# ARIZONA FAIR TRIAL–FREE PRESS DILEMMA AT THE PRELIMINARY HEARING STAGE

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In the last issue of the *Arizona Law Review* this writer noted the case of *Phoenix Newspapers, Inc. v. Superior Court.*[1] In that case the Arizona Supreme Court held that an order foreclosing the press from freely printing what occurs in open court violates the Arizona Constitution.[2] The case provided an excellent vehicle for an examination of the legal problems involved in the current fair trial-free press controversy. As a solution to the dilemma, the note proposed restrictions on the pretrial release of information by judicial officers,[3] a solution similar to that recently adopted by the American Bar Association.[4]

Subsequent to the completion of the casenote, but prior to its publication, Walter W. Meek, a reporter for the *Arizona Republic,* refused to comply with an order of exclusion made during a preliminary hearing pursuant to the old provision of Rule 27 of the Rules of Criminal Procedure requiring exclusion of the press and public from preliminary hearings upon motion of the defendant.[5] As a result Meek was ordered to show cause why he should not be held in contempt. Subsequent to these events, but prior to Meek's trial, the Arizona Supreme Court revised Rule 27 by deleting the exclusion provision,[6] apparently as a result of the adverse publicity attending the Meek proceedings.

The court did not indicate the basis of this ruling. Now, in *Meek v. Superior Court,*[7] Meek is seeking review of his contempt conviction resulting from his refusal to comply with the order of exclusion. The decision in *Meek* should determine whether the court felt the deletion of Rule 27 was constitutionally compelled or merely an exercise of the court's discretionary power to set the procedural rules of the state

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[1] 101 Ariz. 257, 418 P.2d 594 (1966); 9 ARIZ. L. REV. 327 (1967).

[2] Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966).

[3] 9 ARIZ. L. REV. 327, 333 (1967).

[4] 36 U.S.L.W. 2529 (Feb. 27, 1968).

[5] The Magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court.

[6] *Order Amending Rule 27 of the Rules of Criminal Procedure,* Jan. 29, 1968. The text of the new rule now reads:

> During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all others are examined.

[7] No. 54087 (Ariz., filed March 1, 1968).

courts.[8] The court would seem to have three alternatives. First, affirm Meek's conviction on the basis that the provision requiring exclusion was constitutional and that the deletion was an exercise of the court's supervisory powers. Second, reverse Meek's conviction on the basis that the provision requiring exclusion was unconstitutional since it was mandatory that a request of exclusion be granted, with no requirement that defendant show cause, thereby unconstitutionally infringing on a public right to attend preliminary hearings and on the public's right to know of the proceedings of such hearings. Third, reverse Meek's conviction on the basis that the provision requiring exclusion was unconstitutional since the public has an absolute right to attend preliminary hearings and has an absolute right to know of the proceedings of such hearings.

Recently there have been indications that the absolute right theory will be the constitutional standard for Arizona.[9] If so, proposed restrictions on the pretrial release of information by judicial officers will be rendered less effective since in the *Phoenix Newspapers, Inc.* case it was held that an order foreclosing the press from publishing what occurs in open court violates the Arizona Constitution.[10] Presence of the press at preliminary hearings would enable the press to learn of and publish the very facts the proposed restrictions are designed to withhold.[11] Because of the impact the *Meek* decision could have on the fair trial-free press controversy in Arizona, the alternatives facing the court should be carefully considered.

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[8] ARIZ. CONST. art. 6, § 5.

[9] In *State v. Hooper*, Cr. 54087 (Ariz. Feb. 21, 1968), *cert. denied*, 36 U.S.L.W. 3443 (U.S. May 21, 1968), Judge Gooding interpreted the deletion of the provision requiring exclusion from Rule 27 as a mandate that a magistrate cannot, in his discretion, exclude any persons from a preliminary hearing. Then in *Hooper v. Gooding*, No. 9224 (Ariz. Feb. 23, 1968), *cert. denied*, 36 U.S.L.W. 3443 (U.S. May 21, 1968), the Arizona Supreme Court denied an application for writ of mandamus ordering Judge Gooding to close the hearing, notwithstanding that Judge Gooding found that there "might well" be a "likelihood" of prejudice. Thereafter, an injunction was sought from and issued by the federal district court closing the preliminary hearing. Hooper v. Gooding, No. Civ. 6597 Phx. (D. Ariz., March 19, 1968). This decision was reversed in an amended decision by the Ninth Circuit Court of Appeals. Hooper v. Gooding, No. 22,669 (9th Cir., March 28, 1968). Recently the Arizona Judges Association adopted a set of bar-press guidelines which were approved by the board of governors of the Arizona State Bar. One guideline was that all hearings, court proceedings and records of the same must be open to the news media. Arizona Daily Star, April 18, 1968, at 2, col. 4.

[10] It is still possible to punish out of court utterances after they have been made. To do so there must be a showing that the utterances created a "clear and present danger" to the administration of justice. Bridges v. California, 314 U.S. 252 (1941). Since the United States Supreme Court has never held this test to have been satisfied in these circumstances its value would be negligible. 9 ARIZ. L. REV. 327, 330 (1967).

[11] Recently a Supreme Court Justice of New York barred newsmen and the public from a pretrial hearing in connection with a manslaughter charge. The defense counsel had asked that the hearing be closed and the record sealed on the ground that defendant's statements might never be introduced at trial. New York Times, Feb. 28, 1968, at 44c, col. 2. This exemplifies the desirability of excluding the press from pretrial proceedings. *See* Simmons v. United States, 88 S. Ct. 967 (1968),

## I

### The Doctrine of the Press' and Public's Absolute Right to Attend Preliminary Hearings.

A holding by the Arizona Supreme Court that the public has an absolute right to attend preliminary hearings and an absolute right to know of the proceedings of such hearings would be unwise as a matter of policy and would represent unsound constitutional law. At the outset it should be noted that the deciison of the Court of Appeals for the Ninth Circuit in *Gooding v. Hooper*[12] has no bearing on the constitutional issues involved in *Meek*. In an amended decision the court of appeals assumed arguendo the jurisdiction of the federal district court to decide the petition for a temporary injunction restraining Judge Gooding of the Superior Court of the State of Arizona from holding an open preliminary hearing.[13] The Court seemed to be concerned with the *propriety* of issuing the injunction and held that the injunction should not have been granted since there was no finding by the trial court that prejudice would in fact result from an open hearing.

The decision seems to follow the general principal that federal courts should refuse to interfere with proceedings in a state court save in those exceptional circumstances which call for the imposition of equity to prevent irreparable injury which is clear and imminent.[14] What the decision probably means is that in the Ninth Circuit, before a district court should interfere with a state criminal prosecution, there must be a factual showing that prejudice would result if the district court did not intervene.[15] *Gooding* does not mean that a *state* court must find that

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where it was held that testimony given by the defendant to meet standing requirements to raise an objection that evidence is the fruit of an unlawful search and seizure, should not be admissible against him at trial on the question of his guilt or innocence. This testimony was given at a pretrial motion to suppress. Obviously if these proceedings are not closed, the possibility exists that this evidence will reach potential jurors. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

[12] No. 22,669 (9th Cir., March 28, 1968). For a chronology of the proceedings *see supra* note 9.

[13] The district court found jurisdiction pursuant to 28 U.S.C. § 1343 (1948) and 42 U.S.C. § 1983 (1958). Hooper v. Gooding, No. Civ. 6597 Phx. (D. Ariz., March 19, 1968). The United States Supreme Court has not yet resolved the question whether suits under 42 U.S.C. § 1983 come under the "expressly authorized" exception to the anti-injunction statute, 28 U.S.C. § 2283 which states:

> A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

See Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965).

[14] Stefanelli v. Minard, 342 U.S. 117, 122 (1951).

[15] While § 2283 is not a complete bar to equitable relief, the United States Supreme Court said in the *Dombrowski* case:

> It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment. 380 U.S. at 485 n.3.

Whether the dicta in *Dombrowski* compels the *Gooding* requirement that irreparable

an open preliminary hearing would in fact result in prejudice before the hearing can be closed.

Since the issue of whether a trial court judge can or cannot constitutionally close a preliminary hearing centers around the right or interest of the public to be present in open court and concurrently the right of the public to know of the proceedings, it will be necessary to examine public right vis-a-vis the right of the criminally accused to a public trial and to a trial by impartial jurors.

Criminal defendants are guaranteed public trials by the sixth amendment to the United States Constitution[16] and by each individual state.[17] Nowhere is a defendant guaranteed a right to a private trial, and, because of a public interest in open courts, it has been said that a defendant has no absolute right to waive a public trial.[18]

The public interest in an open court apparently was recognized early in the development of the common law and today it is generally agreed that not only the accused, but also the public, has an interest in open court.[19] English law recognized this interest, but there the rights of the public are subject to the inherent jurisdiction of the courts to exclude the public if it becomes necessary for the administration of justice.[20] Arizona also recognizes a public interest in attending judicial proceedings, but it has yet to consider whether this interest is a right

injury be established factually before a federal court may intervene is open to question. It is submitted that this requirement is an impossible one to meet when considering the prejudicial effect of news articles emanating from preliminary hearings, since at the beginning of a hearing evidence has not yet been taken and the results are not yet in.

The certainty requirement may have been taken from the removal cases under 28 U.S.C. § 1443 (1964), which the United States Supreme Court has interpreted as authorizing removal only if it can be "firmly predicted" that a defendant will be denied or cannot enforce a specified federal right in a state court. Georgia v. Rachel, 384 U.S. 780, 800 (1966); Greenwood v. Peacock, 384 U.S. 808, 827 (1966). A firm prediction is not the same as a certainty. Even if the removal cases are used as the standard for granting injunctive relief, a showing of a substantial likelihood of prejudice, found by Judge Gooding at the preliminary hearing, would seem to be as firm a prediction as need be made. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

[16] The sixth amendment right to a public trial has not yet been held applicable to the states. Gaines v. Washington, 277 U.S. 81 (1928). However, in *In Re Oliver*, 333 U.S. 257 (1948), the Court held that a conviction of criminal contempt reached in the presence of only three judges and, possibly, a court stenographer, was a denial of due process.

[17] The right to a public trial, or the "right to have justice administered openly", is guaranteed by the constitutions of forty-three states. Nevada and New York have statutes guaranteeing such a right while statutes in Virginia and Massachusetts recognize the right by implication. Maryland and Wyoming recognize the right by judicial decision. New Hampshire recognizes it in dictum only. State v. Copp, 15 N.H. 212, 215 (1844). Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1138 (1966).

[18] Singer v. United States, 380 U.S. 24, 35 (3d Cir. 1965) (dictum); *see* United States v. Kobli, 172 F.2d 919, 924 (1949).

[19] Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138 (1966).

[20] 10 HALSBURY'S LAWS 414-15 (3d ed. 1955).

enforceable by individual members of the public,[21] or whether it is an absolute right.

The New York Court of Appeals held in *United Press Associations v. Valente*[22] that the public's interest in an open court does not have the stature of an enforceable right. The majority reasoned that the public's interest in maintaining an open court is merely one element of its general interest in securing a fair trial, an interest that is fully protected so long as the accused can enforce his own right to a public trial.

The *Valente* reasoning was rejected by the Ohio Court of Appeals on the ground that the public must be able to enforce its right in order to maintain vigilance over the judicial branch of government.[23] When dealing with *trials*, Ohio's position would seem to be the better of the two, since the public's presence serves as an effective restraint on possible abuse of judicial power[24] and since during a trial the jury can be protected from prejudicial news accounts by means of sequestration.

The view taken by Ohio is not compelling when considering *preliminary hearings*. While it is true that most jurisdictions recognize an interest of the public in "open court," a term broad enough to include preliminary hearings, and while it is true that Arizona's Constitution states that all justices will be administered openly,[25] it has not yet been determined whether the same interest of the public extends to preliminary hearings. There are persuasive reasons why it should not.

California, the one jurisdiction other than Ohio which recognizes the standing of the public to enforce its right to a public trial,[26] provides by statute for the mandatory exclusion of the public from a preliminary hearing upon the defendant's request.[27] In the words of the California Supreme Court this right of exclusion:

> is a fundamental safeguard. The testimony heard at the preliminary examination is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established. One of the main purposes of section 868 is to give the defendant the opportunity of protecting his right to an impartial and unbiased jury by

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[21] State v. White, 97 Ariz. 196, 198, 398 P.2d 903, 904 (1965) (dictum). In Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 260, 418 P.2d 594, 597 (1966), the court recognized that this right was guaranteed by article 2, § 11 of the Arizona Constitution which states that "all justice shall be administered openly" but did not decide whether the public can enforce this right.

[22] 308 N.Y. 71, 123 N.E.2d 777 (1954).

[23] E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).

[24] *See generally* Sullivan, *The 'Public' Interest in Public Trial*, 25 PA. B.A.Q. 253 (1954).

[25] ARIZ. CONST. art. 2, § 11.

[26] Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956).

[27] CAL. PENAL CODE § 868 (1956).

> preventing dissemination of this testimony, either by newspaper or other media prior to trial.[28]

California's position is even more compelling when one considers that evidence which is introduced at the preliminary hearing may be suppressed at the trial.[29] Since jurors are not picked until trial, there is no way to immunize potential jurors from prejudicial news accounts. Further, if the evidence provides probable cause for believing the accused is guilty of a crime, he is bound over for a public trial at which time facts and circumstances surrounding the accused's arrest and incarceration will be made known to the public.

An argument can be made that since it would be possible for a magistrate to show favoritism in determining who would be bound over for trial the public should be allowed to scrutinize the preliminary hearing. However, by analogy to other stages of the administration of justice which are, and will continue to be, conducted in secret, it can be seen that an absolute public scrutiny argument is not compelling.

In Arizona, grand jury proceedings and juvenile proceedings are both conducted in secret.[30] The reasons compelling grand jury secrecy are said to be to prevent the flight of the accused, to prevent the procuring of perjury, to protect the reputation of an innocent accused, and to provide for freedom of action by the jurors in the proceeding.[31] In juvenile proceedings it has been said that the policy of the juvenile law is "to hide youthful errors from full gaze of the public and bury them in the graveyard of the forgotten past."[32] In both proceedings there exists the possibility of preferential treatment.[33] It is clear, therefore, that when the policy compelling secrecy is deemed sufficient, the public's right to know is not of paramount importance. Since potential jurors cannot be immunized from possible prejudicial news accounts

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[28] People v. Elliot, 54 Cal. 2d 498, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (Sup. Ct. 1960). *Contra* State v. McKenna, 78 Idaho 647, 309 P.2d 206 (1957); People v. Quinn, 27 N.Y. Crim. 388, 135 N.Y.S. 477 (Sup. Ct. 1912).

[29] While preliminary hearings are governed by the same rules of evidence as those governing trials, Ex Parte Plumer, 79 Cal. App. 2d 651, 655, 180 P.2d 771, 775 (1947), magistrates in preliminary hearings are not held to as high a standard when administering these rules as are trial judges. State v. Harris, 44 Okla. Crim. 116, 275 P. 925, 926 (1929). Since a finding of probable cause will not be set aside if there is a rational basis for assuming an offense has been committed, Bompensiero v. Superior Court, 44 Cal. 2d 178, 183, 281 P.2d 250, 254 (1955), magistrates would seem to have greater leeway in admitting objectional evidence. In Arizona, evidence developed at an open preliminary hearing, whether admissible or not, can be published and distributed to potential jurors. Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966).

[30] ARIZ. R. CRIM. P. 91 (grand juries); ARIZ. REV. STAT. ANN. § 8-229 (1956) (juvenile proceedings).

[31] United States v. Smyth, 104 F. Supp. 283 (1952).

[32] State v. Guerrero, 58 Ariz. 421, 430, 120 P.2d 798, 802 (1942).

[33] For a discussion of the factors a juvenile judge considers in reaching a decision as to the fate of a particular "defendant," see Molloy, *Juvenile Court — A Labyrinth of Confusion for the Lawyer*, 4 ARIZ. L. REV. 1 (1962).

emanating from preliminary hearings, the public's right to know should not be deemed paramount at this stage of the judicial process.[34]

The United States Supreme Court deciisons of *Sheppard v. Maxwell*[35] and *Estes v. Texas*[36] cast serious doubt on the soundness of the position that a preliminary hearing can never constitutionally be closed. *Sheppard* and *Estes* seem to require that trial court judges be allowed to exercise a discretionary power in closing preliminary hearings where there is a reasonable likelihood of prejudice resulting from pretrial publicity emanating from the preliminary hearing. In *Estes* it was held that Billie Sol Estes was denied due process by the televising of his sensational criminal trial. An important factor in the majority's opinion was the impact of the televised preliminary hearing. The Court said:

> It is contended that this two day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.[37]

While the Court reaffirmed the right of the press to print what transpires in its presence in open court,[38] pretrial proceedings and trials were thereafter closed for both radio and television.[39]

The *Estes* holding may not be directly in point since radio and television create special problems not presented by the press in general.[40] However, its reasoning supports the argument that when the news media threatens the administration of justice, access to the courts must be denied since "it is a public trial that the Sixth Amendment guarantees to the *'accused'*."[41] (emphasis added). *Estes* does establish that adverse publicity at the time of a preliminary hearing may deny a defendant a fair trial consistent with constitutional due process standards.

In *Sheppard* the Court held that the failure of the trial judge to protect Dr. Sam Sheppard from prejudicial publicity and to control disruptive influences in the courtroom denied him due process of law. Since the Court again reiterated the right of the press to print what transpires in its presence in open court,[42] it would seem the only effec-

[34] If the old Rule 27 is deemed unconstitutional, defendants who are brought before grand juries will be afforded greater protection from pretrial publicity than defendants subjected to preliminary hearings, since grand jury proceedings are conducted in secret and since a defendant indicted by a grand jury is not subjected to a preliminary hearing.

[35] 384 U.S. 333 (1966).

[36] 381 U.S. 532 (1965).

[37] *Id.* at 536.

[38] *Id.* at 542.

[39] *Id.* at 540.

[40] *Id.* at 544-46.

[41] *Id.* at 538.

[42] Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

tive means of preventing the press from printing evidence developed at a preliminary hearing, which could be inadmissible at trial, is to close the court for the hearing. "[W]here there is a reasonable likelihood that prejudicial news prior to the trial will prevent a fair trial"[43] *Sheppard* holds that due process demands that a trial court exercise its descretion to prevent it.

## II

### The Doctrine of Balancing a Defendant's Right to a Fair Trial Against the Press' and Public's Right to Attend Preliminary Hearings and to Know of the Proceedings of Such Hearing.

It should be pointed out that we are not here concerned with free speech guarantees. The press may argue that while the general public can properly be excluded from preliminary hearings, the press' right of access to court is recognized by free speech guarantees under the Arizona Constitution.[44] As Justice Musmanno stated in a dissent, "freedom of the press means freedom to gather news, write it, publish it, and circulate it."[45] While an order of exclusion may curtail the amount of information the public receives, such an order in no way infringes on the press' right to print information gleaned from other sources. Consequently the state courts that have considered the question have rejected the contention that the press has a right to attend judcial proceedings superior to that of the general public.[46] They take the logical position that the press has no constitutional right of access to sources of information not available to others.[47]

What we are concerned with is the right of a defendant to a fair trial and the public's right to attend open court and to know of the proceedings therein as guaranteed by the Arizona Constitution.[48] As discussed *supra* in Section I, a holding that the public has an absolute right to attend all judicial proceedings would seem to infringe on a defendant's guarantee of due process under the United States Constitution. On the other hand old Rule 27 may have been in conflict with the provision of the Arizona Constitution that "all justice shall be administered openly" since a defendant had an absolute right to a closed

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[43] *Id.* at 363. It should be noted that this standard is not the same as the "clear and present danger" standard used in contempt cases for out-of-court utterances. *See* Bridges v. California, 314 U.S. 252 (1941).

[44] ARIZ. CONST. art. 2, § 6.

[45] *In re* Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (dissenting opinion), *cert. denied*, 352 U.S. 1002 (1957).

[46] Kirtowsky v. Superior Court, 143 Cal. App. 2d 745, 754, 300 P.2d 163, 169 (1956); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777, 778 (1954); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 168, 125 N.E.2d 896, 904, *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955). *See also In re* Mack, 386 Pa. 251, 264, 126 A.2d 679, 685 (1956) (concurring opinion).

[47] United Press Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954).

[48] ARIZ. CONST. art 2, § 11.

preliminary hearing. The Arizona Supreme court, in *Phoenix Newspapers, Inc.*, recognized a public "right to know" of court proceedings, arising out of this provision. Perhaps the old Rule 27, in failing to recognize this interest, unconstitutionally infringed upon the rights of the public.

If the court reaches this conclusion, the result should be a requirement that trial judges balance the competing interests of the defendant and the public in each situation, ordering exclusion of the public and press from a preliminary hearing whenever the defendant demonstrates sufficient cause for such exclusion.[49] This result would assure the defendant of the safeguard against prejudicial pre-trial publicity constitutionally required under *Sheppard* and *Estes*, while also protecting the interest of the public.

Dicta in *Phoenix Newspapers, Inc. v. Superior Court*,[50] a case involving free speech rights, lends support to a balancing approach:

> Courts are public institutions. The manner in which justice is administered does not have any private aspects. To permit a hearing held in open court to be kept secret, *the order of secrecy being based entirely on defendant's request*, would take from the public its right to be informed of a proceeding to which it is an interested party. (emphasis added).

## III

### Doctrine of the Discretionary Power of a Magistrate to Close Preliminary Hearings Upon a Showing of Cause by a Defendant.

The preceding two sections of this article argue that if the deleted provision of old Rule 27 is held unconstitutional, *Sheppard* and *Estes* require this to be done on a balancing basis, leaving in the trial judge the discretionary power to balance the rights of a defendant against rights of the public, with each confrontation of the two determined on its individual merits.

What steps must Arizona take to achieve this ideal situation? The answer is surprisingly clear — none.

The deletion of Rule 27 has removed the objection of the absolute standard in favor of a defendant. Long-standing Arizona precedent establishes that magistrates *now have* the discretionary power to close a hearing upon a showing by the defendant that the safeguard is essential to the administration of justice.

In *Helm v. Superior Court*,[51] the Arizona Supreme Court held that

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[49] *See* discussion Section III *infra*.
[50] 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966).
[51] 90 Ariz. 133, 367 P.2d 6 (1961).

a trial judge was free, under his inherent residual power, to permit broader pretrial discovery than that expressly authorized under Rule 195 of the Rules of Criminal Procedure,[52] where such discovery was essential to the administration of justice and the rule did not express a contrary policy. In order to obtain this broader discovery the defendant was required to show a need for the evidence desired.[53]

While the holding in *Helm* was limited to Rule 195, the doctrine would seem applicable to the rules in general. In *Mahoney v. Superior Court*,[54] a decision handed down prior to the enactment of Rule 195, it was held that the superior court had the inherent power to enter an order permitting the accused to inspect certain physical objects in the possession of the county attorney. The supreme court reasoned that every court has inherent power to do all things that are reasonably necessary for the administration of justice.[55] Under the *Helm* decision this broad power would seem to be limited only if it could be shown that a contrary policy was stated in the applicable rule of criminal procedure.

The new Rule 27 provides for exclusion of witnesses during the defendant's testimony or examination or during the testimony of any witness. Applying the doctrine of *Helm* and *Mahoney* to this situation, trial judges would seem to have the discretionary power to make a broad order excluding the press and public upon a showing of cause by the defendant that such exclusion was necessary for the administration of justice, since there is nothing in the rule expressing a contrary policy.

Since both *Helm* and *Mahoney* were concerned with the inherent residual power of superior court judges, there could be some question as to their applicability to justices of the peace, who are authorized by statute to sit as magistrates in preliminary hearings for both misdemmeanors and felonies.[56] Since it is also provided by statute that the rules of criminal procedure for the superior court shall apply to the justice of the peace court,[57] and since justices of the peace sitting as magistrates serve the same purpose that superior court judges do when

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[52] Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the county attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and taking the copies or photographs and may prescribe such terms and conditions as are just.

[53] Helm v. Superior Court, 90 Ariz. 133, 137, 367 P.2d 6, 9 (1961).

[54] 78 Ariz. 74, 275 P.2d 887 (1954).

[55] *Id.* at 77, 275 P.2d at 890.

[56] ARIZ. REV. STAT. ANN. § 22-301 (1956).

[57] ARIZ. REV. STAT. ANN. § 22-313 (1956).

sitting as magistrates, it would seem to follow that justices of the peace possess the same inherent power to administer these rules that superior court judges possess under *Helm* and *Mahoney*. While there is no Arizona case law indicating that justices of the peace do in fact possess this power, the Texas Court of Criminal Appeals adopted this logical position many years ago in *Kerry v. State*:[58]

> When a justice sits for the purpose of inquiring into a criminal accusation against any person, he sits not as a justice of the peace but as a magistrate, and the court he then holds is not a justice's but 'an examining court'. . . . When holding such a court, his functions as a magistrate are the same as those of the judges of the county, district, supreme or court of appeals, when they sit as magistrates to hold an examining trial. The same rules govern each.

A question remains as to the standard to apply in determining when a magistrate can properly make a broader order of exclusion than that expressly authorized under Rule 27. In *Sheppard*, the United States Supreme Court spoke in terms of invoking procedural safeguards where there is a "reasonable likelihood of prejudice." The *Mahoney* standard of "reasonably necessary" would seem closer to *Sheppard* than the *Helm* requirement that a broader order be "essential" to the administration of justice. In *Helm*, however, the broader order permitting discovery of a medical record was deemed "essential" because this was the only source from which information could be obtained concerning the defendant's alleged intoxication.[59] In Arizona today, because of the holding in *Phoenix Newspapers, Inc.*, the only effective way to prevent prejudicial publicity emanating from preliminary hearings is to close the hearing. *Sheppard* establishes that the invocation of procedural safeguards to prevent publicity is "essential" where a reasonable likelihood of prejudice exists to the administration of justice. Thus the *Helm* and *Sheppard* standards coalesce. Whenever a "reasonable likelihood of prejudice" is established the Arizona magistrate is compelled by the law of Arizona to close a preliminary hearing since in Arizona this is a step "essential" to the administration of justice.

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[58] 17 Tex. App. 178, 181 (1884).
[59] Helm v. Superior Court, 90 Ariz. 133, 138, 367 P.2d 6, 9 (1961).