The Role of the Prosecutor in Criminal Procedure

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INTRODUCTION

What is the role of the public prosecutor in criminal procedure? Such a topic is obviously broad in its scope and each of us may have a specific topic in mind which we believe should be covered. It will be attempted here, however, to take in chronological order from complaint through appeal, certain topics that can at least "paint" some sort of completed picture, if certain trial procedures are avoided, involving the introduction and exclusion of certain evidence. These subjects cannot be treated generally, and although opinion may vary, there are usually only two views, the right and the wrong, both of which are more or less uniform among the various state and federal courts.

For the most part this article will be in the nature of a survey of the criminal procedure rules and statutes of the fifty states. The federal rules and statutes are listed in the appendix as an example. A surprising revelation of this survey will come to those who believe their system is the only one and that any other method of dispensing justice is obviously inept, unconstitutional or unworkable. In "those" probably will be included all of us, as we, for the most part, are slaves to one of two state procedures plus possibly the federal criminal procedure.

Where my opinions are inevitable, may they be blamed upon practical experience and association with those having such practical experience in the field, plus those writings which have had a profound influence upon me, but whose ideas are incorporated with lack of specific intent to plagiarize, and thus are not noted as authority.

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I. Arrest, Complaint and Preliminary Hearings**

A large percentage of criminal prosecutions begin with the arrest of the individual without a warrant by some law enforcement officer during the investigation. The other great bulk of criminal cases begin on the complaint of the victim or a police officer and warrant issued thereon. The prosecutor has little control over the processing of the criminal case which begins with an arrest by the law enforcement officer. He may refuse to approve, either by direct right of the statute or by the indirect pressure, to countenance a complaint by the magistrate. In the latter case the magistrate will usually go along with whatever the prosecutor wants, whether there be statutory authority or not. However, in some states, the prosecutor does not first approve or necessarily even know that a complaint is being issued and is called in after the fact.[1] There are some cases which are started directly with indictment by the grand jury, which we will take up in the next section.

In cases where there is an arrest on a warrant issued in conjunction with a complaint or where there is an arrest without a warrant, a preliminary hearing, or as it is sometimes called, preliminary examination, is required.[2] It is usually a condition precedent to the filing of an information. Differing from the indictment, if it is not held or waived, the information may be

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**Unless otherwise indicated all references throughout the article are made to the handling of felonies as distinguished from misdemeanors. Prosecuting attorneys include all those persons having like capacity regardless of title.

[1] In Kentucky and Utah the County Attorney conducts the preliminary hearings in felony cases and the District Attorney prosecutes when it reaches the trial court. Ky. Rev. Stat. § 69.210 (1962); Utah Code Ann. § 17-18-1 (1953). In other states there are County Attorneys who handle preliminary hearings, but they are under the control of the District Attorney. There are other instances where the prosecuting attorney does not attend the preliminary hearing, but such instances are limited, even though the statute may not require his presence.

[2] Some form of preliminary examination is provided for in all states. Representative statutes include:

Ala. Code tit. 15, § 128 (1958). Ala. Code tit. 15, § 168 (1958). Specifically provides no preliminary hearing necessary if arrest occurs after the indictment.

Colo. Rev. Stat. Ann. § 39-5-1 (1953). Preliminary hearing required before filing information, unless waived or by leave of court.

Del. R. 5. Preliminary hearing necessary to file information, see State v. Barr, 23 Del. 340, 79 A. 730 (1909).

Idaho Code Ann. §§ 19-514, 19-801 (1947); 19-1308 states that informations require preliminary hearings and no preliminary hearings to be held on indictment by grand jury. See also Idaho Const. art. 1 § 8; *In re* Winn, 128 Idaho 461, 154 Pac. 497 (1916).

Ky. R. Crim. P. 3.02, 3.04, 3.08, 3.10.

quashed.[3] The preliminary hearing is usually conducted by the prosecuting attorney, who will be trying the case when it is bound over to the trial court, except in those states in which there is an "inferior" office to the prosecutor, where preliminary hearings for felonies and the trial of misdemeanors are handled.[4] It should be noted that when we are talking about preliminary hearings we are concerned for the most part about felonies.[5]

The preliminary hearing has the aspects of being the *quid pro quo* for the indictment of the grand jury, giving to the defendant the opportunity to have someone other than the prosecutor or police officer pass upon whether or not there are sufficient grounds to hold the defendant to answer in the trial court having jurisdiction of the offense. Its main value, outside of eliminating a possible abuse of law enforcement officials in keeping a man incommunicado for a long period of time, is

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LA. REV. STAT. § 15:154 (1950). Preliminary hearings on demand except discretionary with district judge after arrest on indictment.
MINN. STAT. § 628.31 (1961). Preliminary hearing required before filing of information, unless waived.
MO. REV. STAT. § 544.250 (1959); MO. SUP. CT. R. 23.02. Provides requirement of preliminary examination before filing information. See State v. Green, 305 S.W.2d 863 (Mo. 1957). No preliminary examination if indictment or if information is substituted for indictment on amendment, if there is no substantial change in allegation.
MONT. REV. CODE ANN. §§ 94-4909, -4915 (1947). Preliminary examination or waiver required before trial on information, but none if indictment.
N.D. CENT. CODE § 29-09-02 (1960). Preliminary examination required or waiver thereof before information may be filed.
OKLA. STAT. tit. 22, §§ 171, 258 (1961). OKLA. CONST. art. 2, § 17. Preliminary hearings or waiver thereof required before filing information.
S.D. CODE §§ 34.1402-.1404, -.1502 (1939). No information filed without preliminary examination.
VA. CODE ANN. § 19.1-163.1 (1950). This is the exception, that defendant is entitled to a preliminary hearing even though charged by an indictment.
WIS. STAT. §§ 954.04, 955.18 (1959). Preliminary hearing required in misdemeanor cases in cities over 500,000 (Milwaukee), where the county court does not have jurisdiction, and in all felony cases before filing of information.
WYO. STAT. ANN. § 7-124 (1957). Preliminary hearing required or its waiver before information can be filed.

[3] *Id.* See specific statutes: Delaware, Idaho, Minnesota, Missouri, Montana, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming. *Contra:* Arkansas provides for a preliminary hearing but it is not prerequisite to filing an information. See Payne v. State, 226 Ark. 910, 295 S.W.2d 312 (1956). Note Virginia and Louisiana, in so far as indictment is concerned and the requirement of a preliminary hearing.

[4] *Supra* note 1.

[5] Generally misdemeanors require preliminary hearings only where a court that handles preliminary hearings does not have jurisdiction to try the offense. See Wisconsin under note 2 in regard to cities over 500,000 (Milwaukee).

the possible benefit to the defendant to take a look into the state's case and thus provide a measure of discovery.[6]

The accused who is unable to hire a lawyer will usually waive the preliminary hearing as the magistrate has no authority to appoint an attorney for the defendant and he is usually so informed. Thus, the accused without funds will waive preliminary examination in order to be arraigned in the trial court which has that authority. If he wishes to plead guilty without the aid of counsel, he again has no reason to want a preliminary hearing, but is anxious to "get it over with" as quickly as possible. This applies only to felony cases, as in misdemeanor cases most states do not have provision for the appointment of an attorney at the expense of the state or a requirement that attorneys can be "drafted" to defend a person charged with a misdemeanor, whether by statute or by actual practice.[6a]

If a preliminary hearing is demanded the state must present sufficient evidence to persuade the magistrate that it has a case, which probably as a practical matter does not require very much, the statute having rather loose standards.[7] However, such testimony can be recorded and can be used for impeachment purposes; it can also be used as evidence should one of the witnesses die or become incapacitated and the need for the witnesses testimony is thus demonstrated. This, of course, could work in favor of the prosecution, but the defendant can also put on witnesses and thus preserve testimony. The preservation of testimony can also be made by deposition, which will be explained further under the discovery section of this article.

II. Dismissal: The Discretion of the Prosecutor

The prosecuting attorney probably is able to exercise what discretion he may have left to him before a complaint is issued or at the time of the preliminary hearing. In other words, although the statutes do not provide for it, the prosecuting attorney may merely fail to approve a complaint in the magistrate court, or fail to "prove up" a case at the preliminary

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[6] *Supra* note 2. It is interesting to note the State of Virginia requires both a preliminary hearing and indictment.

[6a] The case of Gideon v. Wainwright, 372 U.S. 335 (1963) and related cases may well make the question of appointment of counsel for indigent defendants moot, and counsel will be appointed in *all* criminal cases.

[7] A typical standard: Mo. Sup. Ct. R. 23.08: "If upon examination of the whole matter the magistrate shall determine that no felony has been committed by any person, or that there is no probable cause for charging the accused thereof he shall discharge such accused. . . ."

hearing[8] and/or move to dismiss the complaint at the time the preliminary hearing is called. The statutes are silent as to the authority of the prosecutor to do this; however, it is generally the practice and may find approval by innuendo in some statutes. Presumably after the complaint has been issued the prosecuting attorney must attend the preliminary hearing and supposedly the magistrate could bind the defendant over against the wishes of the prosecuting attorney.[9]

After the preliminary hearing, when the defendant has been bound over to the trial court of general jurisdiction, the authority of the prosecuting atorney to dismiss is often couched in statutory limitations requiring reasons to be given why an information is not filed or an indictment pursued, together with the obtaining of the trial court's approval.[10]

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[8] Other than possible disciplinary measures, there is nothing requiring the prosecutor to be diligent in the preliminary hearing, and as a practical matter the magistrate, who often is not an attorney, places great reliance upon the prosecutor for advice.

[9] Since the statutes require some evidence to be presented that would at least show "probable cause" that a felony was committed and that the defendant committed it, the prosecutor, his assistant or some attorney with authority would seem to be required. However, the statutes are silent, except in certain instances where it is stated that the magistrate must give notice and can require the prosecuting attorney to attend the preliminary hearing. *E.g.*, supposedly a police officer could testify before the magistrate without the prosecuting attorney present and give sufficient evidence to have a defendant bound over. This is contemplated in some of the statutes. Ordinarily, however, the prosecutor will want to know what is going on if he is going to be required to prosecute the case. *E.g.*, OHIO REV. CODE § 2937.06 (Baldwin 1958). Prosecuting Attorney may appear before the court for a preliminary hearing in any case of felony. Some statutes provide specifically that the prosecuting attorney must be present at preliminary hearings, *e.g.*, NEV. REV. STAT. § 173. 170 (1961).

[10] CAL. PENAL CODE § 1385.

COLO. REV. STAT. ANN. § 39-4-7, -8 (1953). The District Attorney must file reasons why he does not file an information after inspection of the preliminary hearing record and the judge may require prosecution.

IOWA CODE § 769.10 (1962). A private prosecutor could file an information.

KAN. GEN. STAT. ANN. §§ 62-804, -807 (1949). The County Attorney must check preliminary examination to see if information should be filed and if he deems it should not be filed, he must give reasons in writing. The District Judge may compel prosecution of a crime by the County Attorney and enforce it through attachment, fine or imprisonment. However, the case of Foley v. Ham, 102 Kan. 66, 169 Pac. 183 (1917) illustrates the practical aspects vs. the statutory requirements showing that the County Attorney has more control than the statute would indicate.

MICH. STAT. ANN. § 28.981. Prosecuting Attorney must give a reason to the court why an information is not filed.

MONT. REV. CODE § 94-6206 (1947). If the County Attorney does not believe an information should be filed he must give reasons and the court must approve. The Court can require prosecution, if it is not satisfied with the reasons.

After the indictment or information has been found or filed, the majority of statutes require the approval of the judge of the trial court before it can be dismissed.[11] Where the state statute is silent as to the right of the prosecuting attorney to

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NEV. REV. STAT. § 173.150 (1961). Court can compel the District Attorney to prosecute a crime in an extreme case, enforcing same by fine, attachment or imprisonment.

N.D. CENT. CODE § 29-09-07 (1960). State's Attorney must present to court in writing, reasons why no information is filed after a preliminary hearing and the court must approve.

OKLA. STAT. § 815 (1961).

S.D. CODE § 34.1540 (1939). State's Attorney to determine if an information is to be filed and if not to give statement in writing to be concurred in by court. If court does not agree, it can require filing of information.

UTAH CODE § 77-17-1, -4 (1953). If District Attorney fails to file information after defendant is held on a complaint, he is guilty of contempt and may be prosecuted for neglect of duty. Court can order District Attorney to file an information.

VT. STAT. ANN. tit. 13, § 5654 (1958). Provides that State's Attorney can notify judge or clerk that he will not file information and defendant will be discharged from custody.

WASH. REV. CODE §§ 10.16.110, .20 (1951). If information is not filed Prosecuting Attorney must give reasons in writing and if court is not satisfied may direct Prosecuting Attorney to file information.

WIS. STAT. § 955.17 (1959). Judge approval required if District Attorney does not want to file information after a preliminary hearing.

WYO. STAT. ANN. §§ 7-123, -127 (1957). Prosecuting Attorney must check record in preliminary hearing and court can require filing of information if it is not satisfied with the reasons given.

There are statutes which provide for dismissal if information or indictment must be filed or found by a certain time or term and be tried by certain time or dismissed. *E.g.*, ARIZ. R. 236 provides for dismissal of information if not filed within thirty days after arrest. CAL. PEN. CODE § 1382, 15 days after a person has been held to answer.

[11] The true *nolle prosequi* is allowed by statute in the following states:

DEL. R. 48. It is interesting to note that there was a readoption of an unlimited right of *nolle prosequi*, after a prior rule had required court approval.

NEB. REV. STAT. § 25-1323 (1943). Provides that no record shall be kept when a case is nol-prossed.

NEV. REV. STAT. § 173.150 (1961) provides court can compel District Attorney to prosecute crime in *extreme* cases, whatever extreme means.

N.M. STAT. ANN. § 41-11-9 (1953). *Nolle prosequi* is not restricted except after testimony has been introduced for the defendant.

MASS. GEN. LAWS ch. 277 § 70A. (1932). Provides *nolle prosequi* allowed with accompanied written statement giving reasons, but does not specifically require court approval.

Mo. REV. STAT. § 558.170 (1959). Provides for punishment of prosecuting attorney if *nolle prosequi* in pursuance of corrupt agreement. Cases construe unlimited right in prosecuting attorney, subject to possible showing of malfeasance in office. See Dalton v. Moody, 325 S.W.2d 21 (Mo. 1959).

LA. REV. STAT. §§ 15:327-:330 (1950).

In some other states there are no statutory provisions expressly restricting right of *nolle prosequi*.

dismiss a complaint prior to the indictment or information being filed, but after the defendant is bound over to the trial court, it could be logically implied from the statutes requiring judicial approval of dismissal of the indictment or information that the same is true at that stage of the prosecution.[12] It can be noted that the court may dismiss the indictment or information on its own motion and does not require the motion of the prosecuting attorney.[13] There may be some rights of appeal in certain states should the judge do this on his own motion, so this would rarely be done except on the motion or concurrence of the prosecuting attorney.[14]

Only infrequently the judge would require the prosecuting attorney to try a case which he moves to dismiss and that as a practical matter the prosecuting attorney has more control over the disposition of a criminal case than the statute actually implies. This demonstrates, as many of the statutes of the states seem to do, that there is a distrust by the public or the legislature of the prosecutor and thus the statutes couch the authority of the prosecutor with the requirement of obtaining the judge's approval, in whom more trust is reposed. While, as has been stated, this restriction is probably more fictional than actual, there are some ramifications where the judge may be inclined to be dictatorial. As for the fear of the prosecutor, there are many methods of control without such supervision, including the right of the court, whether by statute or implied authority, to appoint a prosecuting attorney if he is absent when the court convenes to try a criminal case.[15] Most states also provide by statute for the dismissal of a case if an information is not filed by the prosecuting attorney or if an indictment is not found at the term of court at which the defendant has

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[12] Most of the states not listed in note 11 have restrictions on *nolle prosequi* or its equivalent.

[13] Several statutes so provide: *E.g.*, IOWA CODE § 769.8 (1962); MONT. REV. CODE ANN. § 94-9505 (1947). Although a number of statutes provide for dismissal on motion of prosecuting attorney and on approval of court: *E.g.*, IND. ANN. STAT. § 9-910 (1932).

[14] Like all human beings unless the information is defective on its face, the judge does not like to take the full responsibility and would usually place the responsibility on the prosecuting attorney, where it more properly lies.

[15] Most states have statutes which provide that a judge may appoint a temporary prosecuting attorney, if the official prosecutor is absent, disabled, sick or in any way incapacitated or unable to attend court. *E.g.*, GA. CODE § 24-2913 (1933), which provides for an appointment under like conditions or judge may request the Governor for the Attorney General. Other courts have held that authority to appoint a prosecuting attorney for a particular case when there is need is inherent in the power of the court, State v. Gauthier, 113 Ore. 297, 231 Pac. 141 (1925).

been arrested or bound over to the court. In addition, the case will be dismissed if it is not tried within a certain time after the filing of the information, or the finding of the indictment.[16] Seemingly, if the prosecutor is neglectful of his duty, the court could appoint an attorney with the powers of the prosecutor to handle that case, which includes the penalty oftentimes of paying the court appointed prosecuting attorney out of the regularly constituted prosecutor's salary.[17]

III. The Accusation: Indictments and Informations

The indictment is the accusation in writing found by the grand jury. The pros and cons of the grand jury are discussed in innumerable books and articles, all of which are rampant with authority. In order to simplify the discussion let me point out the variances again in the statutes and allow the reader to arrive at his own decision of its worth, with the writer's opinion, gathered from experience and discussion with prosecutors over the nation, as a conclusion.

Grand juries are provided for in every state in the nation. In some states they are the exclusive charging agency for all criminal offenses, although usually through one method or another they are only involved in accusations of felonies.[18] In

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[16] The statutes vary: Ill. Rev. Stat. ch. 38, § 748 (1961)—four months; Mo. Rev. Stat. § 545.900 (1959)—by the end of the third term, after indictment, found or information filed, if on bail.

[17] *E.g.*, Wash. Rev. Code § 36.27.030 (Supp. 1954); *supra* note 15.

[18] Alaska Comp. Laws Ann. § 66-1-2 (1949).
Ala. Code tit. 15, §§ 15-227, 260, 261 (1953). Exclusive indictable offenses being all felonies with original jurisdiction in Circuit Court. Defendant can waive indictment and plead guilty except in capital offenses.
Conn. Gen. Stat. Ann. § 54-46 (1958). Limited to crime punishable by death or life imprisonment.
Del. Sup. Ct. R. 7. Must indict in capital cases, but may waive in other crimes.
Fla. Stat. § 904.01 (1961). Capital cases. (Provision in section 905.20 for use of grand jury of another county if judge decides it is practical.)
Ga. Code §§ 2-105, 27-704 (1933). Indictments required in all cases, but may waive in all except capital offenses.
Ill. Const. art. 1, § 8. Ill. Rev. Stat. tit. 38, § 702. Except misdemeanor cases.
Ind. Ann. Stat. §§ 9-712, -908 (1933). Provides prosecution by affidavit (same as information) if no grand jury is in session, except treason and murder.
Iowa Const. art. 1, § 10. Provides that information can be used only in Justice of Peace Court. Indictments are required for felonies. However, by statute (Iowa Code §§ 769.1-.7 (1962)) information may be filed for indictable offenses, but requires approval of the judge (a form of one man grand jury).

other states their exclusive authority is limited to the more serious felonies, with concurrent accusatory powers with the prosecuting attorney, through the information, of all other crimes.[19] Generally, however, crimes can be charged by the grand jury through indictment or in the alternative with an information by the prosecuting attorney.[20] There are some

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KY. CONST. § 12. KY. R. CRIM. P. 6.02. Indictment required for indictable offenses (felonies).
LA. REV. STAT. § 15:209 (1950). Required in all capital cases.
MASS. ANN. LAWS ch. 263, § 4(a). May waive except in capital cases.
ME. REV. STAT. ANN. ch. 147-33 (1954); ME. CONST. art. I, § 7. Required in capital or infamous crimes, but may waive indictment in all cases except in crimes punishable by death or life imprisonment.
MD. CONST. BILL OF RIGHTS § 21; MD. ANN. CODE art. 27, § 592 (1957); MD. RULES 708, 709. Information permitted in misdemeanor cases and may be waived in felonies.
MISS. CONST. art. 3, § 26, provides for information and indictment, but MISS. CONST. art. 3, § 27 provides that no information will be allowed for indictable offenses, which means offenses triable in inferior courts.
N.H. REV. STAT. ANN. §§ 601:1-:2 (1955). Required in all cases punishable by death or one year imprisonment, but may waive except in capital offenses.
N.J. CONST. art. 1, § 8 and N.J. REV. STAT. tit. 2A, §§ 152-3 (Supp. 1951-61). May be waived. See Edwards v. State, 45 N.J.L. 419 (1883).
N.Y. CODE CRIM. PROC. § 4. Except in certain lower courts.
N.C. GEN. STAT. §§ 15-140, -140.1 (1953). May waive indictment in misdemeanor and non-capital felony cases, but in order to waive must have counsel. See N.C. CONST. art. I, §§ 12, 35.
OHIO REV. CODE ANN. § 2941.021 (Baldwin's Supp. 1961). Can waive indictment, but required to be in writing and must have counsel, except not allowed to waive in crimes punishable by death or life imprisonment. No requirement in misdemeanor cases.
ORE. REV. STAT. §§ 131.010, 133.010 (1961); ORE. CONST. art. VII(A), § 5. Waiver allowed by defendant and not required if crime tried before magistrate.
PA. STAT. ANN. tit. 19, § 241; (Supp. 1962); PA. CONST. art. 1, § 10. May waive indictment except in homicide cases.
R.I. GEN. LAWS ANN. § 12-12-19 (1956); R.I. CONST. art. 1, § 7. Required in capital or infamous crimes, but may waive other than in murder cases. Infamous crimes include all but those punishable by fine or imprisonment for one year or less. State v. Nichols, 27 R.I. 69, 60 A. 763 (1905).
S.C. CODE §§ 17-401, 43-112 (1952); S.C. CONST. art. 1, § 17. Required for crime punished by fine of more than $100.00 or thirty days in jail or at hard labor. Not required for crime punishable in magistrate court.
TENN. CODE ANN. §§ 40-301, -401, -402 (1955). Justice of Peace can accept plea of guilty without indictment for misdemeanor. Jurisdiction of Justice of Peace allows fine up to $50.00.
VT. STAT. ANN. tit. 13, § 5652 (1958). Required to indict for crimes punishable by death or life imprisonment.
VA. CODE ANN. § 19.1-162 (1950), required for felonies, unless waived by defendant.
W.VA. CODE ANN. § 6165 (1961); W.VA. CONST. art. III, § 4, Felonies.

[19] *Id.* Connecticut, Florida, Indiana, Louisiana, Vermont.

[20] This is true in all states not listed in note 18 and the limited exceptions in note 19.

various combinations of the methods of accusation of crimes in several states.[21]

Where there is concurrent jurisdiction to accuse, in most states the grand jury is seldom used and the statutes make it clear that a grand jury should not be called except in extreme emergencies.[22] The number of cases which have been appealed in connection with grand juries would indicate that some states have not called more than one grand jury in the last twenty years. In discussing the problem with prosecutors in many of these states, some of them have stated that they would not have any idea of what they would do with a grand jury if it were called. When a grand jury has been called in many of those states, it has been because of some irregularities within governmental offices including possibly the prosecuting attorney's office.[23] In some instances the grand jury has either "gone wild" or has cleared up the rumors that may have been circulating of such malfeasance in office.[24]

The grand jury functions at its best in the large metropolitan areas, and, often in those states with the concurrent methods of accusation, it will be used in the populous counties, but ignored in the rural counties.[25] It is probable that in many of the states where a defendant has the right to be indicted by a grand jury, that in the rural areas the defendants waive this right and grand juries are rarely called. In most states requir-

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[21] Complaints are often used in lower courts for misdemeanors with informations and/or indictments for felonies. NEV. REV. STAT. §§ 169.120, 185.020 (1961). The term affidavit or accusation is used in certain states to mean either complaint or information. *E.g.*, GA. CODE § 27-7 (1933); IND. ANN. STAT. § 9-908 (1933).

[22] *E.g.*, UTAH CODE ANN. § 77-18-1 (1953). Grand jury is called only when in the opinion of the judge of the district court the public interest demands it. IOWA CODE §§ 761.1-.2 (1962). *Contra* to its constitution allows use of information when grand jury is not in session, if approved by judge. N.D. CENT. CODE § 29-09-09 (1960). Grand jury is to be called only if the judge thinks there is a need or the board of county commissioners ask or request by petition of ten per cent of the voters for governor in the county in the last election.

[23] The last grand jury called in the State of North Dakota was due to a feud (among other reasons) between the State's Attorney and the District Judge. If anything, it proved to the people of the state that a grand jury should never be called. The State's Attorney was the winner in North Dakota. For indirect story see, State *ex rel.* Ilvedson v. District Court, 70 N. Dak. 17, 291 N.W. 620 (1940).

[24] *Ibid.*

[25] Missouri, an example where the grand jury is used frequently in three metropolitan areas, Kansas City, St. Louis and St. Louis County, and very infrequently in the rural areas.

ing an indictment by the grand jury, such a constitutional right can be waived except in certain instances involving capital offenses.[26]

How does the grand jury arrive at finding an indictment? Generally it is by bringing before the jury witnesses to alleged crimes of which the prosecuting attorney has been informed or is cognizant, and wishes either to prosecute or, in some cases, not to prosecute. These witnesses testify as to their knowledge of the alleged crime, which testimony is recorded. The witnesses are usually questioned by the prosecuting attorney with additional questions asked by members of the grand jury. In the large offices one or more assistants are usually assigned to handle all cases before the grand jury and a certain attachment to this prosecutor is natural. He unquestionably becomes the advisor, as by statute he is supposed to be, and is more or less the leader.[27] It would be improper to say that the grand jury members are merely pawns of the prosecutor, but as a practical matter they must be and should be dependent upon the prosecutor for the cases which they investigate.[28]

There is a provision for another accusation in writing by the grand jury in many statutes which is called a presentment.[29]

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[26] *Supra* note 18.

[27] One will often find the report of a grand jury complimenting the assistant for his outstanding devotion to duty. The assistant in large offices often is a specialist in handling grand juries, and unquestionably schooled, as we all should be, in good public relations and practical, if not formal psychology. The prosecuting attorney has the duty and right to be present when the grand jury is hearing evidence and is excluded only when the grand jury members are deliberating and voting. No one else, not even the judge, has that right. *E.g.*, ARIZ. SUP. CT. R. 100. Exceptions might be when the grand jury is investigating the prosecuting attorney's office. *E.g.*, S.D. CODE § 34:1222 (1939).

[28] Many statutes discourage grand juries from going out on their own specifically and others by innuendo do not give the grand juries a free hand. Although it has been stated that the grand jury is not an "arm" of the prosecution, such words do not necessarily stop it from being such. See N.J. REV. STAT. ANN. § 2A:158-4 (1951), and *ex parte* Peart, 5 Cal. App.2d 469, 43 P.2d 334 (1935).

[29] GA. CODE § 27-7 (1933) provides for presentments, but in § 27-703, the statute provides that presentments are to be treated the same as indictments.
HAWAII CONST. art. I, § 8. Provides for presentment in the same language as the United States Constitution, but nothing more is stated in the statutes, much the same as in the United States Code.
IDAHO CODE ANN. §§ 19-1201 (1947). Provides for presentment as a formal statement, but nothing concrete is given as to its use.
MINN. STAT. §§ 628.01, -.15 (1961). Seems to have the only clear statutory definition as to its use, making a distinct differentiation between a presentment and an indictment. In substance it states that a presentment by a grand jury is an informal statement of reasonable grounds that an offense has taken place and that a person has committed such an offense, but the

A simple definition of the presentment is that it is the same as an indictment (in many statutes it is treated synonymously as such) except that the case originated within the grand jury itself rather than by matters which have been prompted by the prosecuting attorney.[30] In other state statutes and constitutions it is obvious that the historical distinction between a presentment and indictment has been lost and its continued use merely adds to the confusion. It suffices to say that presentment in its technical sense, whether or not called an indictment, is frowned upon and the statutes, cases and authorities indicate that there is little place for the so-called "runaway" grand jury, except as a possibility in the background which may have some psychological effect upon the prosecuting attorney, partisan politics and the criminal element. The need of such is, however, so remote as not to justify the use of the grand jury for that reason alone.

There is a running controversy as to whether or not grand juries have power to give reports. Typically, reports are called for in inspection of public jails and buildings, but there is a limitation to that phase of investigation. If a grand jury makes a "report" as distinguished from an indictment, there is no defense that can be made and the person or persons or a com-

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court will determine the exact type of crime committed. The same number of jurors required to find an indictment is also required to make a presentment.

NEV. REV. STAT. § 172.230 (1961). Gives typical definition of presentment as "Informal statement representing a public offense committed and reasonable grounds that defendant committed it."

N.C. GEN. STAT. §§ 15-137-139 (1953). Provides that if a presentment is made, the names of the grand jurors and witnesses must be on the presentment. It has been held to be only an instruction to the prosecuting attorney to frame a bill of indictment. A presentment is an accusation made *ex mero moto*, upon own knowledge without bill of indictment having been submitted by the public prosecuting attorney. Historically it has been proven ineffective. See State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

ORE. REV. STAT. § 132-37 (Supp. 1950). Provides that a presentment of facts shall be made to the court, when there is doubt as to whether such facts constitute a crime at law, and the court then is to instruct the grand jury in regard thereto.

R.I. CONST. art. 1, § 7. Also follows United States Constitution, but nothing in statute.

S.D. CODE § 34.1217 (1939). Presentment as defined in Nevada.

TENN. CODE ANN. § 40-302 (1955). Stating that a presentment may be made upon the information of any one of the grand jurors.

VA. CODE ANN. § 191-162 (1950).

W.VA. CODE ANN. §§ 6165, 5288 (1961). Provided for but not distinguished from indictment although W.VA. CONST. art. II, § 4 provides for indictment for felonies only.

[30] BLACK, LAW DICTIONARY 1347, (5th ed. 1956).

munity may be maligned without being able to counter such a "report."[31]

The grand jury is supposed to receive only legal evidence and to base its indictment upon legal evidence.[32] It is not required to hear the defendant's side of the case, but it is often cautioned by statute that it should hear the defendant's side if the evidence of guilt can be explained away.[33] The grand jury then takes a vote on whether or not there is sufficient evidence so that the defendant could be convicted if charged.[34] If a certain number or percentage of the grand jurors vote for an indictment a "true bill" is returned. The number of grand jurors required for an indictment is proportionate to the number of persons required to be on a grand jury, which varies from six to twenty-three.[35]

The grand jury and indictments are provided for in the state constitutions as well as the Federal Constitution, although the Federal Constitution, as far as it has been so interpreted, does not require the states to use the grand jury, but the state

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[31] Recently a controversy involving the question of reports came out when the grand jury gave a report calling Kansas City, Missouri a "Playground for Criminals," and made some rather questionable statements in this report. See: Oliver, John, *Inquiry into the Power of a Missouri Grand Jury*, 30 KAN. CITY L. REV. 200 (1962).

[32] *E.g.*, ARIZ. SUP. CT. R. 103. Provides that there must be sufficient legal evidence, and if doubt, should ask the county attorney.
IDAHO CODE ANN. § 19-1105 (1947).
NEV. REV. STAT. § 172.260 (1961). Provides for the use of legal evidence to the exclusion of hearsay.
Obviously these are only statutory guides and it is up to the prosecuting attorney whether stated so, as in Arizona, or not, as there is no way of knowing whether only legal evidence was used to make this determination and there is no way to attack the use of "illegal" evidence. Only the prosecuting attorney and the grand jury members are present at the time of the receipt of the testimony and evidence.

[33] *E.g.*, IDAHO CODE ANN. § 19-1106 (1947). Provides that the grand jury is not bound to hear the defendant's witnesses and evidence, but may do so to explain away the charge. Again, these statutes are merely "suggestions" without any method to enforce, except as a practical matter if the prosecuting attorney suggests this be done.

[34] *Supra* note 32. Again, obviously, whether or not there is sufficient evidence will be more or less guided by the prosecuting attorney's "suggestions" to the jury, rather than on their own knowledge which must be limited. Usually lawyers are not on the grand jury, but it has occurred. For a case involving seven lawyers on the grand jury see State v. Davies, 146 Conn. 137, 148 A.2d 251 (1959). The Dean of the University of Kansas City Law School was foreman of a grand jury in Kansas City.

[35] The number needed for an indictment varies from five out of six (IND. ANN. STAT. § 9-901 (1933)), and five out of seven (*e.g.*, VA. CODE ANN. §§ 19.1-148, -150 (1950)) to the typical grand jury requiring twelve out of twenty-three (*e.g.*, ILL. REV. STAT. ch. 78, §§ 16 and 17 (1961)).

is rather controlled by its own constitution or laws.[36] Although considered a right, historically the grand jury was to give the King an advantage of at least nominal communal accusation of crime.[37] As it developed, its use was deemed beneficial to the rights of the individual. Its use was blindly continued in the Constitutions of the United States and the states. Whether its continued existence is really necessary, with the expense and cumbersome methods of arriving at an accusation, is very questionable. Most authorities and prosecuting attorneys would agree that it is more of a nuisance than an assistance. Most prosecuting attorneys would be reluctant to make such a statement because, like so many institutions, it is considered by some a "sacred cow" which cannot be touched without raising an indignatious uproar, which is based upon the unwarranted belief that its disappearance will help develop a "police state."

Such concern by the public stirred up by those who generally are uninformed does point out some of its usefulness. Psychologically the public can believe that some of its own members, in the form of the grand jury, control whether or not there will be a charge and who will or will not be prosecuted. The theory is that this will prevent the prosecutor and the police from both becoming oppressive and/or lax in their prosecutions. This country was born in distrust of too much authority and the idea continues today. If there is a bona fide basis for such a need no one would question the value of the grand jury. The facts can be demonstrated that the grand jury influence is not to any appreciable degree a restraining influence upon possible abuse by a prosecuting attorney or of the police. Rather it might be said that many prosecutors can and do use the jury to remove their office from any "heat" generated by the victim or a crusading group that will demand a prosecution in a case where the prosecutor knows he does not have a chance to convict. In our elective system of selecting prosecutors this can be very beneficial, not just to keep the prosecutor from being thrown out of office, often unjustifiably by an uninformed public, but also to prevent someone who should not be prosecuted from being put into the position of having to defend himself. There are other methods which will put a prosecutor in a position to administer justice impartially, but as yet we evidently are not willing to accept

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[36] Hurtado v. California, 110 U.S. 516 (1884).

[37] This advantage continues today. However, in the historical beginning, if the grand jury did not do as it was expected, the judge might fine or imprison the jurors. *The Grand Jury*, 30 KAN. CITY L. REV. 149, 151 (1962).

them.[38] Of course, there are differing views on what methods should be used to achieve that result. Regardless, we still must depend upon the integrity and ability of the official in office and the better method would seem to be to endow such official with such authority, duty and responsibility that it will enhance the obtaining and retaining of an official with those attributes. Surely, we have learned that you cannot legislate morals.

There is little question that the prosecuting attorney is the most powerful public officer with direct effect upon the individual. It is within his power, regardless of the fictional restraints of the statute, to ruin an individual by prosecution, to allow the community to be law abiding or to be sold out to the forces of crime. If the grand jury or other methods, which are ostensibly used to keep the prosecutor from being a "tyrant," would in fact do so there would be no argument, but this is not the case.

IV. The Information

The information is the pleading used in the charging of crimes in most instances. Almost every state allows its use or even requires its use or the equivalent in cases of misdemeanors.[39] As previously stated, the concurrent usage with indictment in felonies is most common. In filing the information the prosecuting attorney merely is charging the crime in the same words and with the same notice as that used in the indictment. The only difference, which is obvious, is that the prosecuting attorney takes full responsibility for filing or failure to file an information which must be signed by him. Sometimes there are provisions for a complaining witness also to verify the information.[40] The prosecutor is protected in filing an information in his official capacity and may verify the same

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[38] If a "career prosecutor" were at the helm of law enforcement, it is believed that this would be the result. Nedrud, Duane R., *The Career Prosecutor*, in four parts, 50 J. Crim. L., C. & P.S. 343 (1960); 51 J. Crim. L., C. & P.S. 557, 649 (1961); 52 J. Crim. L., C. & P.S. 103 (1961).

[39] *Supra* note 2. In some instances a complaint is the only pleading necessary.

[40] *E.g.*, Mo. Sup. Ct. R. 24.16. The purpose for this is to hold the prosecuting witness liable for cost in a doubtful case, and to make the complaining witness think twice. It is frequently provided that the prosecuting witness' name be subscribed to the indictment having doubtful validity, for the purpose of holding the person liable for costs and also additional asurance that the witness will prosecute the case to its finality and not use it for the purpose of extorting money or recovering property.

on information and belief.[41] One of the alleged disadvantages or advantages that occur as previously mentioned, is that the preliminary examination is always required in felony charges and thus the prosecutor must or could be required to give sufficient evidence to the defendant and his attorney about the case in order to satisfy the magistrate that he should be bound over to the trial court. The defendant is not present at the investigation and questioning of witnesses by the grand jury, but must be present at the preliminary hearing. Actually, if this matter of indictment versus information were debated, the strict use of the information and the preliminary hearing would give greater safeguards to the individual than the indictment by the grand jury. However, again those who misunderstand look only to the face of the laws and see advantages one way or the other. The unfortunate aspect of statutes and laws, and even in their construction by the court, is that they often belie the fact that their actual and practical use differs from the ostensible safeguard that would seem obvious in reading the statute or the case so construing the statute. This is clearly demonstrated in the conflict of the information versus the indictment.

In some instances, before the prosecuting attorney can file an information, he must obtain approval of the trial judge of the court of general jurisdiction, who by statute, at least, is required to look into the proof of the matter in a form of second preliminary hearing, and becomes a form of "one man grand jury."[42] While no one questions that a judge should be able to quash an information or indictment or dismiss a case if he so decides as a matter of law that it is insufficient, again there is a great deal of question whether this separation of the two functions of prosecuting and the decision making should be connected in the manner of a so-called "one man grand jury" system.

V. Discovery Procedures

We have made great strides in civil procedure to allow cases to be an open book to both sides. The use of discovery methods in civil procedure has unquestionably improved the methods of arriving at the truth, and in the larger sense of seeing that justice is done. It has removed, at least to some extent, the ability of a lawyer to win a case by his wit, use of technicalities and delaying tactics and other methods of wearing down the

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[41] *Ibid.*

[42] Iowa Code §§ 769.1, .2 (1962); Mich. Stat. Ann. § 767.3.

opposition, especially where there is no defense or cause of action. The same argument is used that there should be more discovery procedures in criminal cases.[43]

There are stumbling blocks in criminal cases that make a difference from their civil counterparts, including "importance," the lawyer involved and the tactics used. "Importance" may well be more of a reason to promulgate discovery procedures in criminal cases.

Let us first look at the discovery procedures that are available. (1) It is a frequent requirement that the indictment and information be subscribed with the witnesses which the state intends to use in its case in main.[44] Only if the judge, in his discretion, believes that the state has shown sufficient reason for endorsing additional witnesses on the charging pleading after its filing, will additional witnesses be allowed to be so endorsed and thus used by the state. The state often can use other witnesses not so endorsed to rebut the defense, but this is on the theory that the prosecution cannot be expected to anticipate what the defense may be. The endorsing of the witnesses by the state gives to the defendant a measure of the state's case. There is nothing preventing the lawyers for the defense from contacting and questioning such witnesses, except their natural reluctance to talk. (2) Depositions may be taken of witnesses by the defense and by the state. This is usually only for the purpose of preserving testimony or taking testimony of witnesses that cannot come under the jurisdiction of the court or are in some way incapacitated.[45] Although seemingly so limited, a rather liberal attitude on the part of the courts will allow a certain measure of discretion in the taking of a deposition which can be used for discovery purposes. Even if it cannot be used in evidence if the witnesses are available, the deposition can be used to impeach witnesses for inconsistency in their testimony.[46] (3) We have already mentioned that the preliminary hearings can and are basically used for discovery purposes by defense attorneys. (4) There are also several statutes and court rulings which allow the obtaining of statements, photographs and other materials in criminal cases which in their civil counterpart might not be allowed as a possible "work product" limitation. This includes provisions for allowing judges to inspect certain prior statements made

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[43] Garber, Albert C., *The Growth of Criminal Discovery*, I CRIM. L. Q. 3 (1 Jan. 1963).

[44] *E.g.*, ARIZ. CRIM. PROC. R. 153.

[45] *E.g.*, DEL. SUP. CT. R. 15.

[46] *Ibid.*

by state witnesses or informers which could be made available to the defense attorney if in the court's opinion it is warranted.[47]

On the other side of the coin, the defense is required in a few states to give advance notice if an "alibi" will be used.[48] Also, in some states there is a requirement of notice or a plea of "not guilty by reason of insanity" to be given as a prerequisite to the use of the defense of insanity.[49] These, of course, give the state the chance to prepare to meet these defenses, which otherwise may require delay in finding witnesses or in the case of the insanity defense, the examination of the defendant by state psychiatrists. The latter provision may be part and parcel of the requirement of such a plea.[50]

The argument continues that the defense attorneys should be able to know more about the state's case. Further, in some cases the defendant, with natural reluctance, refuses even to tell his attorneys the true facts. After all, what is attempted to be done in each case is to see that justice be done.[51] The discovery, as admitted, would be a one way street, because the constitutional safeguards against self-incrimination and unlawful search and seizure, among others, would prevent disclosures and thus discovery on the part of the defense.

The defense side of the story is that there is no truth to the idea that the right of discovery on the part of defense would

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[47] Garber, *supra* note 43, at 10. See appendix, FED. R. CRIM. P. 16.

[48] Arizona, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, Wyoming. See: Appendix, Proposed Rule of Federal Criminal Procedure 12A.

[49] ARIZONA CRIM. PROC. R. 192.
ARK. STAT. ANN. § 43-1304 (Supp. 1961).
CALIF. PEN. CODE § 1016.
COLO. REV. STAT. ANN. § 39-8-1 (1953).
FLA. STAT. § 909.17 (1961).
GA. CODE § 27-1502 (1933).
IOWA CODE § 777.16 (1962).
LA. REV. STAT. § 15:268 (1950).
MD. CRIM. PROC. R. 725.
MICH. STAT. ANN. § 28.1043.
S.D. CODE § 34.20A01 (Supp. 1960).
VT. STAT. ANN. tit. 13, § 6561 (1958).
WIS. STAT. § 957.11 (1959).
OHIO REV. CODE ANN. § 2943.03 (Baldwin 1958).
IND. ANN. STAT. § 9-1701 (1933).
Some states provide for notice or plea of insanity, but it is not considered binding on the defendant as to his raising the issue of insanity on a plea of not guilty. *E.g.*, N.Y. CRIM. CODE 336. See People v. Joyce, 233 N.Y. 61, 134 N.E. 836 (1922).

[50] IND. STAT. ANN. § 9-1701 (1933).

[51] Garber, *supra* note 43, at 5.

countenance perjury.[52] Perjury possibility is probably the strongest argument on the side of the prosecution for preventing discovery. The fact remains that presuming the defendant is truthful to his lawyer, with the admittedly limited rights of discovery procedure, the defense is seldom at a disadvantage in knowing all about the case. The actual practice will also show that the defense attorney who has a reputation for integrity and fairness will find the prosecutor willing to open his files to him. Unfortunately, our adversary system does not allow this frankness in criminal cases, because unscrupulous attorneys, without ever actually ruling out subordinating perjury (from a technical, legal or more properly termed "provable" sense), may ask their client whether or not he has any defense to certain evidence, thus said client would be able to bring forward countering and perjured evidence if he were given sufficient time and opportunity. This is especially true where the prosecution may be holding in abeyance a rebuttal witness where it is probable that the defense will come up with some story that can be skillfully "filled with holes" if the defense is unaware that such a witness or such evidence is available. Thinking neutrals[53] rationally see the problems and see the need for limitation of certain discovery matters as well as other possibly hidden defects in the wide open criminal trial. If there could be a complete disclosure of both sides in a criminal case, as in a civil case, discovery would probably work equally as well, but it cannot be seriously advocated that this come about. A solution might come through a compromise whereby the state must give all of its information in discovery proceedings providing the accused first waives some of his constitutional rights which also often prevent the truth from being known.

VI. Trial by Jury

The right of trial by jury is ingrained in our system of justice. Although other countries cannot understand that need, and it is at times questionable as a fact finding body, we have not been willing to abdicate this constitutional right. Almost everyone for or against the jury system will agree that its true value

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[52] *Id.*, at 4.

[53] There is some question if there is any such "animal" as usually, if he is thinking, he cannot be neutral; but we can visualize him as the ordinary reasonable neutral, albeit that such a person is probably not "thinking."

This view is certainly not subscribed to by the committee of federal judges that prepared the Federal Grand Jury Handbook under the auspices of the Section of Judicial Administration of the American Bar Association. It is not

lies in the tempering of justice with mercy. Every state provides for a jury trial in all felony cases with a few states eliminating the requirement in misdemeanor cases.[54] In certain instances the right is not automatic without a demand by the defendant.[55] However, generally the right to be tried by a jury of his peers can be waived.[56] This right to be tried by a jury does, in some instances, blossom into a right by the defendant to waive the same.[57] In other jurisdictions waiver of a jury

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meant to say that the judges' committee, nor other groups sharing their view that the grand jury is ". . . a sword and a shield of Justice—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution . . ." are not thinking, merely that they lack some "realistic thinking."

[54] *E.g.*, LA. REV. STAT. § 15:340 (1950). OHIO REV. CODE ANN. § 2938.04 (Baldwin Supp. 1961). As a practical matter it is true in most states that trials of misdemeanors are tried by the court, but a jury trial is generally provided for if desired. In a few states, trials of felonies by jury are the exceptions to the rule.

[55] *E.g.*, ALA. CODE tit. 15, § 321 (1958). In misdemeanor cases. COLO. REV. STAT. ANN. § 79-15-4 (1953). In cases before Justice of the Peace.
OHIO REV. CODE ANN. § 2938.04 (Baldwin Supp. 1961). Demand in writing must be filed in court of record three days before trial date.
UTAH CODE ANN. § 77-57-17 (1953). By state or defendant before Justice of the Peace.
WIS. STAT. § 960.10 (1959). Misdemeanor cases before Justice of the Peace.

[56] Other than pleading guilty, the exceptions include:
ARIZ. REV. STAT. ANN. § 13-1593 (1956). Waiver allowed only in case of misdemeanor.
IOWA CODE § 777.16 (1962).
MONT. CONST. art. III, § 23. Waiver allowed in misdemeanors.
N.C. CONST. art. I, § 13. Allowed in misdemeanors.
TENN. CODE ANN. § 40-2504 (1955).
W.VA. CONST. art. III, § 14. See: State v. Conttrill, 31 W.Va. 162, 6 S.E. 428 (1888).

[57] CONN. GEN. STAT. REV. § 54-82 (1958). In capital or life imprisonment cases there is a requirement of three judges.
FLA. STAT. § 912.01 (1961). Except capital cases.
HAWAII REV. LAWS § 258-35 (1955). Except capital cases.
ILL. REV. STAT. ch. 38, § 736 (1961).
LA. REV. STAT. §§ 15:258, :345 (1950). Except cases punishable by death and hard labor.
MD. ANN. CODE art. 27, § 591 (1950), MD. R. 741. If more than one judge, majority decides.
MASS. ANN. Laws ch. 278, § 2 (1957).
MICH. STAT. ANN. § 28.856.
MINN. STAT. § 631.01 (1961).
N.H. REV. STAT. ANN. § 1955. Except capital cases.
OHIO REV. CODE ANN. §§ 2945.05, .06, .07 (Baldwins 1958). Three judges required in capital cases. Can demand three judges in all cases.
R.I. GEN. LAWS ANN. § 12-17-3 (1956).
S.C. CODE § 10-1209 (1952).
TENN. CODE ANN. § 40-2705 (1955).
UTAH CODE ANN. § 77-27-2 (1953).

trial must be concurred in by the judge, the prosecutor, or both.[58] Again, a different rule often applies in capital cases.[59]

The right of a jury trial in criminal cases often becomes additionally confusing to those of other countries when they take into consideration the grand jury. The difference should be noted that the grand jury usually hears only one side of the case and there is no instruction by the court on the individual case as to the law and the evidence. An indictment does not require a unanimous vote of the members of the grand jury. The trial jury, in all jurisdictions, is given instructions in the instant case as to the law and is picked carefully by the attorneys for that case. The grand jury is picked only as a fair minded body, more as an arm of the prosecution rather than a protection for the defendant.[60] Challenges to the members of the grand jury can be made by defendants in a very limited

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If nothing is stated in the statutes of a state about the right of waiver, it is generally understood that one can waive a constitutional right to trial by jury. See: *e.g.*, State v. Hernandez, 123 P.2d 38.

[58] With the consent of the prosecuting attorney:
ARK. STAT. § 43-2108 (1947).
ARIZ. REV. STAT. ANN. § 13-1593 (1956). Only in misdemeanor cases.
CALIF. CONST. art. 1 & 7.
IDAHO CODE ANN. § 19-1902 (1947).
MISS. CODE ANN. § 1521 (1942).
MONT. CONST. art. III, § 23. In misdemeanor cases.
NEV. REV. STAT. § 174.480 (1961).
N.J. CONST. art. 1, § 10. See: State v. Stevens, 84 N.J.L. 561, 87 Atl. 118 (1913).
OKLA. CONST. art. 7, § 20.
With the consent of court and prosecuting attorney:
DEL. SUP. CT. R. 23.
KAN. GEN. STAT. ANN. § 62-1401 (1949).
PA. STAT. ANN. tit. 19, § 786 (1930).
TEX. CRIM. PROC. R. 10(a).
Courts have determined that defendant has right to waive jury trial with or without right or consent of prosecutor.

[59] *E.g.*, ARK. STAT. § 43-2108 (1947).
FLA. STAT. § 912.01 (1961).
HAWAII REV. LAWS § 258-35 (1955).
LA. REV. STAT. §§ 15:262, .258, .345 (1950). Capital and hard labor cases, an unqualified plea of guilty cannot be accepted.
TEX. CRIM. PROC. R. 10(a).
UTAH CODE ANN. § 77-27-2 (1953). For an example of a court decision see: Munsell v. People, 122 Colo. 420, 222 P.2d 615 (1950).

[60] *Supra* note 28. Recently the prosecuting attorney of Jackson County (Kansas City), Missouri, stated that robbery cases were being processed too slowly through the use of the information, because of the delays caused by defense motions for continuances in connection with preliminary hearings. In order to speed matters along, the prosecuting attorney stated he would use indictments in all robbery cases.

The same prosecuting attorney a week later stated he would send all cases involving "Sunday Blue Laws" to the grand jury, indicating his displeasure at being required to prosecute these violations.

way,[61] while challenges involved in the composition of the trial jury are quite extensive as far as both the state and defense are concerned. In addition, in all of the states the verdict of the trial jury, also called petit jury, must be unanimous.[62]

VII. PUNISHMENT

What is the role of the prosecutor in the punishment of the defendant? In some states the punishment is meted out by the jury, along with its verdict of guilty or not guilty.[63] The pros-

[61] Usually those defendants who are being held to answer a criminal charge may challenge a juror or the panel before the jurors are sworn. *E.g.*, MO. REV. STAT. § 540.060 (1959).

[62] Exceptions include: MONT. CONST. art. III, § 23. In Misdemeanor cases:
LA. REV. STAT. § 15:338 (1950). Nine out of twelve jurors sufficient except in capital offense or felonies punishable at hard labor.
IDAHO CODE ANN. §§ 19-1902, 19-3911 (1947). States 5/6 of jurors.

[63] ALA. CODE tit. 15, §§ 277, 328, 336 (1958). Court must cause punishment to be fixed by jury even if defendant pleads guilty unless otherwise provided.
ARK. STAT. § 43-2306 (1947).
FLA. STAT. § 919.23 (1961). In most cases jury can recommend mercy, but the judge is not bound by such recommendation except in capital cases.
ILL. REV. STAT. ch. 38, § 754a (1961). In felony cases, including time to be served at hard labor and solitary confinement in the penitentiary as well as fines.
IND. ANN. STAT. §§ 19-1819, -1820 (1933). Jury to sentence except in felonies where defendant is under thirty years of age.
KY. R. CRIM. P. 9.84. Except where penalty fixed by law. In capital cases jury must fix penalty even on plea of guilty.
MD. R. 758. Jury may recommend mercy, but judge is not bound.
MO. R. CRIM. P. 27.02, .04. MO. REV. STAT. 546.10 (1959).
MONT. REV. CODE § 94-7411 (1947).
N.M. STAT. ANN. § 41-13-2 (1953). Jury may recommend mercy, but judge is not bound.
OKLA. STAT. tit. 22, § 926 (1961). On application of the defendant, punishment to be determined by jury. See Tilghman v. Burns, 910 Okla. Cr. 359, 219 P.2d 263 (1950).
TENN. CODE ANN. § 40-2703 (1955). In felony cases.
VA. CODE ANN. § 19.1-291 (1950).
Often state statutes require punishment to be fixed by a jury in specific types of offenses, especially capital cases. *E.g.*:
CALIF. PEN. CODE § 190. Jury trying Murder in first degree.
COLO. REV. STAT. ANN. §§ 40-2-3, 79-15-6 (1953). Capital cases and cases before the Justices of the Peace.
IOWA CODE § 792.1 (1961). Capital cases.
KAN. GEN. STAT. § 21-403 (1949). Capital cases.
LA. REV. STAT. § 15:409 (1950). Capital cases.
MISS. CODE ANN. § 2536 (1942). Capital cases.
NEB. REV. STAT. § 29-2027 (1943). Capital cases.
N.D. CENT. CODE § 12-06-06 (1960). Criminal homicide cases.
OHIO REV. CODE ANN. § 2945.06 (Baldwin 1958). Capital cases.
WASH. REV. CODE § 10.49.010 (1951). Punishment to be set by jury in murder trial even if defendant pleads guilty. Discretionary with judge in other cases.
W.VA. CODE ANN. § 6203 (1961). Murder in the first degree.

ecutor's additional duty is obvious in such cases; not only must he present evidence that the defendant is guilty, but also he must through all legal means give evidence of the nature of the crime and other reasons why, how long and how severely, especially in capital cases, the defendant should be punished. This can be a hindrance to the defense by clouding some issues and a source of error for the prosecution. Further, the prosecution is prevented from showing some of the past record of the defendant before the jury, which, of course, can be shown to the judge when he determines the sentence.[64] There are numerous obvious defects which are disadvantageous to both sides. Allowing the jury to pass sentence, with the possible exception of the death penalty which involves more the discussion of the pros and cons of capital punishment, is condemned by all. Yet, it is difficult to change this antiquated method of determining punishment. True, the punishment of each crime is provided for as to minimum or maximum sentence by statute, but these are often very broad and require more deliberation, facts and understanding than can and are given to and by a jury. Some correction of abuses can be made by the judge and there are also provisions for suspending sentences and placing the defendant on probation,[65] but a decision by a jury on punishment, having been made by members of the public and in whom the public puts a great deal of faith, has probably more weight than the circumstances warrant. It, at the least, puts the judge in the position of having to overcome the *prima facie* "correct" punishment.

In most states the judge passes on the sentence meted out after the verdict of guilty. While only in a few states is the prosecutor by statute[66] given duties in connection with assisting the judge to determine the sentence, it is the usual procedure to ask the prosecutor for his recommendations. Such recommendations are given a great deal of weight. In some instances the prosecutor can almost guarantee to a defendant what sentence he will receive, especially where he pleads guilty. This method is often used to dispose of cases without trial, by bargaining between the prosecutor and the defense. The pros-

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[64] There are some provisions for habitual criminal or multiple offender trials by jury, where the defendant's prior record is in issue. These cases, of course, are limited only to the multiple offender and defendants are rather rarely so prosecuted.

[65] *E.g.*, ARK. STAT. § 43-2324 (Supp. 1961).

[66] ARIZ. REV. STAT. ANN. § 11-533 (1956); NEV. REV. STAT. § 176.080 (1961). District attorney to give recommendations; S.D. CODE § 34.3704 (1939); WYO. STAT. ANN. § 7-348 (1957). For sex crimes.

ecutor can also regulate the sentence by charging a person with a lesser degree of a felony or even reducing it to a misdemeanor.

VIII. New Trials; Appeals

Provision for appeal by the defendant is unrestricted for all practical purposes in all jurisdictions.[67] The procedures vary, but the review by a higher court is fairly well all-inclusive. New trials can be granted on the motion of the defendant.[68]

As to the authority for the state to appeal and obtain new trials there is an entirely different picture. Connecticut and Vermont, by statute have given the state the equal right with the defendant to appeal on questions of law so that if the defendant is acquitted the state can obtain a new trial and the defendant thus can be retried.[69]

Several states allow the state an appeal on errors committed by the court for the purpose of the future guidance of the trial courts in handling similar problems on procedure or

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[67] Some interesting features include statutory given trial *de novo* in the Supreme Court of Alabama by the defendant, if he should agree to try the case without a jury. Ala. Code tit. 15, § 322 (1958). This is obviously pointed to encourage trials without juries. Although such a provision is not uncommon in civil cases, at least statutory provisions of such a trial *de novo* in criminal cases are rare. Appeals are often automatic where the defendant is sentenced to death. *E.g.*, Ala. Code tit. 15, § 328 (1958). Seemingly the right of the defendant to appeal is limited in Maine and other States. Me. Rev. Stat. Ann. ch. 148, § 30 (1954).

[68] Typically the defendant can obtain a new trial from the trial court if the trial court can be persuaded that it was in error.

[69] Conn. Gen. Stat. Rev. § 54-96 (1958). Appeals on question of law are permitted by the state, if permission of the presiding judge is obtained, in the same manner as an appeal by the accused. It should be noted that although this "right" of appeal by the state can actually reverse a conviction, the permission must be obtained by a judge, who has had a "hand" in the prosecutor's appointment. The statute was held constitutional in Palko v. Conn., 302 U.S. 319, 58 Sup. Ct. 149 (1937).

Vt. Stat. Ann. tit. 13, § 7403 (1958). "In a prosecution by complaint, information or indictment for a felony or misdemeanor, upon exceptions taken by the state, questions of law decided against the state by a county or municipal court shall be allowed and placed upon the record before final judgment. When such exceptions are so taken and allowed, in its discretion such court may pass the same to the Supreme Court *before final judgment.* (Italics mine) The Supreme Court shall hear and determine the questions upon such exceptions and render final judgment thereon, or remand the cause to such county or municipal court for further trial or other proceedings as justice and the state of the cause may require." See State v. Green Mt. Power Corp., 113 Vt. 34, 28 A.2d (1942); State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1958). The Constitution of Vermont contains no provision against double jeopardy and the statute giving the state the right of exception in criminal cases equals in all respects that possessed by a defendant, has been held not to be an infringment of due process in state or Federal Constitutions. See State v. Desso, 110 Vt. 1, 1A.2d 710 (1938).

law, but such appeals have no effect on the instant case.[70] Many states allow limited appeal in other areas, basically where the court has dismissed the charge either before trial or after conviction or in the change of sentence or preliminary orders before trial.[71] Sometimes the statute provides that the state can cross appeal on errors claimed or excepted to, where the de-

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[70] ARK. STAT. §§ 43-2720-2722 (1947). Appeal by state if attorney general is satisfied error was committed and in order to obtain uniform treatment of the laws and procedures.

COLO. REV. STAT. ANN. § 39-727 (1953). Some question of its use by virtue of cases construing statute. See: People v. Brown, 87 Colo. 261, 286 Pac. 859 (1930); People v. Byrnes, 117 Colo. 528, 190 P.2d 584 (1948).

IDAHO CODE ANN. §§ 19-2804, -2808 (1947). From any ruling of the trial judge in regard to receipt or rejection of testimony and from any ruling of the trial judge on the giving or refusal to give instructions to the jury.

IND. ANN. STAT. § 9-2304 (1933).

IOWA CODE §§ 793.1—.9 (1962). State may appeal for any reason, but it will have no effect on case in question. There can be no reversal or modification, but the Supreme Court may point out errors in the proceeding.

KAN. GEN. STAT. ANN. §§ 62-1703, -1725 (1949). On question reserved by the state.

KY. REV. STAT. § 21.140 (1962). From adverse decision or ruling of the circuit judge. Statute states that such an appeal shall not suspend the proceedings in the case. This is a change effective January 1, 1963. Previously there was a "moot" appeal on approval of attorney general, with reversal obtainable in cases involving fine. KY. CRIM. CODE §§ 280, 337, 347, 348, 350, 552.

MISS. CODE ANN. § 1153 (1942).

NEB. REV. STAT. §§ 29.2314-2316 (Supp. 1961).

NEV. REV. STAT. § 175.505 (1961). The district attorney may take exception to the decision of the court upon a matter of law in regard to (1) challenges to jurors; (2) admitting or rejecting witness or testimony that is not a matter of discretion.

OHIO REV. CODE ANN. §§ 2945.67, 2945.68, 2953.14 (Baldwin 1958). State v. Mueller, 179 N.E. 503 (Ohio Ct. App. 1931); State v. Hamilton, 107 Ohio App. 37, 156 N.E.2d 326 (1958).

OKLA. STAT. tit. 22, § 1053 (1961). State v. Stout, 90 Okla. Cr. 35, 210 P.2d 199 (1949).

WYO. STAT. ANN. §§ 7-289 to -292 (1957). State v. Ginther, 53 Wyo. 17, 77 P.2d 803 (1938).

[71] ALA. CODE tit. 15, § 370 (1958).

ARIZ. CRIM. PROC. Rules 349, 352. ARIZ. REV. STAT. ANN. § 13-1712 (1956).

CAL. PENAL CODE § 1258. See People v. Valenti, 49 Cal.2d 199, 316 P.2d 633 (1957).

COLO. REV. STAT. ANN. § 39-7-27 (1953).

FLA. APP. Rules 6.1, 6.6 FLA. STAT. § 924.07 (1961).

IDAHO CODE ANN. § 19-2804 (1947).

ILL. REV. STAT. ch. 38, § 747 (1961). Writ of error for quashing of indictment or matters pertaining to suppression of evidence, arrest, and search warrant preliminary to trial.

IND. ANN. STAT. §§ 9-2304-2305 (1933).

KAN. GEN. STAT. ANN. §§ 62-1703-1725 (1949).

Kentucky, see *supra* note 70.

LA. REV. STAT. § 15:540 (1950).

MD. ANN. CODE art. 27, § 645-I (Supp. 1959). Right to apply for leave to

fendant appeals the conviction.[72] There are some states that either do not provide for appeal or specifically deny the right to the state to appeal.[73]

In the area of the lack of the state's right to appeal, the prosecuting attorney finds himself truly frustrated. The criminal law and procedures are generally developed by appeals by defendants and the molding of the law is thus determined in those cases picked by the defendants. Some courts are inclined to lean toward the state on a questionable point raised on trial because they know the defendant can appeal if there is error, and in other cases the trial judge, who wants to have a good record on appeal, leans toward the defense, realizing that the state cannot appeal. Both situations are deplorable. With the right to appeal by the state limited, the more imporant matters involving trial procedures become unquestioned and affect each case as well as future cases. It has been clearly decided that, at least in state courts, there is no Federal Con-

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appeal on post conviction procedure. See: State v. Roberson, 222 Md. 518, 161 A.2d 441 (1960).
MICH. STAT. ANN. § 28.1109. Usual matters pertaining to setting aside an indictment or information, arrest of judgment or direction of acquittal and "From a decision or judgment sustaining a special plea in bar, when defendant has not been put in jeopardy."
MISS. CODE ANN. § 1153 (1942).
MO. R. CRIM. P. 28.04.
MONT. REV. CODE ANN. § 94-8104 (1947).
NEB. REV. STAT. § 29-2316 (Supp. 1961).
NEV. REV. STAT. § 175.520 (1961).
N.M. STAT. ANN. § 41-15-3 (1953).
N.Y. CODE OF CRIM. P. §§ 518, -518a.
N.C. GEN. STAT. § 15-179 (1953).
N.D. CENT. CODE § 29-28-07 (1960).
OKLA. STAT. tit. 22, § 1053 (1961).
ORE. REV. STAT. § 133.040 (Supp. 1961).
S.D. CODE § 34.4103 (1939). Certain orders before trial, at discretion of the Supreme Court. TENN CODE ANN. § 40-3401 (1955).
UTAH CODE ANN. § 77-39-4 (1953). In addition to usual, adds from order of the court directing the jury to find for the defendant.
WASH. REV. CODE § 10.72.020 (1951).
WIS. STAT. § 958.12 (1959).

[72] *Id.* Arizona, Florida, Mississippi, New York.

[73] Still other states limit the state's right to appeal to certain offenses: *E.g.*, PA. STAT. ANN. tit. 19, § 1188 (1930). Cases involving nuisance, forcible entry and detainer.
VA. CODE ANN. § 19.1-282 (1950). Revenue laws or constitutionality of criminal statute. See: Commonwealth v. Willcox, 11 Va. 849, 69 S.E. 1027 (1911).
W.VA. CODE ANN. § 5182 (1961). Public revenue laws. See: State v. Bluefield Drug Co., 41 W. Va. 638, 24 S.E. 649 (1896).
A statute which specifically denies the state the right to appeal:
TEX. CODE OF CRIM. P. art. 812.

stitutional objection of former jeopardy as it applies to the state's right to appeal,[74] but there are still limitations within state constitutions and statutes.

While the rights of the state to appeal errors in procedure occurring during the trial for the purpose of future guidance of courts is better than nothing, it has a number of disadvantages which the equal right of appeal for both the state and defendant would cure. Often such limited "moot rights" of appeal are couched with the need of approval of the trial judge, or the appellate court, or both.[75] In most of the statutes provision is made for the trial judge to hire counsel, possibly the defense attorney, who would not have a direct concern as it would not affect the instant case.[76] The appeals are probably limited to cases where the trial court, either by statutory authority or by tacit approval, agrees with the prosecutor that a certain point, i.e., admission of evidence needs clarification. Other abuses include: (1) the defendant's lawyer is not restrained in any manner during the trial of the case, but he is encouraged to become more of an advocate than is necessary; (2) the prosecutors, who generally are not career men, lose the incentive to make an issue of a matter where there is only this limited right to attack procedural rules as a moot matter; (3) even more is the fact that this type of appeal is allowed in most states that lack large metropolitan areas where the prosecutors have more of a stake in the future procedural rules.[77]

The same argument *a fortiori* applies to the more limited right of appeal, not to mention in those states where no right of appeal by the state exists.

IX. Control of the Prosecutor's Authority

The degree of control of the prosecutor in administering the duties of his office vary to some extent, at least as far as the statutes indicate. Although it probably can be more accurate

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[74] Palko v. Conn., 302 U.S. 319, 58 Sup. Ct. 149 (1937).

[75] Conn. Gen. Stat. Rev. § 54-96 (1958). *Supra* note 69.
Md. Ann. Code art. 27, § 645-I (1957).
Neb. Rev. Stat. §§ 29-2314-2316 (Supp. 1961).
Ohio Rev. Code Ann. §§ 2945.67, 2945.68 & 2953.14 (Baldwin 1958).
S.D. Code § 34.4103 (1939). Appeals from orders before trial are discretionary with the Supreme Cort.
Wis. Stat. § 958.12 (1959).
Wyo. Stat. Ann. §§ 7-289 to -292 (1957).

[76] *Id. e.g.*, Nebraska, Wyoming.

[77] *Supra* note 70. The exception being Ohio. Career prosecutors, with all that such a title implies, either in the person of the top official or the career assistants are usually to be found only in the very large offices, *e.g.*, New York, Los Angeles, Chicago, etc.

to state the prosecutor is relatively free from controls and the statutory provisions are more or less illusory, in that most prosecutors in this country are elected for relatively short terms, the consciousness of election may have a great deal of bearing on the need for the use of the statutory methods in two ways: (1) the prosecutor is very conscious of public opinion, possibly too much so;[78] (2) those who have some semblance of authority to control the prosecutor also are conscious that he has been elected and that neglect of duty is a relative thing which is difficult to prove and even more difficult to "clash horns" over in a battle of rights and duties. A prosecuting attorney would have to commit a serious malfeasance in office to force most judges or the attorney general of a state to move.

Whether by statute or by implied authority, the courts of each state could probably appoint an acting prosecuting attorney because of his absence in court and failure to prosecute a matter, i.e., failure to file an information after a defendant was bound over to court.[79] In some states the statutory authority is more explicit.[80] In Connecticut, since the courts appoint all the prosecuting officials for a term of years, the court could change the prosecutor whenever it so desired.[81]

The attorney general of each state also has varying powers to take over the duties of the prosecuting attorneys. Almost all states have provisions for the attorney general to take over the prosecution of a criminal case at the order of the governor of the state, and it covers the gauntlet to where the attorney general is, in fact, the prosecuting official.[82] Many statutes provide that the attorney general will conduct all appeals in the highest appellate court of the state,[83] so that the prosecuting

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[78] Nedrud, Duane R., "The Career Prosecutor," 51 J. CRIM. L., C & P.S. 557, 558 (1961).

[79] *Supra* note 15.

[80] *E.g.*, MONT. REV. CODE ANN. § 94-6204 (1947). If the county attorney fails to file an information after the preliminary examination, he is guilty of contempt and may be prosecuted for neglect of duty.

[81] One might think that the state of Connecticut is being picked upon, but its criminal law, procedure and administration differ so much from the rest of the states that there can be agreement on the part of persons from all other states that what is done is "inept, unconstitutional or unworkable."

[82] In Delaware and Rhode Island the attorney general and his assistants handle all criminal prosecutions.

[83] *E.g.*, OKLA. STAT. tit. 74, § 18b (1961). But note Okla. Stat. tit. 74, § 18d (1961), which provides that he can require assistance of the county attorney. In many states this is done as a matter of general practice, even to the appointment of the county attorney as an assistant attorney general in order to circumvent the statute. The prosecuting attorney may well be more able than the attorney general, at least as to the knowledge of the case in question.

attorney either has no authority in appeals, whether made by the defendant or by the state, or only nominal connection, except in the case of the more enlightened attorney general. Some attorneys general have been known to oppose the prosecuting attorney's concept of a case,[84] although it is obvious the prosecutor who has tried the case is more cognizant of the problems and will usually be in a better position to advise what should be done. In addition, the prosecuting attorney who does not have the responsibility from beginning to end is rather handicapped, and yet probably bears the brunt of the public indignation if there is a failure to convict.

X. Conclusion

In making this survey and in reference to the procedural problems from the standpoint of the prosecutor there has been an attempt to merely refer to what are the facts and leave the need for a change, if one is thought needed, to the individual reader's own belief.

That the criminal law procedures and its administration moves slowly, is uniformly agreed upon. It is also generally stated that it does not move with the benefit of any empirical study or purpose. Much change has come about merely on an emotional basis where the matter is placated by the passage of a law or a decision by a court. The plaudits still are there, that in spite of seemingly insurmountable obstacles we adapt various laws and precedents to fit the change in times, arriving at a rather unimpeachable administration of criminal justice. We must criticize the obvious injustices whether to the individual or the public in the administration of our criminal laws. Even more than that we must try to recognize both sides of the question and by this we will arrive at what is the best for all concerned. For this reason above all, we need strong spokesmen for the prosecutor, who after all represents the public, and equally strong spokesmen for the defense, who represent the individuals whose rights as members of the public must be protected.

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[84] The Attorney General of Pennsylvania is the chief law enforcement officer of that state, Pa. Stat. Ann. tit. 71, § 244 (1962), but has opposed the district attorney on appeals. See: *In re* Di Joseph's Petition, 394 Pa. 19, 145 A.2d 187 (1958).

APPENDIX

Federal Rules of Criminal Procedure

Rule 6(a). Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

Rule 6(b)(1). Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

Rule 6(d). Who May be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 6(f). Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

Rule 6(g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

Rule 7(a). Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if an indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

Rule 15(a). Deposition—When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

Rule 16. Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the

attorney for the government 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 of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 23(a). Trial by Jury. Cases required to be tried by jury shall be so tried unles the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Rule 32(a). Sentence and Judgment. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 48(a). Dismissal By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Rule 48(b). Dismissal by Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Proposed Amendment to the Federal Rules of Criminal Procedure

Rule 12a (New). Notice of Alibi. No less than ten days before the date set for trial, the attorney for the government may serve upon the defendant or his attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the government proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served the defendant, if he intends to rely on the defense of alibi, shall not more than five days after service of such demand, serve upon the attorney for the government and file a notice of alibi which states the place where the defendant claims to have been at the time stated in the demand. If the defendant fails to serve and file a notice of alibi after service of a demand, he shall not be permitted to introduce evidence at the trial tending to show the defense of alibi other than his own testimony, unless the court for cause shown orders otherwise.

United States Code Title 18

§3432. Indictment and List of Jurors and Witnesses for Prisoner in Capital Cases. A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment stating the place of abode of each venireman and witness.

§ 3731. Appeal by United States. An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismising any indictment or information, or any court thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. As amended May 24, 1949, c. 139, § 58, 63 Stat. 97.

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