id.*
187. The San Diego Study investigated the advantages and disadvantages of the omnibus hearing in the federal courts of the Southern District of California in 1967-1970. R. NIMMER, *supra* note 10.
188. *Id.* at 87-89.
189. One judge's reaction to the experimental use of the omnibus hearing in his courtroom paralleled the findings of the San Diego Study: "I have experimented with several versions of the omnibus hearing procedure. Except for a very small percentage of the cases, I find this type of hearing to be inefficient and time-consuming, out of proportion to any benefits received." *Id.* at 87.

that the judge may omit the omnibus hearing if he determines that it will serve no purpose, the *Rules* clearly seek to encourage the use of the omnibus hearing.[190] The San Diego Study found that where the hearing was optional but encouraged, the courts used it in 85 percent of all cases.[191]

Some authorities have extolled the virtues of the hearing. Reports of the use of the hearing in federal courts in San Antonio have indicated that the omnibus hearing did achieve positive results.[192] Further, other observers have interpreted the results of the use of the hearing in San Diego more positively than Nimmer.[193] Finally, the committee, in writing the *Rules*, considered Nimmer's criticisms and tried to construct the Arizona rule to meet these objections. The committee contended that by establishing independent discovery, requiring a prehearing conference between counsel, limiting the use of the hearing to judicial discretion, and timing it after the completion of discovery, they have prevented the Arizona omnibus hearing from being subect to the faults Nimmer found in the San Diego hearings.[194] Thus the Nimmer study may not be entirely dispositive of the issue of the efficacy of the hearing in Arizona. Nevertheless, it (and the initial experience under the *Rules*)[195] suggest that the hearing may well be less than a panacea for delay.[196]

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190. Rule 16.6 provides that "the court shall hold an omnibus hearing unless it determines that the hearing will not serve a useful purpose in a particular case." The drafting committee's comment to the rule indicates that it strongly recommended use of the hearing in almost every case, even where only one issue could be disposed of at the hearing. PROPOSED RULE, 17, Comment, at 91. This philosophy of nonuse as the exception rather than the rule, although supposedly based on the results of the San Diego Study, seems contrary to the concept of using the hearing only in a few complex case situations. *See* note 189 *supra*.

191. R. NIMMER, *supra* note 10, at 93.

192. Harrison, Gillespie & Spears, *Why the Omnibus Hearing Project?*, 55 JUDICATURE 377 (1972). Among the advantages attributed to the use of the omnibus hearing are an increase in guilty pleas, elimination of long costly delays caused by in-trial motions, and elimination of paperwork.

193. *See* ABA, *supra* note 97, at 9, which argues that very positive results were achieved by the use of the hearing in San Diego. While observing that conclusive data had not yet been collected, the Advisory Committee believed that in 2 years the use of the hearing had achieved advantages in terms of speeding up the process and simplifying trials. *See also* Comment, *The Omnibus Hearing: A Proposal for California Criminal Pretrial Motion Procedure*, 4 PAC. L.J. 861 (1973), wherein the author contends that the results of the use of the hearing in San Diego are mixed.

194. PROPOSED RULE 17.6, Comment, at 90-91.

195. Judges in Pima County have found that the adoption of the *Rules* has increased their in-court time. Under the old rules, 25 to 30 criminal motions were heard each week in Pima County. Since the *Rules* were adopted, this has increased to 75 to 100 motions per week. This has put a tremendous strain on the capacity of the superior court to deal with both these motions and other criminal and civil matters. At least arguably, this may be due either to discovery related motions or to the misuse of the hearing that has occurred in Pima County. *See* text & note 199 *infra*. It has been suggested that elimination of the omnibus hearing would reduce this total by at least 30 motions per week. Interview with the Hon. Ben. C. Birdsall, Presiding Judge, Pima County Superior Court, in Tucson, Ariz., Feb. 25, 1974.

196. Of course, even if the omnibus hearing does speed up the criminal system, such

The only real benefit of the omnibus hearing, the San Diego Study found, was that the hearing allowed some informal discovery in a system where there was no comprehensive discovery process.[197] In Arizona, which already has a liberal discovery system, the value of this aspect of the omnibus hearing is rather limited. If the Arizona discovery system is emasculated[198] then an omnibus hearing may serve as a useful discovery device. However, absent some sort of prior discovery, the hearing itself may become even more time-consuming and thus fail in its purpose of efficiently delimiting issues before trial. Both sides must have adequate information to raise issues at the omnibus hearing for any advantage to accrue from its use.

Early practice under the omnibus hearing rule confirms that problems exist. Some attorneys have contended that the hearing as presently employed achieves no benefit at all. In Pima County the present practice is to have a pro forma omnibus hearing and, rather than arguing the motions specified on the form at that time, to set dates for subsequent separate hearings on various motions.[199] Where the hearing is used merely as a scheduling meeting, it fails to achieve its basic purpose of saving time by a single consolidated hearing on the various motions. To remedy the problems experienced thus far, the omnibus hearing should be employed selectively in complex cases at the judge's discretion, giving the court adequate time to dispose of all matters at one sitting.

Pleas and Plea Bargaining

Other major pretrial changes created by the new *Rules* lie in the areas of pleas and plea bargaining. Under the new rules there are three basic pleas: guilty, not guilty and no contest.[200] All pleas must be voluntary and intelligent.[201] To insure that pleas of guilty or no contest have met these standards, rules 17.2 and 17.3 establish the judicial duty in accepting a plea. Rule 17.2 provides that the court must ensure that the defendant understands the nature of the charge to which the plea is offered,[202] the nature and range of possible sen-

speed may have a negative impact on the fairness and accuracy of the process. *See* text & note 10 *supra.*

197. R. NIMMER, *supra* note 10, at 87.

198. *See* text & notes 115-56 *supra.*

199. Interview with William Callaway, Deputy Ass't Public Defender, Pima County, in Tucson, Ariz., Feb. 20, 1974; interview with W.R. Stevens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974; interview with Stephen D. Neely, Deputy County Attorney, Criminal Division, Pima County Attorney's Office, in Tucson, Ariz., Feb. 25, 1974.

200. ARIZ. R. CRIM. P. 17.1.

201. *Id.* RULE 17.1(b).

202. *See also* Smith v. O'Grady, 312 U.S. 329 (1941) (defendant plead guilty assuming the charge was simple burglary and was not informed that the charge was bur-

tence,[203] the constitutional rights he waives by pleading guilty or no contest, and his right to plead not guilty. Under rule 17.3, a court, before it accepts a plea of guilty or no contest, must determine that there is a factual basis to support such a plea.[204] To the extent that accuracy of the fact finding process is a goal of the criminal justice process this rule is justified.

The formalization of the plea bargaining process represents another major change in this area of procedure. In the vast majority of jurisdictions, plea bargaining is a significant part of the criminal system.[205] The drafting committee cited many advantages to the system of plea bargaining, particularly in terms of making the criminal justice system somewhat administratively manageable.[206] Any system of "bargain justice" presents serious ethical problems, however.[207] It

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glary with explosives, Court held it to be a violation of due process to accept his guilty plea); Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963) (rule 11 of the Federal Rules of Criminal Procedure requires the defendant be informed of and understand the charges against him before he makes his plea).

203. *See also* Boykin v. Alabama, 395 U.S. 238 (1969) (judge may not accept a guilty plea without determining that it was intelligent and voluntary).

204. *See also* ABA, STANDARDS RELATING TO: PLEAS OF GUILTY 30-33 (Approved Draft 1968). In terms of legal standards, most of the present law on guilty pleas has dealt with the question of voluntariness. However, an equally important question is the *accuracy* of a guilty plea. Since the acceptance of a guilty plea has the same legal effect as a full trial, surely there must be some judicial effort to make certain that the plea has some basis. At least on a rudimentary level such a rule requires that the judge not enter judgment on the plea if the defendant denies commission of the offense. *Compare* McCoy v. United States, 363 F.2d 306 (D.C. Cir. 1966), *with* Maxwell v. United States, 368 F.2d 735, 739 (9th Cir. 1966). While this new rule may create a problem in terms of additional judicial time spent, the expenditure is clearly justified in terms of a more accurate and just judicial process.

The ABA contends that the need for a factual basis for a plea of nolo contendere (the equivalent of Arizona's no contest plea) is not pressing. It argues that when a nolo plea is tendered, the risk that the factual determination will be inaccurate is relatively slight, since use is made of it primarily by the sophisticated defendant with retained counsel. Further, the purpose of the nolo plea is largely reduced by the use of an inquiry into the factual basis of the plea. ABA, *supra*, at 34. The Arizona committee rejected this view based on its reading of North Carolina v. Alford, 400 U.S. 25, 38 (1970). It felt that the policy considerations which support the *Alford* rules on accuracy of guilty pleas also apply to nolo pleas. The policy considerations cited by the committee are: (1) protecting an innocent defendant from being convicted of offenses which he did not commit; (2) protecting a defendant guilty of some wrongdoing from being convicted of a crime more serious than his actions justify; (3) protecting the judicial system from the loss of respect and trust which such mistakes engender; (4) protecting the defendant from making an unintelligent plea; and (5) promoting the finality of judicial determinations. PROPOSED RULE 20.3, Comment, at 99.

205. A study of the handling of criminal cases in a major American city (which was anonymous for purposes of the study) found that well over 90 percent of all felony cases processed past indictment were disposed of by guilty pleas. *See* A. BLUMBERG, CRIMINAL JUSTICE 29 (1967).

206. The various authorities in the field seem to adduce several advantages from the system of plea bargaining. One often cited advantage is that it permits the criminal justice system to operate in an efficient manner in large cities with huge criminal case loads. If the system were not used, these authorities maintain, the courts would fall hopelessly behind. Others maintain that the system produces the "best deal" that defense counsel can obtain for his client. Still others maintain that it promotes the best interest of the defendant who is in need of proper evaluation and placement. *See* ABA, *supra* note 204, at 60-74; A. SMITH & H. POLLACK, *supra* note 50, at 157-62.

207. There appears to be much negative sentiment toward the entire practice of plea

was in an attempt to meet some of the problems[208] posed by the system while retaining its advantageous features that the authors of the *Rules* gave plea bargaining a formal role in the pretrial disposition process.[209]

Rule 17.4(a)(1) allows the parties to enter into plea negotiations without direct judicial supervision or interference. The provisions in 17.4(b) and (c) seek to implement any agreement reached through this negotiation process. A new and useful device is employed here—the formal written plea agreement. This written agreement may be revoked by either party prior to its acceptance by the court. The court under 17.4(d) and (e) is not bound by the form of the agreement and may reject any portion of it. If the court rejects the agreement in part, the defendant again is entitled to rescind, although he may of course let the plea stand and accept the modified terms. A plea agreement accepted by the court becomes a permanent part of the record.[210] If the agreement is rejected, neither the agreement, the discussion which produced it, nor any statement made at the hearing on the plea will be admissible in the instant or future actions.[211] Finally, if a defendant withdraws his plea, he may request and obtain a change of judge.[212]

A problem has arisen over the new plea negotiation practice in

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bargaining. Critics have expressed doubts both as to the constitutionality of defendant's negotiated pleas and as to whether defendants receive any practical benefit from the process. For further comment on these problems, see D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 38-42 (1966); *Recommendations of the National Advisory Commission on Criminal Justice Standards & Goals*, 14 CR. L. RPTR. 3003 (1973); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Note, *Judicial Plea Bargining*, 19 STAN. L. REV. 1082 (1967).

208. Some authorities posit that the system operates at the whim of the state's attorney and that in many cases the innocent may plead guilty to avoid the possibility of a greater sentence. *See* J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 77-81 (1972). *See also* Arnold, *Law Enforcement—An Attempt at Social Disection*, 42 YALE L.J. 1, 19 (1932); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 220 (1956).

209. PROPOSED RULE 20.4, Comment, at 101-02. The committee noted that plea bargaining is an accepted part of the Arizona criminal process. *See* State v. Jennings, 104 Ariz. 3, 448 P.2d 59, *modified*, 104 Ariz. 159, 449 P.2d 938 (1969); State v. Carpenter, 105 Ariz. 504, 467 P.2d 749 (1970). There is also ample federal support for the legitimacy of the plea bargaining technique. *See* Santobello v. New York, 404 U.S. 257, 261-62 (1971). Further, the decided federal cases have held that plea negotiation is a critical stage in the criminal process, at which the accused is entitled to be represented by counsel. *See, e.g.*, Gallarelli v. United States, 441 F.2d 1402 (3d Cir. 1971); Lorraine v. Gladden, 261 F. Supp. 909 (D. Ore. 1966).

No other state has yet adopted the full system of formal plea bargaining procedures advocated by the ABA. Some states have moved at least partially toward making plea bargaining a more official part of the court's procedure. *See, e.g.*, W. VA. CODE ANN. § 62-3-1a (1966) (pleas of guilty are to be in writing); OHIO R. CRIM. P. 11(f) (Page, 1973) (underlying agreement behind negotiated plea must be stated on the record in open court).

210. ARIZ. R. CRIM. P. 17.4(f).

211. *Id.*

212. *Id.* RULE 17.4(g). Only one change of judge is allowed under this provision.

Pima County. The county attorney's office has adopted the policy that it will only negotiate plea bargains before the omnibus hearing. They contend that reasons of case overload and manageability make any plea bargaining after that point extremely difficult for them.[213] The public defender's office, on the other hand, favors negotiation after the omnibus hearing. They contend that both sides are in a better position to make a realistic assessment of what sort of bargain should be made after rulings have been made on evidence suppression motions.[214] Judicial intervention may be needed to solve this impasse.

TRIAL AND POST-TRIAL PROCEEDINGS

While the largest number of changes wrought by the *Rules* occur before trial, some significant changes have been made in the trial and post-trial process. In the area of trial, jury selection and change of judge have been altered. The most important change occurs, however, in the post-trial process of probation revocation. Important constitutional issues have to be considered in discussing this process.

The system established by Rule 10 to effect a change of judge is beset by lack of clarity. Rule 10.1 continues the prior system of disqualification of judges for cause. Rule 10.2, "Change of judge upon request," is less clear. It merely gives a party the right to *request* a change of judge. Such request must be made at the time a case is assigned to a particular judge or at the time required for filing of the omnibus hearing form.[215] The essential problem with rule 10.2 is that the nature of the party's rights under it is not clear. The proposed rule clearly gave the prosecution and the defense one change of judge as a matter of right.[216] As adopted, however, the rule is

213. Interview with W.R. Stephens, Chief Criminal Deputy, Pima County Attorney's Office, in Tucson, Ariz., Feb. 21, 1974.

214. Interview with William Callaway, Ass't Deputy Public Defender, Pima County, in Tucson, Ariz., Feb. 20, 1974; interview with Michael Grayson, Felony Lawyer, Public Defender's Office, Pima County, in Tucson, Ariz., Feb. 20, 1974.

215. This has caused some interpretation problems in Pima County, where there are no regular criminal divisions. The rule has been interpreted by one judge to require the parties to request nonassignment to a specific trial judge, whom they wish not to hear the case, at the time of the omnibus hearing, even though under the calendar system employed it is not certain at that point which judge will preside at trial of the case. Interviews with William Callaway, Ass't Deputy Public Defender, Pima County; John McDonald, Felony Lawyer, Public Defender's Office, Pima County; Michael Grayson, Felony Lawyer, Public Defender's Office, Pima County; Lindsey Brew, Felony Lawyer, Public Defender's Office, Pima County, in Tucson, Ariz., Feb. 20, 1974. The rule may have to be reinterpreted to meet this problem, or Pima County may have to adjust its calendar method. A third possibility is adoption of a local rule "not inconsistent with" rule 10.2. *See* ARIZ. R. CRIM. P. 36.

216. PROPOSED RULE 10 read:

10.1 *Change of Judge Upon Request.*

a. *Entitlement.* In any criminal case in superior court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon

not clear as to the number of changes a party is entitled to or whether he has a right to any mandatory change. Definitive judicial interpretation or amendment will be required to clarify this rule.

The chief changes that the new *Rules* embody with regard to the process of trial itself are in the area of jury selection and procedure. There is a new standard for challenging the entire jury panel. It may be challenged only if there has been a material departure from the requirements of law during the selection process.[217] This new standard requires a showing of prejudicial effect before an irregularity in jury selection will be considered error. The standard of the old rule[218] was that any deviation from procedure was error. Additionally, the concept of challenge of the individual juror for cause has been altered. Instead of the list of 15 specific grounds embodied in the previous rule,[219] the new rule employs the general concept of inability to render an impartial verdict.[220] The comment to the rules, however, contains the former 15 grounds as a useful yardstick to determine whether a juror is incapable of rendering an impartial verdict.[221] These changes in the *Rules* will, at least on their face, reduce the possibility of reversal based on a challenge of the jury. The burden the defense must carry is increased when the standard of violation shifts from *any* deviation to a *material* departure. Furthermore, the requirement that the challenge be based on an inability to render an impartial verdict, while appearing to be more flexible, reduces the advantage of the spe-

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the judge to hear the case, the trial judge may, in the interests of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.

b. *Procedure.* At the time required for filing the omnibus hearing form, or within 10 days after a judge is identified for the first time thereafter, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.

The rule as enacted reads:

Rule 10.2 *Change of Judge Upon Request*

a. *Entitlement.* In any criminal case in Superior Court, any party shall be entitled to request a change of judge.

b. *Procedure.* At the time required for filing the omnibus hearing form, or within 10 days after a case is first assigned to a judge, a party may exercise his right to a change of judge by noting the request on the Omnibus Hearing Form or by filing a pleading entitled "Notice of Change of Judge"; signed by counsel, if any, stating the name of the judge to be changed, a judge may honor a timely informal request for change of judge entering upon the record the date of the request and the name of the party requesting. [*sic*] Assignment to another judge shall be made in accordance with the provisions of this rule.

217. ARIZ. R. CRIM. P. 18.4(a).
218. Ariz. R. Crim. P. 213(b) (1956) (abrogated 1973).
219. Ariz. R. Crim. P. 219 (1956) (abrogated 1973).
220. ARIZ. R. CRIM. P. 18.4(b).
221. *Id.* RULE 18.4(b), Comment.

cific guidance offered by the 15 former grounds for challenge. Since the specific challenge grounds are retained as suggested criteria in the comment to the rule, perhaps no problem will result.

Probation Revocation

The most significant question regarding the post-trial procedures established by the new *Rules* is posed by the probation revocation process. A recent decision of the United States Supreme Court, *Gagnon v. Scarpelli*,[222] will have great impact. In *Gagnon* the Court held that, due to the danger of loss of liberty implicit in probation revocation proceedings, the requirements of due process must be met.[223] Specifically, the opinion of the Court seems to require a two-tier hearing process: the first to determine if there is probable cause to believe that a violation of probation has occurred, the second to determine if probation should be revoked.[224] The accused is given a right at both hearings to cross-examine adverse witnesses. Although the right to counsel does not attach at all probation revocation hearings,[225] the basic elements of due process must be met at each hearing.

In at least one respect, Arizona more than meets the basic requirements set down by the Court. Rule 27.7(b) grants the probationer an unconditional right to counsel at a revocation hearing,[226] while the *Gagnon* majority left that right to a case-by-case determination of need.[227] However, the other requirements of *Gagnon* may present problems that will be less easy to deal with.

The new rules call for an initial appearance after arrest, at which time the probationer is advised of his rights and a date is set for a formal hearing to determine if revocation of probation will occur.[228] At the revocation hearing each party may present evidence and has a right to cross-examine witnesses. Rule 27.7(c)(3) allows the Court at the revocation hearing to accept "any reliable evidence . . . including hearsay." Admissions made at this hearing may be used for impeachment purposes at a subsequent trial, if his probation violation is a separate criminal offense for which he will later be tried.[229]

222. 411 U.S. 778 (1973).
223. *Id.* at 782. The court relied largely on its similar holding in Morrissey v. Brewer, 408 U.S. 471 (1972), a parole revocation case.
224. 411 U.S. at 782.
225. *Id.* at 787-89. Justice Douglas in his dissent argues that probation revocation is a crucial stage of the criminal process at which the right to counsel attaches. *Id.* at 791 (Douglas, J., dissenting in part).
226. Even before the adoption of the new *Rules*, the probationer had a right to counsel at probation revocation hearings in Arizona. *See* Leonard v. State, 101 Ariz. 42, 415 P.2d 570 (1966).
227. 411 U.S. at 787-89.
228. ARIZ. R. CRIM. P. 27.6.
229. *Id.* RULE 27.8.

Two recent Arizona decisions have interpreted these rules. In *State v. Seattle*,[230] division one of the court of appeals attempted to fit the above described procedures into the two-tier pattern suggested by *Gagnon*. The court reasoned that within the existing framework of the rules the initial appearance could be remolded into a preliminary hearing at which a probable cause determination will be made. Judge Ogg's specific recommendations for practices to be followed regarding this initial hearing are in effect a total rewriting of the rule.[231] However, his proposal does not really achieve a clear procedure, as the *Rules* themselves do not contemplate a full probable cause hearing. A better solution would be for the Supreme Court of Arizona to rewrite the rules dealing with the process of probation revocation. Such a revision is offered in the Appendix to this comment.[232]

A further important change in the probation revocation process was made in *State v. Marlar*.[233] Rule 27.7 allows the court to admit hearsay at a probation revocation hearing. However, *Gagnon* said that there is a right to confront opposing witnesses at both hearings in the probation revocation process.[234] The Court of Appeals of Arizona, Division Two, held that the guarantee of confrontation goes beyond a right to cross-examine those witnesses presented at the hearing: confrontation also normally will preclude the use of hearsay against the accused at such hearings.[235] The court reasoned that where third-party hearsay evidence is admitted against an accused, he is effectively denied his right to confront and cross-examine the source of that hearsay.[236] Thus the court held that statements of non-presented witnesses could not be admitted at the probation revocation hearing absent a showing of "good cause for not allowing confrontation."[237]

Beyond the fact that the system of probation revocation in the *Rules* does not meet the two-tier hearing requirement of *Gagnon*, the Supreme Court's language in that case seems to suggest that a totally neutral party should preside at the hearings.[238] The language of the Court specifically excludes the probation officer, but at least arguably some of the objections to that party's neutrality can be extended to the original sentencing judge who presides at the probation revocation

230. 20 Ariz. App. 283, 512 P.2d 46 (1973).
231. *Id.* at 286, 512 P.2d at 49.
232. See p. 206-07 *infra*.
233. 20 Ariz. App. 191, 511 P.2d 204 (1973).
234. 411 U.S. at 782.
235. 20 Ariz. App. at 193, 511 P.2d at 206.
236. *Cf.* California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).
237. 20 Ariz. App. at 193, 511 P.2d at 206.
238. 411 U.S. at 783-85.

hearing under the *Rules*.[239] Since the judge has made the original decision to place the petitioner on probation and, therefore, has past knowledge of the case, he may not be the truly "neutral official" *Gagnon* requires.[240] He has already made the judgment that the probationer was a good risk and may be prejudiced either by feelings that his trust has been misplaced or of partiality toward defendant.[241] Such a reading of *Gagnon* might require changes in rule 27.

CONCLUSION

This analysis has attempted to present the major constitutional and practical questions which will arise under the new *Arizona Rules of Criminal Procedure*. Many of the innovative devices introduced in those rules will be of benefit both to society and the individual defendant who becomes involved in the system. While there may be an overemphasis on increasing the speed of the criminal process at a sacrifice of other considerations, the provisions which seek to improve the accuracy of results reached as well as those lightening the burden on the nonconvicted accused are praiseworthy. Major problems may exist with discovery,[242] the preliminary hearing,[243] the omnibus hearing,[244] and probation revocation processes.[245] In each case, however, a solution can probably be achieved with relatively minor changes in the *Rules*. Clearly this discussion could not focus to any great extent on operational problems under the *Rules*, for only after they have been in effect for a greater period of time can that assessment be made. Practical problems with various procedures under the *Rules* can of course be remedied as they arise. This analysis has attempted to present the policy considerations upon which any assessment of the theoretical underpinnings of the *Rules* must be made. Arizona should derive more benefit than harm from the adoption of these rules. They should achieve their stated purpose, the achievement of "just, speedy determination of every criminal proceeding."[246]

239. ARIZ. R. CRIM. P. 27.5(a).
240. See the discussion of a "neutral official" (the equivalent to the "independent decisionmaker" of *Gagnon*, 411 U.S. at 786) in Morrissey v. Brewer, 408 U.S. 474, 485-86 (1972). *Cf.* Johnson v. Mississippi, 403 U.S. 212 (1971); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Offutt v. United States, 348 U.S. 11 (1954) (all involving contempt proceedings). *But see* State v. Neil, 4 Ariz. App. 258, 419 P.2d 388 (1966), *vacated on other grounds*, 102 Ariz. 110, 425 P.2d 842 (1967); State *ex rel.* Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).
241. In *Morrissey* the Court stated that, while it need not decide whether parole officers or others involved in the case would always as a rule be prejudiced one way or another, it felt that use of a totally neutral uninvolved official would be the better practice. 408 U.S. at 486.
242. *See* text accompanying notes 80-162 *supra*.
243. *See* text accompanying notes 163-178 *supra*.
244. *See* text accompanying notes 179-199 *supra*.
245. *See* text accompanying notes 222-241 *supra*.
246. ARIZ. R. CRIM. P. 1.2.

APPENDIX

The writers propose the following rules as a model for use in remolding the Probation Revocation Process to meet the requirements of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). New provisions are italicized.

RULE 27.5 INITIATION OF REVOCATION PROCEEDINGS; SECURING THE PROBATIONER'S PRESENCE; NOTICE

a. PETITION TO REVOKE PROBATION. If he has reasonable cause to believe that a probationer has violated a written condition or regulation of probation, the probation officer responsible for the probationer's conduct or the county attorney of the county in which the probationer was convicted or resides may petition the court to revoke probation.

b. SECURING THE PROBATIONER'S PRESENCE. After a petition to revoke has been filed, the court may issue a summons directing the probationer to appear on a specified date for a *preliminary hearing on revocation* or may issue a warrant for the probationer's arrest.

RULE 27.6 INITIAL APPEARANCE AFTER ARREST AND PRELIMINARY HEARING

a. Initial Appearance.

(1) When a probationer is arrested on a warrant issued under rule 27.5(b), his probation officer shall be notified immediately, and the probationer shall be taken without unreasonable delay before the issuing judge, who shall *inform the probationer of what violations have been alleged,* advise him of his right to counsel under rule 6, inform him that any statement he makes prior to either *his preliminary or final revocation hearing may* be used against him, set the date for the *preliminary* hearing, *inform the probationer of the purpose of that hearing,* and make a release determination under rule 7.2(b).

(2) If probationer is not arrested but instead is served with a summons under rule 27.5(b), that summons shall include a notice of the violation alleged and a statement informing the probationer of the nature and purpose of the preliminary hearing as well as his right to counsel at the hearing. His probation officer shall also be notified of the violation and the hearing.

b. Preliminary Hearing.

A hearing to determine whether there is probable cause to believe violation of probation has taken place shall be held before a judge other than the sentencing judge no less than 7 nor more than 20 days after service of summons or warrant; unless the court, upon written request of the probationer, sets the hearing for another date. At this hearing, after the state has presented its case to establish probable cause to believe a violation has occurred, the probationer may present witnesses to rebut the probable cause

presentation of the state. Probationer will have a full right to question any person who gave adverse information unless the judge in his discretion determines that the informant would be subject to risk of harm if his identity were disclosed. If after both sides have presented evidence, the judge determines that there is probable cause to believe that a probation violation has taken place, he shall set a date for a full revocation hearing and shall make a written report of his findings.

RULE 27.7 REVOCATION OF PROBATION; RIGHT TO COUNSEL.

a. HEARING.

A hearing to determine whether probation should be revoked shall be held before a court other than sentencing court no less than 7 and no more than 20 days after *the preliminary hearing*, unless the court, upon the written request of the probationer, sets the hearing for another date.

b. PRESENCE; RIGHT TO COUNSEL; WAIVER.

The probationer shall be present at the hearing and shall have the rights to counsel provided in rule 6.

c. NATURE OF THE HEARING.

(1) Prior to the hearing, the probationer will again be provided with written notice of alleged probation violations.

(2) Prior to the hearing the probationer shall be given disclosure of the evidence against him subject to the standards of rule 15.

(3) If the alleged violation involves a criminal offense for which he has not yet been tried, the probationer shall be advised, at the beginning of the revocation hearing, that regardless of the outcome of the present hearing, he may still be tried for that offense, and any statement made by him at the hearing may be used to impeach his testimony at that trial.

(4) The court shall then ask him whether he admits or denies the violation charged. If the probationer admits the violation and the court, after making the determination required by rule 27.8, accepts the admission, it shall enter an appropriate order under rule 27.7(d).

(5) If no admission is made or if an admission is not accepted by the court, the violation must be established by preponderance of the evidence. Each party may present evidence and shall have the right to cross-examine witnesses who testify. The court may receive any reliable evidence, *excluding third-party hearsay and privileged material.*

(6) If the court determines that probation will be revoked, it shall issue a written statement as to the evidence relied upon and reasons for revoking probation.