

UNIFORM RULES OF CRIMINAL PROCEDURE (1974) — COMMENTS — INDEX

UNIFORM RULES OF CRIMINAL PROCEDURE (1974)

APPROVED DRAFT

WITH PREFATORY NOTE AND COMMENTS

INDEX

WEST PUBLISHING CO.

09251

(MS)

UNIFORM RULES OF CRIMINAL PROCEDURE (1974)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-THIRD YEAR
AT KAA NAPALI BEACH, MAUI, HAWAII
AUGUST 1 TO 9, 1974

WITH
PREFATORY NOTE AND COMMENTS

Prepared under Grant 73-NI-99-0041-G from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice. The fact that the National Institute of Law Enforcement and Criminal Justice furnished financial support for the activity described in this publication does not necessarily indicate the concurrence of the Institute in the statements or conclusions contained therein. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the Department of Justice.

FOREWORD

This convenient Pamphlet edition contains the Approved Draft of the new Uniform Rules of Criminal Procedure together with Comments by the National Conference of Commissioners on Uniform State Laws.

The Uniform Rules of Criminal Procedure were approved by the National Conference of Commissioners on Uniform State Laws at its meeting in Hawaii in August, 1974.

The text is made available in this convenient and compact form for ready reference by members of the Bar, the Judiciary, Legislators, and Teachers and Students of the law.

A detailed index covering these Rules appears in the back of this pamphlet.

THE PUBLISHER

December, 1974

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UNIFORM RULES OF CRIMINAL PROCEDURE

Prefatory Note

The former Uniform Rules of Criminal Procedure, adopted in 1952, have been rendered largely outdated by extensive changes in the area of criminal procedure, including numerous United States Supreme Court and other judicial decisions which have substantially changed various aspects of criminal procedure in view of constitutional limitations. Furthermore, considerable research and drafting, much of it supported by federal and state government and by large organizations, has occurred since 1952.

Consequently, this Committee of the Conference was created in February, 1970 to revise the Uniform Rules. The Committee was fortunate in receiving grants from the LEAA's National Institute of Law Enforcement and Criminal Justice to carry on this project. This made possible the employment of a Staff Director and three Reporters. The Committee also had available the advice and views of a 19-member Advisory Committee appointed by the President of this Conference.

These Rules reflect the Committee's work at 19 meetings held between November, 1971 and May, 1974, at which it met to consider drafts prepared by the Staff Director and, in areas the Committee felt required the expertise thereof, by the Reporters. At three of the meetings, the Committee met together with the Advisory Committee.

The American Bar Association Standards for Criminal Justice, the American Law Institute Model Code of Pre-Arrest Procedure, the Standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, and the Federal Rules of Criminal Procedure and its amendments, both adopted and proposed, were carefully examined and were influential in the preparation of these Rules. In addition, the Committee has directed particular attention to the criminal procedure rules or codes of 14 states, *viz.*, Alaska Rules of Criminal Procedure, California Penal Code, Part 2 (of criminal procedure), Colorado Rules of Criminal Procedure, Florida Rules of Criminal Procedure, Illinois Code of Criminal Procedure, Louisiana Code of Criminal Procedure, Maine Rules of Criminal Procedure, Montana Code of Criminal Procedure, Nevada Revised

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Statutes, Title 14 (procedure in criminal cases), New Jersey Rules of Court, Part III (rules governing criminal practice), New York Criminal Procedure Law, Pennsylvania Rules of Criminal Procedure, Texas Code of Criminal Procedure, and Wisconsin Statutes, Title XLVII (criminal procedure). The criteria for selecting these codifications were recency of the codification's adoption, leading position of the state in the area of law generally and legislation in particular, and geographical balance. It is felt that these codifications are representative of the various approaches being taken in criminal procedure provisions in this country and include most of the recent developments in the area. The Committee also took into account provisions of other states, judicial decisions, particularly those of the United States Supreme Court, secondary materials, and proposed rules under consideration by committees in various states.

The overall organization of the Rules is shown by the Table of Articles and Parts, p. XIX, *infra*, and by the Table of Rules, p. XXI, *infra*. With the exception of Article VII, which contains general provisions applicable throughout the entire prosecution, the organization is designed to be chronological for the typical case. Accordingly, the typical case would proceed under these Rules as follows:

- (1) Detention following alleged commission of offense, for purpose of determining whether to cite, release, or arrest, under Rule 211.
- (2) Issuance of citation under Rule 221(a)(1).
- (3) Issuance of information under Rule 231.
- (4) Appearance, either in person or by the defense lawyer filing a statement, under Rules 312 through 321.
- (5) Trial court setting times for discovery and other pretrial procedures, under Rule 411.
- (6) Discovery under Rule 421 (and possibly under other discovery Rules).
- (7) Discussions between the parties regarding disposition of the case, under Rule 441.
- (8) Pretrial diversion under Rule 442, plea under Rule 444, or trial under Article V and, if there is a conviction, sentencing or other disposition under Article VI.

Article VI covers matters respecting sentencing which are appropriate for court rule. Other matters, such as whether to permit the fixing of minimum sentences or the fixing of maximum sentences of imprisonment shorter than the term fixed by statute, concurrent versus consecutive sentences, and the types of

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correctional institutions and programs available, can be dealt with only by legislation since they involve matters of substantive, as distinguished from procedural, law.

Among the major policies pursued in developing these Rules are the following:

(a) Eliminating unnecessary detention before and during trial. This policy, based upon the view that unnecessary detention before and during trial is an unwarranted burden both upon the defendant and upon police time and facilities, is furthered by:

Rule 211, which provides that a law enforcement officer authorized to arrest a person without a warrant may not immediately arrest him, but may detain him while a determination is made whether he should be cited, released, or arrested, and that the person may be arrested only in certain specified situations.

Rule 221(c), providing that an arrest warrant (as opposed to a summons or prosecutor's citation) may issue only in certain specified situations.

Rule 341, providing that release may be conditioned upon deposit of money or property or upon the obligation of an uncompensated surety only if other specified conditions would not assure appearance and the safety of any person or the community.

Rule 344, providing a detention hearing for a defendant detained because of inability to meet conditions of release or because ordered detained for violating a condition of release.

Rule 431(b), providing a perpetuation deposition procedure for a witness who would not respond to a subpoena, in lieu of the more common material witness commitment procedures.

(b) Centralizing in the prosecutor the responsibility for initiation and control of criminal prosecutions. This policy is effectuated by:

Rule 231(a), requiring prosecution to be by information except to the extent that state constitution requires it to be by indictment.

Rule 231(f), requiring the information to be filed at the outset of the prosecution (rather than normally after a preliminary examination, as under traditional rules), and not providing for a "complaint." See Comment to Rules 221(c) and 231(a).

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Rule 231(g) and (h), authorizing the prosecutor without leave of court to amend the information before trial and to dismiss the information (the dismissal is without prejudice if made before trial unless the court approves a stipulation for dismissal with prejudice).

Rule 432, providing the prosecutor a pre-prosecution investigatory deposition procedure which generally requires court intervention only in case of dispute between the prosecutor and the deponent.

Rule 732, providing for a grant of transactional immunity to a witness upon the prosecutor's request.

Rule 441, authorizing the prosecutor to meet with the defense to discuss the possibility of disposing of the case short of trial.

Rule 442, providing for pretrial diversion agreements between the prosecutor and the defense, with court intervention needed only in the event of alleged violation of the agreement or in the event of a claim by either party that the agreement was fraudulently obtained.

Rule 443(a), on plea agreements, allowing the prosecutor without court intervention to agree to amend the charge or to dismiss or not bring certain charges against the defendant (but not to bind the court on sentence).

(c) **Eliminating unnecessary use of the court's time.** This policy is effectuated by the following provisions:

Rule 312, providing that a defendant not in custody need not make a first appearance in person if he has a lawyer who files a statement of representation.

Rule 344, providing a "detention hearing" procedure only to defendants who are in custody rather than a preliminary hearing to all felony defendants.

Rules 421 through 431, providing a system of discovery that is largely automatic, requiring a minimum of court intervention.

Rule 442, permitting certain pretrial diversion agreements without the need for court intervention.

Rule 443(b), permitting the court to determine in advance whether it will concur in a plea agreement, so that court appearance may be unnecessary if it determines it will not concur.

PREFATORY NOTE

Rule 444(a), authorizing only the plea of admission, thus doing away with the formal arraignment where a perfunctory plea of not guilty is entered.

Rule 444(c), authorizing upon conviction of one offense pleas to other offenses committed in the state, provided the prosecutors with jurisdiction over the other offenses agree. This eliminates the necessity of multiple appearances at different places for such pleas.

Rule 444(d), allowing, after conviction upon a plea, an appeal from denial of a suppression motion or a motion which, if granted, would be dispositive of the case, obviating the need for a trial if the matter raised by the motion is the only point in issue. (Under Rule 443(a) (4) the defendant may bargain away his ability to make such appeal.)

Rule 451(b) (2), requiring a party making a pretrial motion to at the same time make any other pretrial motions for which grounds are then available.

Rule 451(d), providing that unless the court otherwise permits, all pretrial motions pending at the time set for the hearing of a pretrial motion shall be heard at the same time.

Rule 481, providing for a motion for a pretrial judgment of acquittal based upon evidence which, and statements and depositions of witnesses whom, the prosecutor has indicated he will use in his case.

Rule 491, authorizing pretrial conferences to consider the possibility of stipulations, orders, and other steps to promote a fair and expeditious trial.

(d) Providing broad discovery to both prosecution and defense.
This policy is effectuated by the following provisions:

Rule 411, providing for the court to establish a time table for discovery and other pretrial matters.

Rule 412, prohibiting interference with another party's investigation.

Rule 421, requiring the prosecutor upon written request by the defense to allow the defense access to all matters within the prosecutor's control which relate in any way to the case except legal work product or matters protectable by a protective order.

Rule 422, requiring the prosecutor automatically to notify the defendant of his intent to use certain types of evidence at trial and of matters which tend to negate the defendant's

PREFATORY NOTE

guilt or would tend to reduce his punishment therefor and requiring him upon defense request to notify the defense of other evidence and of witnesses he intends to use at trial.

Rule 423, requiring the defense to notify the prosecutor of and allow him access to certain matters regarding the defendant's proposed case at trial.

Rule 431, allowing discovery depositions without court intervention except in case of dispute as well as depositions to perpetuate testimony with court approval.

Rule 433, authorizing physical and mental examination of intended witnesses in certain circumstances with court approval.

Rules 434 through 438, authorizing the court, subject to designated protective conditions, to order the defendant or third persons to participate in specified types of nontestimonial evidence procedures, to order the prosecutor to provide such procedures, and to order the prosecutor to have scientific comparisons made of nontestimonial evidence.

(e) Providing effective substitutes for the grand jury system.

This policy is furthered by:

Rule 231(a), requiring prosecution to be by information except to the extent that state constitution requires it to be by indictment.

Rule 432, providing the prosecutor a pre-prosecution investigatory deposition procedure which, although generally operable without court intervention, provides the deponent safeguards including the right to be represented by counsel while at the same time including desirable features of the grand jury system such as provisions on secrecy and immunity.

(f) Providing procedures to encourage disposition without trial. This policy is effectuated by the following provisions:

Rule 441, authorizing the parties to meet to discuss the possibility of pretrial diversion or of a plea agreement and providing procedures to aid them in reaching an agreement.

Rule 442, providing a pretrial diversion procedure designed to divert from the criminal process accused persons who, consistent with public safety, can benefit more from the use of other community resources.

Rule 443, authorizing plea agreements and providing procedures by which the court may indicate in advance whether it concurs in a plea agreement.

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(g) Providing flexible and fair joinder and severance procedures. This policy is evinced by:

Rule 231(d), allowing any offenses charged against a defendant to be joined in one information.

Rule 231(e), allowing defendants to be joined in one information if they are all charged only with the same offenses or with offenses which were part of a common scheme or were so closely connected as to time, place, or circumstance that it would be difficult to separate proof of one from proof of the others.

Rule 471, allowing the defendant to require related offenses to be either joined or dismissed and allowing him to require joinder of any offenses if failure to try them together would constitute harassment.

Rule 472, requiring severance of offenses or defendants on motion of either party unless this may defeat the ends of justice by causing a significant risk of losing material evidence which cannot otherwise be preserved, and providing for the defendant's requesting severance of related offenses to constitute a waiver of any collateral estoppel defense.

Rule 473, allowing the court on its own motion to join offenses or defendants if no party objects and, subject to the defendant's right of joinder, to sever offenses or defendants in order to promote a fair and orderly trial.

(h) Providing for efficient and fair jury trial. This policy is effectuated by:

Rule 511(a), providing that if the defendant understandingly and voluntarily waives his right to trial by jury, trial shall be by the court, without any requirement of consent by the prosecutor or court.

Rule 511(c), employing the "additional juror" rather than the "alternate juror" system.

Rule 513(e), allowing jury note taking only with the court's consent under appropriate conditions and admonitions.

Rule 513(f), providing for discharge of a juror only upon motion of a party.

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Rule 521, providing for a closing argument by the prosecutor followed by one by the defense, whereafter the court may allow both sides to make further argument within limits it prescribes.

Rule 523(b), affording the parties a hearing on instructions before they are given.

Rule 523(c), requiring instructions to be in writing and allowing, with the parties' consent, some or all instructions to be read before closing arguments.

Rule 523(d), barring the judge from summarizing the evidence or indicating his opinion on the weight or credibility of any evidence, and restricting instructions regarding the desirability of reaching a verdict.

Rule 523(e), providing that objections to instructions normally may not be made after they have been given unless the objections could not reasonably have been made at the hearing on instructions.

Rule 531(c), providing that except in specified situations all exhibits except depositions shall be submitted to the jury.

Rule 535(b), requiring the verdict to be unanimous.

Rule 535(e), providing that the poll of the jury is automatic unless waived.

(i) Expanding the court's authority in disposing of post-trial motions. This policy is effectuated by:

Rule 551(a), authorizing the court to direct an acquittal whenever a mistrial is declared anytime after the close of the State's case in chief.

Rule 551(b), authorizing the court, upon directing an acquittal for the offense specified in the verdict, to modify the verdict to convict the defendant of a lesser included offense, or to grant him a new trial as to the lesser included offense.

Rules 551(c) and 552(c), authorizing the court to permit a late motion for acquittal or for a new trial, in the interest of justice.

Rule 552(a), requiring a new trial (1) for an error by reason of which the defendant is constitutionally entitled to a new trial, or (2) for any other error unless it appears beyond a reasonable doubt that the same verdict or finding would have resulted absent the error.

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(j) Providing fair substitution of judge procedures. This policy is served by:

Rule 741(a), providing the defendant one automatic substitution of judge by filing a demand.

Rule 741(c), requiring a motion to disqualify a judge for cause to be heard by a different judge.

Rule 741(e), providing that if a judge is disabled during trial, upon consent of the parties the trial shall continue before a different judge.

(k) Providing procedures for the effective safeguarding of the defendant's constitutional rights. This policy is effectuated by:

Rules 212, and 241 through 311, respecting law enforcement officers' duties toward detained or arrested persons.

Rule 321, respecting informing the defendant and providing for his representation by counsel, upon first appearance.

Rule 331, restricting questioning after appearance.

Rules 341 through 344, respecting release before and during trial.

Rule 444, respecting the plea of admission.

Rule 461, providing for suppression where required under constitution or law or where the evidence derived from a Rule or law violation which significantly affected the discovery of the evidence or the defendant's substantial rights, and providing for a pre-charge motion to suppress in specified circumstances.

Rule 462, respecting transfer of prosecution.

Rule 711, respecting right to counsel.

Rule 713, requiring the defendant's presence at the trial and disposition hearing unless (1) upon an express waiver of the right to be present the court excuses him from being present, (2) upon his intentional absence under specified circumstances the court directs the proceedings to continue, or (3) he is justifiably excluded from the trial for disruptive conduct.

Rule 714, respecting public right of access to courtroom proceedings and deferral thereof under specified conditions.

Rule 722, requiring, subject to specified excluded periods, detained defendants to be tried within two months and all defendants to be tried within four months.

PREFATORY NOTE

Rule 731(b), entitling the defendant to subpoena up to eight non-expert witnesses from within the state at state expense, and to subpoena other witnesses at state expense upon a showing that the witness' testimony could contribute to an adequate defense.

The Committee is indebted to the members of the Advisory Committee and others who have expressed an interest in this project, for their valuable suggestions and criticisms which have made these Rules a better product, and to the LEAA's National Institute of Law Enforcement and Criminal Justice for the grants which have made the Committee's and Staff's work possible.

†

UNIFORM RULES OF CRIMINAL PROCEDURE

ARTICLE I

SCOPE

Rule 111. [Scope.]

- 1 These Rules govern the practice and procedure in all criminal
2 proceedings in this State [except].

Comment

These Rules are designed to apply to the prosecution of all felonies and all misdemeanors punishable by incarceration. It is recognized, however, that a state may desire specifically to exclude prosecution for traffic offenses (see Model Rules Governing Traffic Court Procedure), and extradition proceedings (see Uniform Criminal Extradition Act; Uniform Rendition of Accused Persons Act). To avoid possible confusion as to the scope of the term "criminal proceedings," a state may also desire to specify that proceedings sometimes viewed as "quasi-criminal" are not encompassed—*e. g.*, proceedings under the Uniform Juvenile Court Act, proceedings for forfeiture of property used in

the commission of a crime, proceedings for issuance of peace bonds, etc. See, *e. g.*, N.D.R. Crim.P. 54(b). A state may also find that some provisions of these Rules are not appropriate for the prosecution of minor misdemeanors, particularly where a trial de novo is available following a misdemeanor conviction. Compare ABA Standards, Discovery & Procedure Before Trial 1.5 (Approved Draft; 1970) (discovery Standards "should be applied in all serious criminal cases") with Fla.R.Crim.P. 3.010, 3.220 (applying broader discovery standards, including discovery deposition procedure, in both felony and non-traffic misdemeanor cases).

*

ARTICLE II

PROCEDURES BEFORE APPEARANCE

PART 1. DETENTION FOR OFFENSE WITHOUT ARREST WARRANT

Rule

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Rule

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PART 3. INFORMATION [AND INDICTMENT]

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- (a) Use.
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PART 1

DETENTION FOR OFFENSE WITHOUT
ARREST WARRANT

Rule 211. [Detention to Determine Whether to Cite, Release, or Arrest.]

- 1 (a) Detention authorized. A [law enforcement officer] au-
- 2 thorized by law to arrest a person without a warrant for the com-
- 3 mission of a criminal offense may not immediately arrest him but
- 4 may detain him for the purposes specified in subdivision (b).

Comment

Rules 211 through 221 generally

It is anticipated that most prosecutions will be initiated by an officer's citation and that arrest, either with or without a warrant, will not ordinarily be resorted to under these Rules. Rules 211 through 221, like Rule 341, *infra* (released before and during trial), are designed to minimize unnecessary pretrial detention. As stated in ABA Standards, Pretrial Release 1.1 (Approved Draft, 1968):

The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents major public expense.

It has been suggested that the Fourth Amendment may restrict

the use of the full custody arrest for minor offenses. See *Gustafson v. Florida*, 94 S.Ct. 488, 492, 414 U.S. 260, 38 L.Ed.2d 456 (1973) (Stewart, J., concurring).

Subdivision (a)

The power to detain hereunder (and hence to issue a citation under Rule 221(a)(1), *infra*) is limited to situations where (except for this Rule) the officer could have arrested the person without a warrant. See former Uniform Rule 5(a)(2); Alaska R.Crim.P. 4(a)(2); 38 Ill.Stat. § 107-12 (a); La.Code Crim.P. art. 211; Mont.Rev.Codes § 95-614(a); N.J.Rules of Court 3:3-1(a); N.Y. Crim.P.Law § 150.20. Thus, if state law does not permit warrantless arrest for a misdemeanor committed outside the officer's presence, the officer may not detain or cite for an out-of-presence misdemeanor. In that event, the proper procedure would be either a prosecuting attorney's citation under Rule 221(a)(2), *infra*, summons under Rule 221(b), *infra*, or an arrest warrant under Rule 221(c), *infra*.

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Art. 2

(b) Length of detention. A [law enforcement officer] responsible for the custody of a person detained under subdivision

(a) may continue his detention only for the time reasonably necessary for:

(1) The officer to determine whether the person should be issued a citation under Rule 221(a)(1), released without a citation under Rule 244, or arrested under subdivision (c);

(2) The person to participate in a procedure described in Rule 434(c) to obtain relevant nontestimonial evidence which the officer reasonably believes may be altered, dissipated, or lost if not then obtained; and

(3) The officer to conduct any search permitted by law. The person's detention may not be extended for the purpose of questioning under Rule 243.

Comment

The officer referred to in this subdivision may be the one who made the initial detention or one into whose custody the initial officer placed the detained person. It is left to the law enforcement departments to allocate authority over the matters specified.

With respect to clause (2), see the first part of the Comment to Rule 434(a), *infra*.

Clause (3) leaves to judicial development the question to what extent persons not formally arrested may be searched under the law relating to search incident to arrest, other than for evidence covered by clause (2).

The last sentence is rather similar in effect to provision in ALI Model Code of Pre-Arrestment Procedure § 130.2(1)(b) (T.D. # 6, 1974).

(c) When arrest permitted in lieu of release with or without citation. A person detained under subdivision (a) may be arrested rather than released with or without a citation only if the [law enforcement officer] making the determination reasonably believes that:

(1) The offense or the manner in which it was committed involved violence to person or imminent and serious bodily injury or the risk or threat thereof;

(2) The person is committing an offense in the officer's presence and will deliberately continue to commit the offense unless arrested;

(3) The person committed an offense punishable by incarceration and would not respond to a citation; or

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- 14 (4) Arrest is necessary for the protection of the person
15 arrested or to administer, or to bring him to a source of,
16 needed medical or other aid.

Comment

Clause (1) covers cases not only of actual violence or bodily injury but of risk or threat thereof. Accordingly, it is broad enough to cover commission of or attempt to commit arson (which would involve at least the "risk" of "imminent and serious bodily injury" to occupants, neighbors, passersby, or firemen) or burglary (at least burglary of a building wherein a person might be present, like a residence or a building wherein there might be a worker or watchman). Compare ABA Standards, Pretrial Release 2.2(c)(ii) (Approved Draft, 1968); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.3(1)(c) (1973); Fla. R.Crim.P. 3.125(b)(3).

Clause (2) permits arrest even absent any risk of injury or anticipated nonappearance if the officer reasonably believes the person will deliberately continue to commit the offense unless arrested. The word "deliberately" is intended to limit the scope of this clause to situations where the perpetrator willfully refuses to desist and is actively defying the officer.

Clause (3) permits arrest in cases of anticipated nonappearance. Compare ABA Standard 2.2(c)(i), (ii), (iv), (v); Nat'l

Advisory Comm'n 4.3(1)(a), (e), (f); Fla.R.Crim.P. 3.125(b). In determining whether the defendant would respond to a citation, the officer may consider the nature and circumstances of the offense, the weight of the evidence against the defendant, his residential, employment or family ties, his financial condition, his character, his mental condition, his record of convictions, his record of appearance or nonappearance at previous court proceedings, and other relevant factors. See Bail Reform Act, 18 U.S.C. § 3146(b); ABA Standard 3.3(b); Nat'l Advisory Comm'n 4.3, 4.5 (2). If the offense is not punishable by incarceration, the person may not be arrested under this clause, but if he fails to respond to the citation, he may be summoned under Rule 221(e)(1), *infra*, and if he fails to respond to the summons, an arrest warrant may be issued under Rule 221(e)(2), *infra*.

Clause (4) allows arrest only when arrest is *necessary* to protect or provide treatment for the person—if state law provides a means other than arrest to accomplish the purpose, arrest would not be "necessary" and it would not be permitted by this provision.

- 1 (d) **Promise to appear.** A [law enforcement officer] may af-
2 ford a person who has been detained under subdivision (a) an
3 opportunity to sign a promise to appear at a stated time and

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4 place before a [magistrate]. If afforded that opportunity and
5 the person signs the promise, he shall be issued a citation and re-
6 leased from detention. A refusal to sign the promise may not
7 be the sole basis for denying issuance of a citation, but the offi-
8 cer may consider the refusal in determining whether the person
9 would respond to a citation.

Comment

Here again it should be noted that the action may be taken by an officer other than the one who initially detained the person.

A state may substitute another appropriate reference for the

term "magistrate" here and throughout these Rules, and may define the term in Rule 761, *infra*. Whenever possible, it should be required that magistrates be admitted to the bar.

1 (e) **Effect of detention.** If a detained or arrested person is
2 released with a citation, or released without a citation under
3 Rule 244, his detention may not be recorded as an arrest.

Comment

Rule 244, *infra*, covers both mandatory and permissive release.

Rule 212. [Procedure upon Detention.]

1 (a) **Informing person.** If a person is detained under Rule
2 211(a), a [law enforcement officer] as promptly as reasonable
3 under the circumstances shall:

4 (1) Identify himself as a [law enforcement officer], un-
5 less his identity is apparent; and

6 (2) Inform the person generally of the offense believed
7 to have been committed, unless it is apparent.

Comment

This is very similar to ALI Model Code of Pre-Arrest Procedure § 120.8(1) (a), (c) (Official Draft # 1, 1972).

Normally it will be the officer who initially detains the person

who will comply with this subdivision, but in some situations, *e. g.*, where a number of persons are detained at the same time, another officer may do so.

1 (b) **Warnings upon removal from scene.** A [law enforcement
2 officer], as promptly as reasonable under the circumstances,

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3 shall inform a detained or arrested person who is to be removed
4 from the scene:

5 (1) Where he will be taken;

6 (2) Of his right to remain silent and that anything he
7 says, orally or in writing, will be used against him;

8 (3) That he will not be questioned unless he wishes, and
9 that he has the right to consult with a lawyer before being
10 questioned or saying anything and to have a lawyer present
11 during any questioning;

12 (4) That if he wishes to consult with a lawyer, but is un-
13 able to obtain one, he will not be questioned until he has had
14 the assistance of a lawyer and that if he is unable to pay
15 for the services of a lawyer one will be provided for him;
16 and

17 (5) That if at any time during any questioning he desires
18 to consult with a lawyer or desires it to stop, questioning
19 will stop.

Comment

The warnings specified here must be given upon removal from the scene even if it has not been determined to arrest rather than cite or release the person.

Clause (1) is comparable to provision in ALI Model Code of Pre-Arrestment Procedure § 120.8 (1)(d)(ii) (Official Draft # 1, 1972).

Clause (2)'s references to the "right to remain silent" and "anything he says," derive from *Miranda v. Arizona*, 384 U.S. 436, 444, 468, 469, 473, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R. 3d 974 (1966). The reference "orally or in writing" derives from ALI § 310.1(4)(a) (T.D. # 5, 1972).

As to clause (2)'s reference that anything said "will" be used against him, see *Miranda* at 444 ("may"), 469 ("can and will"), 479 ("can"). "Will" best high-

lights the danger of making statements.

Clause (3) is very similar to ALI § 120.8(1)(d)(iii) (Official Draft # 1, 1972). See *Miranda* at 444, 471, 473, 479.

Clause (4) is quite similar to ALI §§ 120.8(1)(d)(iv) (Official Draft # 1, 1972), 140.8(1)(c) (T.D. # 6, 1974). See *Miranda* at 444, 473, 474, 479.

Clause (5) is to the same effect as ALI § 140.8(2)(c) (T.D. # 6, 1974). See Tex.Code Crim.P. art. 15.17 (advice at first appearance). The *Miranda* court did not expressly state that the accused must be informed of his right to cause questioning to stop, but it did observe that "It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether expressly or implicitly stated, that the interrogation will con-

Rule 212 **RULES OF CRIMINAL PROCEDURE** **Art. 2**

tinue until a confession is obtained" and that the "warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda* at 468. A study has found that where not informed of the right to cause questioning to stop "Most of the suspects were too passive to try to end the ques-

tioning." Project, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1554 (1967).

This subdivision applies in all cases, whether or not any questioning is attempted. See ALI § 120.8(1)(d) (Official Draft # 1, 1972). If questioning is undertaken, additional requirements are imposed by Rule 243, *infra*.

- 1 (c) **Warnings upon determination to take to place of detention.**
2 A [law enforcement officer], as promptly as reasonable under
3 the circumstances, shall inform a detained or arrested person
4 who is to be taken to a place of detention where he will be taken
5 and that he will be permitted upon arrival to communicate with
6 a lawyer and a relative or friend.

Comment

This is very similar to ALI Model Code of Pre-Arraignment Procedure § 120.8(1)(d)(ii) (Official Draft # 1, 1972). As to

the concluding words "lawyer and a relative or friend," see Alaska R.Crim.P. 5(b).

- 1 (d) **Informing of arrest.** A [law enforcement officer] who
2 has determined to arrest a person rather than to release him with
3 or without a citation shall promptly inform him that he is being
4 arrested.

Comment

This is very similar to ALI Model Code of Pre-Arraignment

Procedure § 120.8(1)(b) (Official Draft # 1, 1972).

Rule 213. [Detention of Person Arrested by Private Citizen.]

- 1 A [law enforcement officer] who pursuant to law takes custody
2 of a person arrested by a private citizen shall proceed in accordance
3 with Rules 211 and 212 as if he had detained the person
4 under Rule 211(a).

Comment

Some states have statutes authorizing a person who has made a citizen's arrest to turn the ar-

restee over to a peace officer. See *e. g.*, Calif. Penal Code, § 847; La. Code Crim.P. 227; N.Y. Crim.

Pt. 2 PROCEDURES BEFORE APPEARANCE **Rule 221**

P.Law § 140.40. This Rule makes it clear that the procedure established by Rules 211 and 212 must be employed when an officer obtains custody of a citizen's arrestee, even where the arrestee has committed a misdemeanor outside the officer's presence and thus could not have been arrested by the officer himself.

PART 2

CITATION, SUMMONS, AND ARREST WARRANT

Rule 221. [Issuance of Citation, Summons, or Arrest Warrant.]

1 (a) Citation.

2 (1) *By [law enforcement officer.]* A [law enforcement
3 officer] may issue a citation to a person who has been de-
4 tained under Rule 211(a).

Comment

An officer *may* issue a citation in any case where (apart from Rule 211) he could have arrested the person. See former Uniform Rule 5(a); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.3(2) (1973); Alaska R.Crim.P. 4(a)(2); 38 Ill.Stat. § 107-12(a). Compare ALI Model Code of Pre-Arrestment Procedure § 120.2 (Official Draft # 1, 1972). Further, this subdivision authorizes an officer at the station (subject to the law enforcement department's distribution of decision making authority) to "reevaluate a decision to arrest and * * * issue a citation at the police station in lieu of detention." See Nat'l Advisory Comm'n 4.3(3).

1 (2) *By prosecuting attorney.* Upon signing an informa-
2 tion the prosecuting attorney may issue a citation, request
3 the issuance of summons under subdivision (b), or request
4 the issuance of an arrest warrant, if authorized by subdivi-
5 sion (c). The prosecuting attorney need not issue a cita-
6 tion for a person who has been issued a [law enforcement
7 officer's] citation, or who has been brought before a [magis-
8 trate] under Rule 311 after arrest without a warrant.

Comment

The "information" is governed by Rule 231, *infra*. ney, without the need for any magistrate involvement, this paragraph accords with Wis.Stat. §

In providing for issuance directly by the prosecuting attorney, 968.04(2)(a) and is rather analo-

gous to provisions which specify that a magistrate must issue a summons rather than an arrest warrant if the prosecuting attorney so requests. See ABA Standards, Pretrial Release 3.3(c) (Approved Draft, 1968); ALI Model Code of Pre-Arrestment Procedure § 6.04(3) (T.D. # 1, 1966); Maine R.Crim.P. 4(a); Mont.Rev.Codes § 95-603; Nev. Rev.Stat. § 171.106.

As noted in a previous Comment, the prosecutor's citation

may be used for misdemeanors not committed in a law enforcement officer's presence, even if state law does not permit law enforcement officers to arrest for out-of-presence misdemeanors.

The second sentence makes it clear that if the person has already been issued a law enforcement officer's citation or brought before a magistrate, no further process is necessary.

- 1 (b) **Summons.** A [magistrate] may issue a summons when-
- 2 ever an information has been filed and affidavit or testimony
- 3 shows probable cause to believe that an offense has been committed
- 4 and that the defendant committed it, and shall do so if he is
- 5 not authorized to issue a warrant or the prosecuting attorney re-
- 6 quests the issuance of a summons.

Comment

This subdivision *allows* the magistrate to issue a summons in *any* case in which he is authorized to issue a warrant. *Accord*, ABA Standards, Pretrial Release 3.1 (Approved Draft, 1968); ALI Model Code of Pre-Arrestment Procedure § 6.04(1) (T.D. # 1, 1966); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.3 (1973); Fla.R.Crim.P. 3.120; 38 Ill.Stat. § 107-11(a); Mont. Rev.Codes §§ 95-603, 95-612(a); Tex.Code Crim.P. art. 15.03(b); Wis.Stat. § 968.04(1). Thus he is permitted to override the prosecutor's determination that a warrant should issue.

But he is not allowed to override the prosecutor's determination that a warrant should *not* issue. *Accord*, ABA Standard 3.3 (c); ALI § 6.04(3); Maine R.

Crim.P. 4(a); Mont.Rev.Codes § 95-603; Nev.Rev.Stat. § 171.106.

Finally, he *must* issue a summons whenever affidavit or testimony establishes probable cause to believe that an offense was committed and that the defendant committed it, but does not show that the offense or the manner in which it was committed involved violence to person or imminent and serious bodily injury or the risk or threat thereof or that the offense is punishable by incarceration and that the defendant would not respond to a summons. *Cf.* F.R.Crim.P. 4(a); Alaska R.Crim.P. 4(a)(2).

This subdivision does not provide, as does the immediately following subdivision on issuance of *warrants*, for issuance without an information where the prosecutor is not available. It seems that

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there would never be enough urgency in the need for a summons to justify bypassing the prosecutor.

1 (c) Arrest warrant. A [magistrate] may issue a warrant for
2 the arrest of a defendant if affidavit or testimony shows:

3 (1) Probable cause to believe that an offense has been
4 committed and that the defendant committed it; and

5 (2) The offense, or the manner in which it was committed,
6 involved violence to person or imminent and serious
7 bodily injury or the risk or threat thereof, or the offense is
8 punishable by incarceration and the defendant would not
9 respond to a summons.

10 An information shall be filed before the issuance of an arrest warrant
11 unless the [magistrate] finds that a prosecuting attorney
12 is not available and an affidavit states the essential facts constituting
13 the offense charged and the official or customary citation
14 of any statute, ordinance, rule, regulation or other provision of
15 law which the defendant is alleged to have violated. If a warrant
16 is issued before the filing of an information, an information
17 shall promptly be made and filed and a copy furnished to the defendant.
18 Before ruling on a request for an arrest warrant, the
19 [magistrate] may require any person, other than the defendant,
20 who appears likely to have knowledge relevant to the offense
21 charged to appear personally and give testimony relative to the
22 offense charged.

Comment

This subdivision makes issuance of an arrest warrant *permissible* in the situations specified. Even though the conditions of this subdivision are satisfied, the magistrate may, under subdivision (b), *supra*, issue a summons instead of an arrest warrant.

The specified matters may appear from an affidavit. *Accord*, ALI Model Code of Pre-Arrest Procedure § 6.03 (T.D. # 1, 1966); F.R.Crim.P. 4(a); Alaska R.Crim.P. 4(a)(1); Maine R. Crim.P. 4(a); Nev.Rev.Stat. § 171.106; N.J.Rules of Court 3:3-1(a); Wis.Stat. § 968.04(1). Thus, unless the magistrate so re-

quires (pursuant to the last sentence of this subdivision), it is not necessary to bring any complaining witness personally before him. This is in line with numerous provisions which either fail to specify that the "complaint" must be sworn "before the magistrate," see ALI § 6.01; Calif. Penal Code §§ 740, 806; La.Code Crim.P. art. 385, or expressly state that it may be sworn elsewhere, see Colo.R.Crim.P. 3; Fla. R.Crim.P. 3.120; N.Y.Crim.P. Law 100.30; Tex.Code Crim.P. art. 15.04; Wis.Stat. § 968.01. *Cf.* Alaska R. Crim.P. 3(a).

Further, the specified matters may appear in whole or in part from testimony. See Fla.R.Crim.P. 3.120; 38 Ill.Stat. § 107.9(c); Maine R.Crim.P. 4(a); Mont. Rev.Codes § 95-603(c); Wis.Stat. § 968.04(1). Compare N.J. Rules of Court 3:5-3 (*search* warrant). Black's Law Dictionary defines "testimony" as "evidence given by a competent witness, *under oath or affirmation.*"

In addition to probable cause to believe that an offense has been committed and that the defendant committed it, it must appear that the offense or the manner in which it was committed involved violence to person or imminent and serious bodily injury or the risk or threat thereof, *cf.* ABA Standards, Pretrial Release 2-2(c)(iii), 3.2(d) (Approved Draft, 1968); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.3 (1973); Uniform Juvenile Court Act § 22(c), or that the offense is punishable by incarceration and that the defendant would not respond to a summons, *cf.* ABA Standards, 2.2(c)(iv), (v), 3.2(a), (b), (c) 3.3(a); ALI § 6.04(2); Nat'l Advisory Comm'n 4.3; Fla.R.Crim.P. 3-130(l), Pa.R.Crim.P. 107(b); Wis.Stat. § 968.04(2)(b). Compare F.R.Crim.P. 4(b)(2); Alaska R.Crim.P. 4(a)(2); La.Code Crim.P. art. 209, N.J. Rules of Court 3:3-1(a); N.Y.Crim.P.Law § 120.20(3). For enumeration of factors to be considered in determining whether the defendant would respond, see Comment to Rule 211(c)(3), *supra*.

This subdivision requires that an "information" be filed before

an arrest warrant may issue or, if the magistrate finds that a prosecuting attorney is not available, promptly after the warrant's issuance. The information, which under these Rules serves the charging function of the traditional "complaint," can be issued only by a prosecuting attorney. Thus, a prosecuting attorney's approval is necessary either before or promptly after issuance of the warrant. Compare ABA Standards, The Prosecution Function 3.4 (Approved Draft, 1971); ALI § 6.02; Nat'l Advisory Comm'n, Courts Standards 1.2, 12.8; Wis.Stat. § 968.02(1), (3). Conduct of a criminal prosecution should be controlled by the prosecuting attorney and a prosecuting attorney should be brought into the process as soon as practicable. See Commentary to ABA Standards, The Prosecution Function 2.1, 3.4(c); Commentary to ALI § 6.02. Allowing the magistrate to issue a warrant in the face of the prosecutor's refusal to issue an information would improperly give the magistrate a prosecutorial function, whereas (except in cases of the necessity presented by the prosecutor's unavailability) he should be limited to a judicial function. If a local prosecutor improperly refuses to file an information, the proper remedy is resort to the attorney general or to a "special prosecutor" appointed by the attorney general or the governor.

The last sentence of this subdivision is comparable to provision in ALI § 6.03, F.R.Crim.P. 4(c), Fla.R.Crim.P. 3.120, Idaho Crim. R. 4(a), N.Y.Crim.P.Law § 120-20(2), and Wis.Stat. § 968.04(1).

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Its main purpose is to allow the magistrate to assure himself when faced with a showing which establishes probable cause but nevertheless leaves question in his mind. It may also serve a purpose when witnesses will not appear without subpoena. It is intended only to aid the magistrate's performance of his judicial function; it is not intended to give him any prosecutorial

function, hence the provisions that he may require attendance only by a person who "appears likely to have knowledge relevant to the offense charged" and that he may examine him only "relative to the offense charged." Further, it would seem that the magistrate's authority is limited by the ability of the prosecutor to withdraw his application for an arrest warrant.

- 1 (d) Arrest warrant after citation or summons. The fact that
2 a citation or summons has been issued or served does not pre-
3 clude the issuance of an arrest warrant under subdivision (c).

Comment

Because of the stringency of subdivision (c)'s requirements for arrest warrants, the effect of the instant subdivision is similar to that of former Uniform Rule 5(a)(3), Alaska R.Crim.P. 4(a)(3), and N.J.Rules of Court 3:3-1(b), each of which provides that

"if there is reasonable cause to believe that he [defendant who has been duly summoned] will fail to appear," a warrant of arrest shall issue. See Mont.Rev. Codes, § 95-613. Cf. F.R.Crim.P. 4(b)(3); Pa.R.Crim.P. 107(b)(2).

- 1 (e) Failure to respond.

- 2 (1) *Upon citation.* If a defendant fails to respond to a
3 citation which has been served upon him, an information
4 has been filed, and affidavit or testimony shows probable
5 cause to believe that an offense has been committed and
6 that the defendant committed it, the [magistrate] may issue
7 a summons or, if permitted under subdivision (c), an arrest
8 warrant.

Comment

This is rather similar to N.Y. Crim.P.Law § 150.60. Compare 38 Ill.Stat. § 107-12(c); Mont. Rev.Codes § 95-614.

These Rules provide no punitive sanction for nonresponse to a citation. It seems the only sanction should be the possible issuance of a summons or warrant.

A punitive sanction seems especially inappropriate for nonresponse to a citation in light of the fact that it is not based upon a judicial determination of probable cause and in light of the fact that it will often be served by means other than hand delivery.

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- 1 (2) *Upon summons.* If a defendant fails to respond to a
2 summons, the [magistrate] may issue an arrest warrant.

Comment

This is to the same effect as § 171.106; N.J.Rules of Court
Colo.R.Crim.P. 4.1(d) and N.Y. 3:3-1(b); Pa.R.Crim.P. 107(b)
Crim.P.Law § 130.50. Compare (1); Tex.Code Crim.P. art. 15-
former Uniform Rule 5(a)(3); 03(b).
ALI Model Code of Pre-Arraign-
ment Procedure § 6.04(4) (T.D.
1, 1966); F.R.Crim.P. 4(b)
(1); Alaska R.Crim.P. 4(a)(3);
Maine R.Crim.P. 4(a); Mont.
Rev.Codes § 613; Nev.Rev.Stat.

Here again no punitive sanction
is provided. Issuance of an ar-
rest warrant seems a sufficient
sanction.

Rule 222. **[Form of Citation, Summons, or Arrest War-
rant.]**

- 1 (a) **Citation and summons generally.** Every citation and sum-
2 mons shall be in writing and signed by the person issuing it with
3 the title of his office, state the date of issuance and the munici-
4 pality or county where issued, specify the name of the defendant,
5 and designate a time for appearance not more than [ten] days
6 after issuance. It shall inform the defendant that he is entitled,
7 to be represented by a lawyer. If the defendant is charged with
8 an offense punishable by incarceration, the citation or summons
9 shall inform the defendant that if for any reason he is unable to
10 obtain a lawyer he is entitled to the services of [a court appointed
11 lawyer] [a public defender] [a legal aid lawyer], and how to pro-
12 ceed to obtain those services.

Comment

Except for the "not more than
[ten] days after issuance" refer-
ence, see Pa.R.Crim.P. 132(A)(7)
(B), the first sentence is to the
same effect as former Uniform
Rule 5(b)(2), 38 Ill.Stat. §§ 107-
11(b), 107-12, Mont.Rev.Codes
§§ 95-612(b), 95-614(b), Nev.
Rev.Stat. § 171.112, Pa.R.Crim.P.
132, and Wis.Stat. § 968.04(3).

As to the last two sentences'
providing for inclusion of infor-
mation as to the right to counsel,
including appointed counsel, see

Uniform Juvenile Court Act § 22
(d). As to the standards for en-
titlement to appointed counsel, see
Comment to Rule 321(b), *infra*.

As stated in previous comments,
it seems no punitive sanctions
should be imposed for nonresponse
to a citation or summons. If a
state nevertheless imposes such
sanctions, the form of the cita-
tion or summons should inform
the defendant of their nature and
consequences.

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1 (b) Citation by [law enforcement officer]. A citation issued
2 by a [law enforcement officer] shall contain the matters speci-
3 fied in subdivision (a), describe the offense charged against the
4 defendant, and state that if the defendant does not appear at a
5 stated time and place before a [magistrate] an application may
6 be made for the issuance of a summons or a warrant for his ar-
7 rest. It shall inform the defendant that the officer will re-
8 quest that an information be filed with the [magistrate] before
9 the end of the [second] business day preceding the date specified
10 for appearance, and that if an information is not so filed he will
11 be relieved from his obligation to appear and be so notified by the
12 prosecuting attorney.

Comment

The first sentence, and the second sentence's effect of causing the appearance date to be several days after the citation's issuance, correspond to ALI Model Code of Pre-Arraignment Procedure § 130.3(a) (T.D. # 6, 1974). The prosecutor's duty to either file an information prior to the end of the second business day preceding the date for appearance or to notify the defendant that he need not appear is treated in Rule 231(f) (2), *infra*.

1 (c) Citation by prosecuting attorney. A citation issued by a
2 prosecuting attorney shall contain the matters specified in sub-
3 division (a), have attached a copy of the information, state the
4 date upon or after which he intends to file the information, and
5 state that if the defendant does not appear at a stated time and
6 place before a [magistrate] an application may be made for the
7 issuance of a summons or a warrant for his arrest.

Comment

Rather than "describe the offense," as does the law enforcement officer's citation, the prosecutor's citation must have attached a copy of the information. See Wis.Stat. § 968.04(3).

The reason for having the prosecutor's citation "state the date upon or after which he intends to file the information" is to allow the defendant or his attorney to discuss and possibly clear up the matter with the prosecutor before anything is filed.

The wording as to nonresponse follows that of the first sentence of the immediately preceding provision (law enforcement officer's citation). It seems unnecessary to include here a provision like the second sentence thereof, regarding the defendant's being relieved from his obligation to respond if an information is not filed. A prosecutor not contacted by the defendant or his attorney is much less likely to decide not to file an information he has is-

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sued than to decide not to issue a law enforcement officer's citation and file an information following tion.

1 (d) **Summons.** A summons shall contain the matters specified in subdivision (a), be in the name of the [State] [Commonwealth] [People], have attached a copy of the information, summon the defendant to appear before a [magistrate] at a stated time and place, and state that if he does not so appear an application may be made for the issuance of a warrant for his arrest.

Comment

In requiring the summons to be in the name of the State, this subdivision accords with former Uniform Rule 5(b), La.Code Crim.P. art. 208, Mont.Rev.Codes § 95-612(b), Nev.Rev.Stat. §§ 171.108, 171.112, Tex.Code Crim. P. arts. 15.02, 15.03(b), and Wis. Stat. § 968.04(3)(b)(3).

As with the prosecutor's citation, the summons must "have attached a copy of the information." See Colo.R.Crim.P. 4.1(c)(1); Wis.Stat. § 968.04(3)(b)(4). Cf. Pa.R.Crim.P. 111.

1 (e) **Arrest warrant.** An arrest warrant shall be in writing and in the name of the [State] [Commonwealth] [People], be directed to all [law enforcement officers] in the State, and be signed by the [magistrate] with the title and location of his office and the date of issuance. It shall specify the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall have attached a copy of the information, if filed, or if not filed, a copy of any affidavit supporting its issuance. It may specify the manner in which it is to be executed, terms of release, and requirements for appearance. It shall command that the defendant be arrested and that unless he sooner complies with the specified terms of release, if any, he be brought before a [magistrate] without unnecessary delay. It shall have printed upon it the information specified in Rule 212(b) and (c).

Comment

In providing that the arrest warrant shall be in writing and in the name of the state, this subdivision follows former Uniform Rule 5(b)(1), Fla.R.Crim.P. 3-121(a), La.Code Crim.P. art. 203,

Mont.Rev.Code, § 95-603(d) and Nev.Rev.Stat. § 171.108.

The provision that it shall "be directed to all [law enforcement officers] in the State" accords

with former Uniform Rule 5(c) (1), ALI Model Code of Pre-Arraignment Procedure § 120.3(1) (Official Draft # 1, 1972), 38 Ill.Stat. § 107-9(e), La.Code Crim.P. art. 204, Mont.Rev.Codes § 95-603(f), and Wis.Stat. § 968.04(4). Limiting execution of arrest warrants to law enforcement officers is particularly appropriate in light of these Rules' restricting arrest warrants to relatively serious situations. Although the warrant is to be directed to *all* law enforcement officers in the state, if the magistrate wants a warrant served by a particular officer, he can accomplish this by delivering the warrant to that officer for service and if he wants it served by a certain *type* of law enforcement officer, he can so specify under this subdivision's authorization to "specify the manner in which it is to be executed."

The reference, "location of his office," appears preferable to formulations such as "municipality or county where issued," see former Uniform Rule 5(b)(1); 38 Ill.Stat. § 107-9(d)(4); Mont. Rev.Codes § 95-603(d)(5), "city and county where it is issued" and "name of the court or other issuing agency," see Calif.Penal Code § 815, or "name of the issuing court," see N.Y.Crim.P.Law § 120.10(2)(a). It seems the significant thing is not where the magistrate may be at the time he signs the warrant, but where his office is located.

In providing that the warrant shall "specify the name of the defendant or, if his name is unknown, any name or description by which he can be identified

with reasonable certainty," this subdivision accords with former Uniform Rule 5(b)(1), F.R.Crim.P. 4(d)(1), Alaska R.Crim.P. 4(b)(1), Maine R.Crim.P. 4(b)(1), and Nev.Rev.Stat. § 171.108(2). See Colo.R.Crim.P. 4(b)(1); Fla. R.Crim.P. 3.121(a)(4); 38 Ill. Stat. § 107-9(d)(2); La.Code Crim.P. art. 203(3); Mont.Rev. Codes § 95-603(d); N.J.Rules of Court 3:3-2; N.Y.Crim.P.Law § 120.10(2); Tex.Code Crim.P. art. 15.02(1); Wis.Stat. § 968.04(3)(a)(4).

As to the requirement to "have attached a copy of the information," see Wis.Stat. § 968.04(3)(a)(3). Compare N.Y.Crim.P. Law § 120.40(2).

Although there is no *general* requirement to attach a copy of any affidavit or transcript of recorded testimony upon which the warrant was issued, this subdivision requires "any affidavit supporting its issuance" to be attached *if no information is filed*. This is because otherwise there would be no document accompanying the warrant which specifies the offense charged or cites the provision of law allegedly violated. (Rule 221(b), *supra*, requires an affidavit to contain these matters where, because of prosecutor unavailability, a warrant is sought before filing of an information.)

The provision that the warrant "may specify the manner in which it is to be executed" takes no position on the substantive questions whether there *should be* limits as to such things as time of day, announcement of purpose or use of force upon the execution

of arrest warrants, compare ALI Model Code of Pre-Arraignment Procedure §§ 120.6, 120.7 (Official Draft #1, 1972), § 6.03 (T.D. #1, 1966), but merely authorizes the magistrate, acting either because of compulsion of law or because he deems it advisable, to specify limits as to these or other matters.

This subdivision also says the warrant *may* specify terms of release. See *Idaño* Crim.R. 4(b)(1); La.Code Crim.P. art. 203; Mont.Rev.Codes § 95-603(e); Wis.Stat. § 969.05. Compare Alaska R.Crim.P. 4(b)(1); Calif. Penal Code § 815a; Colo.R.Crim.P. 4(b)(1)(iv); Fla.R.Crim.P. 3-121(a)(7); 38 Ill.Stat. § 107-9(d)(7); Pa.R.Crim.P. 112. Although terms of release should normally be specified, in some situations the magistrate may feel he must get the defendant before him to obtain more information before he can intelligently determine what the terms of release should be. It should be kept in mind that these Rules restrict arrest warrants to relatively serious situations.

By having the warrant direct production of the defendant "unless he sooner complies with the specified terms of release, if any," it is contemplated that officers other than magistrates will be authorized to take bail (and possibly take other actions with regard to pretrial release). See ALI Model Code of Pre-Arraignment Procedure § 8.01 (T.D. #1, 1966); Alaska R.Crim.P. 5(a); Calif.Penal Code §§ 822, 1269b; Nev.Rev.Stat. § 171.178(3); N.Y.Crim.P.Law § 140.20.

The authorization to specify "requirements for appearance" allows the magistrate to specify the time and place of appearance if the defendant meets the "terms of release."

This subdivision makes the warrant command production "without unnecessary delay." *Accord*, Alaska R.Crim.P. 4(b)(1); Colo. R.Crim.P. 4(b)(1). Compare former Uniform Rule 5(b)(1) and Calif.Penal Code § 814 ("forthwith"). Many codifications which do not require the *warrant to command* production "without unnecessary delay" nevertheless state substantively, in their provisions on production, that the defendant must be produced "without unnecessary delay." See former Uniform Rule 6(a); F.R. Crim.P. 5(a); Calif.Penal Code § 825; 38 Ill.Stat. §§ 109-1, 109-2; Maine R.Crim.P. 5(a); Mont. Rev.Codes §§ 95-901, 95-1105; Nev.Rev.Stat. § 171.178(1); N.J. Rules of Court 3:3-3, 3:4-1; N.Y.Crim.P.Law § 120.90; Pa.R. Crim.P. 116; Tex.Code Crim.P. arts. 15.16, 15.17; Wis.Stat. § 969.11. *Accord*, ABA Standards, Pretrial Release 4.1 (Approved Draft, 1968). See generally Appendix IV, "State Prompt Production Statutes," ALI Model Code of Pre-Arraignment Procedure 230-31 (T.D. #1, 1966). If production "without unnecessary delay" is the officer's substantive duty, it seems the warrant should so specify.

Unlike the former Uniform Rule and many current provisions, this subdivision does not have the warrant specify before *what* magistrate the defendant must be produced. Usually the

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officer will prefer to bring the defendant before a magistrate of the court which issued the warrant, and this is permissible if it can be done "without unnecessary delay." It seems that the defendant is adequately, and probably better, protected by a rule like the one here proposed which fo-

cuses solely upon time, rather than (also) on geography.

The final sentence hereof is included as a convenient way to buttress the oral warnings provided for elsewhere in these Rules with written ones to a defendant arrested with a warrant.

Rule 223. [Service or Execution of Citation, Summons, or Arrest Warrant.]

- 1 (a) **Service of citation.** A citation may be served at any place
2 within or without the State. It shall be served with a copy of the
3 information, if one has been issued, by delivering a copy to the
4 defendant personally, by mailing a copy to the defendant's last
5 known address, or in any manner provided for service of a sum-
6 mons in a civil action.

Comment

This subdivision applies to the law enforcement officer's as well as the prosecutor's citation. (Hence the reference "information, if one has been issued.") Since Rule 221(a)(1), *supra*, authorizes law enforcement officer's citations to issue only where a warrantless arrest would otherwise be lawful, hand delivery will almost always be used for them. But an officer, busy at an accident scene, who does not have time to fill out a citation, should be able to release a person telling him he will mail out a citation the next morning. And an officer who subsequently to issuing a citation realizes he has filled it out incorrectly should be able to mail out a new one. Arguably it

would be preferable to require the officer to request the *prosecutor* to issue a citation whenever the officer does not issue a citation on the spot, but this might sometimes discourage the officer from proceeding by citation as opposed to arrest.

This subdivision provides that a citation may be served "at any place within or without the State." It is contemplated that service "without" the State will be accomplished by mail or "in any manner provided for service of a summons in a civil action," since the statutes defining law enforcement officers' authority would likely not authorize him to serve anything by hand delivery outside the state.

- 1 (b) **Service of summons.** The summons may be served by a
2 [law enforcement officer] delivering a copy of the summons and
3 of the information to the defendant personally. If the defend-
4 ant is a corporation the summons shall be served in any manner

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5 provided for service of a summons upon a corporation in a civil
6 action.

Comment

Because of the greater seriousness of an instrument signed by a magistrate upon a judicial determination of probable cause as compared to one signed by a law enforcement officer or prosecutor without such a determination, and because Rule 221(e)(2) authorizes issuance of an arrest warrant upon nonresponse to a summons (even where the offense involved no risk of injury and is not punishable by incarceration), its service upon an individual must be by hand delivery by a law enforcement officer to the de-

fendant personally. Former Uniform Rule 5(c) has optional provisions for so restricting summons service. As to allowing only law enforcement officers to serve summonses, see Colo.R.Crim. P. 4(c)(1), 4.1(c)(1); Wis.Stat. § 968.04(3)(b)(2). As to the requirement of hand delivery, see N.Y.Crim.P.Law § 130.40.

The second sentence hereof is similar to 38 Ill.Stat. § 107-13 and Mont.Rev.Codes § 95-615(b). Compare La.Code Crim.P. art. 212(b).

1 (c) Execution of arrest warrant. The arrest warrant shall be
2 executed by arrest of the defendant as directed in the warrant.
3 The [law enforcement officer] shall identify himself as such un-
4 less his identity is apparent, and inform the defendant that he
5 is under arrest. The [law enforcement officer] need not have the
6 warrant in his possession at the time of arrest, but in that case
7 he shall then inform the defendant of the offense charged and of
8 the fact that a warrant has been issued. The [law enforcement
9 officer] shall inform the defendant of the matters specified in
10 Rule 212(b) and (c). The defendant shall be furnished without
11 unnecessary delay a copy of the warrant and of the information,
12 if filed, or if not filed, a copy of any affidavit supporting its is-
13 suance.

Comment

By specifying "as directed in the warrant," the first sentence hereof effectuates the provisions of Rule 222(e), *supra*, that the warrant "be directed to all [law enforcement officers] in the State" and that it "may specify the manner in which it is to be executed."

The second sentence hereof ac-

Pre-Arraignment Procedure § 120.8(1)(a), (b) (Official Draft #1, 1972).

The third sentence hereof accords with former Uniform Rule 5(c)(1), ALI § 120.3(2) F.R. Crim.P. 4(e)(3), Alaska R.Crim. P. 4(c)(3), Maine R.Crim.P. 4(c)(3), and N.J.Rules of Court 3:3-3(c).

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As to the fourth sentence, see Rules 212(b) and (c) and Comments, *supra*.

As to the last sentence hereof, compare the provisions cited in the third paragraph of this Comment, which provide that if the officer does not have the warrant

in his possession, upon request he shall show it to the defendant as soon as possible. *Cf.* Alaska R. Crim.P. 3(b) ("A copy of the complaint shall be served upon the defendant * * * whenever practicable, upon execution of the warrant").

Rule 224. [Return of Citation, Summons, or Arrest Warrant.]

- 1 (a) **Citation.** If a citation is served and the prosecuting attorney
2 files an information, he shall file the original of the citation
3 and proof of the service.

Comment

Requiring filing of proof of service of a citation serves a purpose as a vehicle for calendaring the anticipated first appearance, in having the record indicate the means by which the defendant came to appear before the magistrate, and in regard to the defendant's right to a speedy trial. Compare Calif.Penal Code § 853.6; Pa.R.Crim.P. 134(2).

The reference, "*if* * * * the prosecuting attorney files an information" refers to the possibility that the prosecutor may decide not to go forward with the prosecution and hence *not* file an information. See Rule 231(f)(2) and Comment, *infra*. Only if the prosecutor determines to file an information is he required to file the citation and proof of its service.

- 1 (b) **Summons.** On or before the return day the officer to
2 whom a summons was delivered for service shall make return
3 thereof to the [magistrate] before whom the summons is return-
4 able.

Comment

This is very similar to provision in F.R.Crim.P. 4(c)(4), Alaska R.Crim.P. 4(d)(4), Colo. R.Crim.P. 4(c)(4), Maine R.Crim.

P. 4(c)(4), Nev.Rev.Stat. § 171.152(2), and N.J.Rules of Court 3:3-3(e).

- 1 (c) **Arrest warrant.** The officer executing an arrest warrant
2 shall make prompt return thereof to the [magistrate] who is-
3 sued it.

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Comment

This accords with N.J.Rules of Court 3:3-3(e). Compare former Uniform Rule 5(d); F.R.Crim.P. 4(e)(4); Alaska R.Crim.P. 4(c); Colo.R.Crim.P. 4(c)(4); Maine R. Crim.P. 4(c)(4); Nev.Rev.Stat. § 171.152(1).

Rule 225. [Cancellation of Summons or Arrest Warrant.]

1 At the request of the prosecuting attorney any unserved sum-
2 mons or unexecuted warrant shall be returned to the [magis-
3 trate] by whom it was issued, who shall cancel it.

Comment

This is quite similar to provision in F.R.Crim.P. 4(e)(4), Alaska R.Crim.P. 4(c)(4), Colo. R.Crim.P. 4(c)(4), Nev.Rev.Stat. § 171.152 and N.D.R.Crim.P. 4 (d).

[Rule 226. [Summons or Arrest Warrant upon Indictment.]

1 (a) Issuance.

(1) *Summons.* After an indictment is returned, the clerk, upon the prosecuting attorney's request, shall issue a summons but the prosecuting attorney may request the issuance of an arrest warrant, if authorized by paragraph (2). The prosecuting attorney need not request a summons for a defendant who has already been issued a citation or summons or arrested for the offense charged.

Comment

Rule 226 in its entirety is set forth in brackets so that it may be omitted by states with constitutions not requiring any use of the indictment.

There is no provision for any *citation* upon indictment, since the prosecutor can so easily obtain a summons. (Unlike the information situation, he can obtain it from the *clerk* without any showing of probable cause, since the grand jury has found probable cause.)

In providing that the clerk shall issue a summons upon the prosecutor's request, this paragraph accords with F.R.Crim.P. 9(a), Alaska R.Crim.P. 9(a), Colo.R.Crim.P. 9(a), Maine R. Crim.P. 9(a), Nev.Rev.Stat. § 173.145(3), and N.J.Rules of Court 3:7-8. See former Uniform Rule 22. Compare Rule 221(c), *supra* (issuance of summons upon information).

The language "except that the prosecuting attorney may re-

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quest" etc., parallels provision in Rule 221(a)(2), *supra* (issuance of citation by prosecuting attorney). See F.R.Crim.P. 9(a).

The last sentence hereof is similar in concept to provisions in Alaska R.Crim.P. 9(a), Calif.Pe-

nal Code § 945, Fla.R.Crim.P. 3.130(k), La.Code Crim.P. art. 496, and N.J.Rules of Court 3:7-8. Cf. N.Y.Crim.P.Law § 210.10(1), (2). Compare Rule 221(a)(2), *supra* (issuance of citation by prosecuting attorney).

1 (2) *Arrest warrant*. The court may issue a warrant for
2 the arrest of a defendant against whom an indictment has
3 been returned if the indictment, affidavit, or testimony
4 shows:

5 (i) The offense, or the manner in which it was com-
6 mitted, involved violence to person or imminent and
7 serious bodily injury or the risk or threat thereof; or

8 (ii) The offense is punishable by incarceration and
9 that the defendant would not respond to a summons.

10 The court may refuse to issue an arrest warrant in any case
11 in which it concludes that a summons should be issued in-
12 stead of an arrest warrant.

Comment

This is identical to Rule 221(b), *supra* (issuance of warrant upon information or affidavit) except that it:

(1) specifies "court" rather than "[magistrate],"

(2) specifies "against whom an indictment has been filed" rather than "it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it,"

(3) provides that the enumerated elements may appear from the indictment as well as from affidavit or testimony,

(4) provides "The court may refuse to issue an arrest warrant in any case in which it concludes that a citation or summons should be issued instead of an arrest warrant" (in this event the prosecutor could obtain a summons under the immediately preceding paragraph), and

(5) does not include provisions regarding the necessity to file an information or regarding the magistrate's ability before issuing a warrant to require testimony.

Compare F.R.Crim.P. 9(a).

1 (3) *Arrest warrant after summons*. The fact that a
2 summons has been issued or served does not preclude the
3 issuance of an arrest warrant under paragraph (2).

Comment

This corresponds exactly to upon information). Cf. La.Code Rule 221(d), *supra* (arrest warrant after citation or summons upon information). Cf. La.Code Crim.P. art. 497.

- 1 (4) *Failure to respond.* If a defendant fails to respond
- 2 to a summons, the court may issue an arrest warrant.

Comment

Except for specifying "court" P. 9(a); Alaska R.Crim.P. 9(a); rather than "magistrate," this is Colo.R.Crim.P. 9(a); Maine R. identical to Rule 221(e)(2), *supra* Crim.P. 9(a); Nev.Rev.Stat. § (failure to respond to summons 173.145; N.J.Rules of Court 3:7- upon information). See former 8. Uniform Rule 22(a); F.R.Crim.

- 1 (b) **Form.** The form of the summons or arrest warrant shall
- 2 be as provided in Rule 222 but:

- 3 (1) It shall have attached a copy of the indictment;
- 4 (2) The summons shall refer to appearance before the
- 5 court; and
- 6 (3) The arrest warrant shall be signed by a judge of the
- 7 court and command that unless the defendant sooner com-
- 8 plies with the specified terms of release, if any, he be brought
- 9 before the court or before a [magistrate] without unneces-
- 10 sary delay.

Comment

Under this subdivision, Rule 222(a), (d), and (e), *supra*, apply to the summons or arrest warrant upon an indictment, except that, as to Rule 222(d) and (e) the required attachment would be the indictment rather than the information, as to Rule 222(d) the summoning would be to appear before "the court" rather than a magistrate, and as to Rule 222(e) the signing would be by a judge of the court rather than by a magistrate and the directed production would be "before the court or before a magistrate without unnecessary delay." Although several codifications have the warrant direct production before "the court," see F.R. Crim.P. 9(b)(2) (except for minor offense); Alaska R.Crim.P. 9(b); Maine R.Crim.P. 9(b); Nev.Rev. Stat. §§ 173.15, 173.185, each of them *in its execution of warrant upon indictment provision* provides for production before a magistrate as well as before "the court." See F.R.Crim.P. 9(c)(1); Alaska R.Crim.P. 9(c)(1) (for purpose of admission to bail); Maine R.Crim.P. 9(c)(1) (same); Nev.Rev.Stat. § 173.195 (same). Cf. Colo.R.Crim.P. 9(c)(1); N.J. Rules of Court 3:7-10(a).

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- 1 (c) **Service or execution.** The summons shall be served or the
2 warrant executed as provided in Rule 223.

Comment

This cross reference is similar Crim.P. 9(c)(1), Maine R.Crim.
to that in former Uniform Rule 22 P. 9(c)(1), and Nev.Rev.Stat. §
(c), F.R.Crim.P. 9(c)(1), Alas- 173.195.
ka R.Crim.P. 9(c)(1), Colo.R.

- 1 (d) **Return.**

- 2 (1) *Summons.* On or before the return day, the officer
3 to whom a summons was delivered for service shall make
4 return thereof to the court before which the summons is
5 returnable.

Comment

Except for specifying "court former Uniform Rule 22(d), F.R.
before which" rather than "[mag- Crim.P. 9(c)(2), Alaska R.Crim.
istrate] before whom," this is P. 9(c)(2), Colo.R.Crim.P. 9(c)
identical to Rule 224(b), *supra* (2), Maine R.Crim.P. 9(c)(2),
(return of summons upon infor- Nev.Rev.Stat. § 173.205, and N.J.
mation). This is very similar to Rules of Court 3:7-10(e).

- 1 (2) *Arrest warrant.* The officer executing an arrest war-
2 rant shall make prompt return thereof to the court which
3 issued it.

Comment

Except for specifying "court Uniform Rule 22(d), F.R.Crim.P.
which" rather than "[magistrate] 9(c)(2), Alaska R.Crim.P. 9(c)
who," this is identical to Rule (2), Colo.R.Crim.P. 9(c)(2),
224(c), *supra* (return of summons Maine R.Crim.P. 9(c)(2), Nev.
upon information or affidavit). Rev.Stat. § 173.205, and N.J.
This is very similar to former Rules of Court 3:7-10(e).

- 1 (e) **Cancellation.** At the request of the prosecuting attorney,
2 any unserved summons or unexecuted warrant shall be returned
3 and cancelled by the clerk.

Comment

This is identical to Rule 225 *su- "by the clerk," this subdivision
pra* (cancellation of summons or accords with former Uniform
arrest warrant upon information) Rule 22(d), F.R.Crim.P. 9(c)(2)
except that the latter concludes, (1972), Alaska R.Crim.P. 9(c)(2),
"returned to the [magistrate] by Colo.R.Crim.P. 9(c)(2), Nev.Rev.
whom it was issued, who shall Stat. § 173.205(1), and N.J.Rules
cancel it." Except for specify- of Court 3:7-10(e). Compare
ing "unserved summons or" and Maine R.Crim.P. 9(c)(2).

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- 1 (f) Appearance. Appearance before the court in response to
2 a summons or arrest warrant upon an indictment shall conform
3 to Rules 312 and 321.]

Comment

This is to make it clear that Rule 312, *infra* (when appearance by defendant not in custody required) and Rule 321, *infra* (appearance in person, including informing of rights and providing for lawyer) apply to appearances

in response to a summons or arrest warrant upon an indictment as well as to appearances in response to a citation, summons, or arrest warrant upon an information.

PART 3

INFORMATION [AND INDICTMENT]

Rule 231. [Information.]

- 1 (a) Use. All offenses shall be prosecuted by information [or,
2 to the extent required by the Constitution of this State, by in-
3 dictment].

Comment

Use of a grand jury is unnecessary under these Rules. The grand jury today is generally recognized as performing two major functions in the criminal justice system. First, it serves as a basic "screening agency," reviewing the evidence of the prosecution to insure that no person is charged with an offense in the absence of probable cause (or, in some states, a higher standard of probability). Second, it serves as an investigatory agency through the use of its subpoena power. These Rules are designed to provide better alternatives for performing both of these functions.

With respect to investigations, Rule 432, *infra*, provides the prosecutor with an investigatory deposition that may be used in much

the same fashion as he currently utilizes the grand jury subpoena, but avoids the complexities resulting from the grand jury's combined investigatory and screening function. See generally Comment to Rule 432, *infra*.

Over half of the states currently do not require that the grand jury review the prosecutor's decision to prosecute with respect to most serious felonies. In those states primary reliance for screening is placed upon the preliminary hearing. The Rule 481 pretrial motion for a pretrial judgment of acquittal provides a more effective and efficient means of screening than either grand jury review or the preliminary hearing. That motion, moreover, will be supplemented

by the Rule 311 determination of probable cause where an arrest is made without a warrant and the Rule 344 detention hearing determination when the arrested person remains in custody.

Aside from its basic screening and investigatory function, the grand jury may perform certain related roles under current practice. In cases of significant political impact, the grand jury's decision to prosecute may serve as a "buffer" between the prosecutor and the public. It seems, however, that the prosecutor should directly bear the responsibility for such decisions. Similarly, insofar as the grand jury might be viewed as a body that could leaven the law's rigidity by refusing to indict, despite adequate evidence, "where prosecution without mercy would result in a miscarriage of justice," Fletcher, Charge to a Grand Jury, 18 F.R.D. 211, 214 (1955), that responsibility should also be borne by the prosecutor directly.

The grand jury also may be viewed as an agency capable of independent investigatory action —i. e., an agency that may initiate its own investigation into areas in which law enforcement has been lax. That rarely exercised capacity is not sufficient, however, to justify retention of the grand jury. Other, more effective alternatives for investigation of such matters are available, and should be adopted by any states which do not presently provide them. In many states, a prosecutor may be replaced for the purpose of a particular investigation by the attorney general or a special prosecutor appointed

by the governor. See, e. g., ABA Standards, The Prosecution Function 2.10(6) (Approved Draft, 1971); Model Department of Criminal Justice Act § 7. Any such replacement prosecutor would have available the investigatory subpoena provided in Rule 432. It should be noted further that some states have investigatory commissions with independent subpoena power that also play an effective role in this area. See Model Crime Investigating Commission Act.

Some states' constitutions require use of the grand jury in some cases. To accommodate these states, reference is made throughout these Rules to prosecution by indictment. These references are in brackets, to be omitted in states with constitutions not requiring any prosecution by indictment. No specific provisions are included relating to the internal operations of the grand jury (compare former Uniform Rules 7-13) since it is anticipated (1) that the Rule 481 motion for a pretrial judgment of acquittal will be available to review the grand jury's charging decision, (2) the grand jury proceedings will be recorded and subject to discovery under Rule 421, *infra*, and (3) the grand jury will not be utilized for investigatory purposes in light of the availability of Rule 432, *infra*.

Indictment aside, the only accusatory instrument provided is the "information," and there is no provision for a "complaint." See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.8 (1973).

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The word "information" is utilized rather than some new term like "accusation" or "charge", for two reasons. First, the instrument envisaged is like the traditional "information" except that:

(1) it is to be used for misdemeanor and ordinance as well as felony prosecutions,

(2) it issues at the outset of felony prosecutions rather than normally issuing only after preliminary examination or waiver thereof,

(3) it of itself justifies the issuance of a "prosecutor's citation," is a prerequisite to issuance of a summons, and unless a prosecuting attorney is unavailable, is a prerequisite to issuance of a warrant, and

(4) it is easier to amend.

Second, some states have constitutional provisions, and many states have statutory provisions, on "informations" which should be permitted to refer to this instrument.

- 1 (b) Issuance. The information shall be signed by the prose-
- 2 cuting attorney.

Comment

This subdivision accords with former Uniform Rule 17 in requiring that the information be signed "by the prosecuting attorney." The significance of this lies in the fact that under these Rules, an information is essential to the maintenance of a prosecution. See Rule 231(f), *infra*. The reasons for requiring prosecutor involvement at the earliest practicable stage of a prosecution, and reference to the possibility of defining "prosecuting attorney" to include the attorney general and "special prosecutors" are included in the penultimate paragraph of the Comment to Rule 221(c), *supra*.

This subdivision covers only those situations in which the prosecuting attorney has determined that there should be a criminal prosecution. It is recognized that oftentimes prosecuting attorneys may dispose of matters referred to them by law enforcement officers and citizens prior

to this stage through investigation and consultation, and that to some extent the consultation may be with the potential defendant. In pursuing the latter course, the prosecuting attorney should use great care to avoid action inconsistent with the potential defendant's privilege against self-incrimination, restrictions upon compounding crimes, and ethical limitations imposed upon a prosecutor in dealing with an unrepresented potential defendant. Compare ALI Model Code of Pre-Arraignment Procedure § 6.02(4) (T.D. # 1, 1966).

This subdivision does not require that the information be under oath because, unlike the traditional "complaint" which appears to serve two functions, setting forth the charge and providing at least part of the basis for a finding of probable cause for issuance of an arrest warrant, the information under these Rules serves only the charging function.

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There appears no need for having the initial accusatory instrument provide any part of the basis for finding probable cause to issue an arrest warrant. In most cases under these Rules there will be no arrest warrant, because the

defendant will appear pursuant to a citation; in cases where an arrest warrant is necessary the probable cause function can be served adequately by presenting affidavits or testimony to the issuing magistrate.

- 1 (c) Form. The information shall be a written statement of
2 the essential facts constituting the offense charged and state for
3 each count the official or customary citation of any relevant statute,
4 ordinance, rule, regulation or other provision of law which
5 the defendant is alleged to have violated, the maximum possible
6 incarceration that may be imposed upon conviction, and, as particularly
7 as possible, the time and place of the defendant's alleged
8 commission of the offense. Allegations of fact may be in the
9 alternative. Unnecessary allegations may be disregarded as surplusage
10 and on motion of either party or on the court's own motion
11 may be stricken from the information by the court.

Comment

The definition herein, "a written statement of the essential facts constituting the offense charged," is the one typically used for the complaint, see F.R. Crim.P. 3; Alaska R.Crim.P. 3; Colo.R.Crim.P. 3; Maine R.Crim.P. 3; Nev.Rev.Stat. § 171.102; N.J.Rules of Court 3:2; Wis. Stat. § 968.01, and with the addition of the seemingly superfluous words, "plain, concise, and definite," for the information, see F. R.Crim.P. 7(c); Alaska R.Crim.P. 7(c); Colo.R.Crim.P. 7(c); Fla.R.Crim.P. 3.140(b); Maine R.Crim.P. 7(c); Nev.Rev.Stat. § 173.075(1).

The requirement to cite the provision of law allegedly violated is similar to provision in former Uniform Rule 16, F.R.Crim.P. 7(c), Alaska R.Crim.P. 7(c), Fla.R. Crim.P. 3.140(d)(1), Maine R. Crim.P. 7(c) and Nev.Rev.Stat. § 173.075. As to nonprejudicial error in or omission of the cita-

tion, see Rules 213(g), *supra*, and 552(a)(2), *infra*.

The reference to the maximum possible incarceration that may be imposed upon conviction derives from Wis.Stats. § 970.02(1)(3).

The requirement to state as particularly as possible the time and place of the alleged offense is to the same effect as provision in Fla.R.Crim.P. 3.140(d)(3), Mont.Rev.Codes § 95-1503(c)(4), and Tex.Code Crim.P. art. 15.05 (3). This requirement is desirable in light of notice of alibi, double jeopardy, statute of limitations, and venue considerations.

The penultimate sentence's reach is similar to that of Fla. R.Crim.P. 3.140(k)(5) and ALI Code of Criminal Procedure § 176 (Official Draft, 1930), which allow "disjunctive or alternative" allegation as to "acts, means, intents or results." La.Code Crim. P. art. 480 provides for conjunctive pleading of such matters.

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Former Uniform Rule 16 covers only means, and not acts, intents or results. The same is true of F. R.Crim.P. 7(c), Alaska R.Crim.P. 7(c), Maine R.Crim.P. 7(c), Nev. Rev.Stat. § 173.075(2), and N.J. Rules of Court 3:7-3(a), each of which provides "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means." The discovery and motion procedures in these Rules provide ample means for clarification of issues, and the defendant is protected by his Sixth Amendment right "to be informed of the nature and cause of the accusation."

The last sentence hereof follows former Uniform Rule 16 and Fla. R.Crim.P. 3.140(i) except for

substituting "on motion of either party or on the court's own motion" for "on motion of the defendant." Compare F.R.Crim.P. 7(d); Alaska R.Crim.P. 7(d); Colo.R.Crim.P. 7(d); Maine R.Crim.P. 7(d); Nev.Rev.Stat. § 173.085.

Although not specified herein, any state constitutional requirement of a formal conclusion such as "against the peace and dignity of the state" would, of course, control.

Nothing herein indicates incorporation by reference would be improper. It is expressly provided for in former Uniform Rule 16, F.R.Crim.P. 7(c), Alaska R.Crim.P. 7(c), Fla.R.Crim.P. 3.140(e), Maine R.Crim.P. 7(c), Nev.Rev.Stat. § 173.075(2) and N.J.Rules of Court 3:7-3(a).

- 1 (d) Joinder of offenses. Two or more offenses may be charged
- 2 in the same information in a separate count for each offense.

Comment

Rule 20 of the 1952 Uniform Rules permitted joinder of offenses of the same or similar character and also of offenses based upon the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Provisions to this effect are very common; see Appendix A, ABA Standards, Joinder and Severance (Approved Draft, 1968). By contrast, subdivision (d) permits joinder of offenses without limitation. A defendant may be charged in one information not only with two or more related offenses (*e. g.*, burglary and rape committed after entry) or with two or more unrelated offenses of the same charac-

ter (*e. g.*, two robberies not part of a single scheme and not connected together in a time-space sense), as is now often permitted, but may also be jointly charged with two or more offenses which are neither related nor of the same character (*e. g.*, unconnected rape and robbery).

Particularly in view of the fact that recent law reform efforts (see ABA Standards, p. 30) have been directed toward the narrowing of permissible joinder, usually by permitting joinder only of related offenses, it is important to note that subdivision (d) does not represent a rejection of the oft-stated criticisms of the joinder of unrelated offenses.¹ Because

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Rule 472(a) permits, with rare exception, a severance of offenses upon demand of the defendant, offenses joined by the prosecutor usually will remain joined for trial only if the defendant does not seek a severance. The defendant may sometimes view such joinder as working to his advantage, either because he wants to avoid the time and expense of multiple trials or because he wants to enhance his chances for concurrent sentencing. This being the case, an absolute prohibition on joinder of unrelated offenses is not warranted.

Even without employing the phrase "whether felonies or misdemeanors or both," there should be no doubt but that felonies and misdemeanors may be joined together for trial. This phrase is to be found in Standard 1.1 and in many court rules and statutes on joinder. See *e. g.*, F.R.Crim.P. 8(a); Alaska R.Crim.P. 8(a); Colo.R.Crim.P. 8(a); Fla.R.Crim.P. 3.150(a); 38 Ill.Stat. § 114-4(a); Maine R.Crim.P. 8(a); Nev.Rev.Stat. § 173.115; N.J. Rules of Court 3:7-6; Wis.Stat. § 971.12(1).

¹ See Note, 74 Yale L.J. 553 (1965) and sources cited therein at 560 n. 39. It is argued that because the offenses are distinct, each requiring its own evidence and witnesses, there is no appreciable saving of time by joinder for trial. If a defendant is tried for two similar but unconnected offenses, he may be limited in his right to testify on his own behalf (in that he may want to testify as to only one offense), see *Cross v. United States*, 118 U.S.App.D.C. 324, 335 F.2d 987 (D.C.Cir. 1964), and may be prejudiced through the introduction of evidence which fails to meet the other crimes test, *Drew v. United States*, 118 U.S.App.D.C. 11, 331 F.2d 85 (D.C.Cir. 1964).

- 1 (e) Joinder of defendants. Two or more defendants may be
- 2 charged in the same information if:
- 3 (1) All are charged with each offense included; or
- 4 (2) Although all are not charged with each offense, it is
- 5 alleged that the several offenses charged:
- 6 (i) Were part of a common scheme or plan; or
- 7 (ii) Were so closely connected in respect to time,
- 8 place, and occasion that it would be difficult to separate
- 9 proof of one from proof of the others.

Comment

Former Uniform Rule 20(b) conforms to the language of F.R. Crim.P. 8(b) in providing for the joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The same or very sim-

ilar language is to be found in many state rules or statutes. However, that language does not fairly indicate when joinder of defendants is actually permitted in current practice, as is evidenced by the amount of litigation which has involved F.R.Crim.P. 8(b). Consequently, this subdi-

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vision follows the more detailed and precise statement which appears in ABA Standards, Joinder and Severance 1.2 (Approved Draft, 1968).

Clause (1) deals with the simplest case, that in which all defendants are charged with all offenses, as where two defendants together commit a burglary. Under this clause, several defendants may be charged with several crimes (*e. g.*, several robberies committed together, or several conspiracies having unrelated objectives).

Clause (2)(i) concerns the class of cases which has caused the courts the greatest difficulty. Least difficult are the cases in which it is apparent that several offenses were all directed toward the same goal, *e. g.*, *Cataneo v. United States*, 167 F.2d 820 (4th Cir. 1948) (joinder of count charging A and B with filing a false form with respect to A's draft deferment, with a count charging A and C with making false statements in a letter with respect to that deferment). In other cases the nexus is provided by the fact that one offense logically grew out of the other, *e. g.*, *Scheve v. United States*, 87 U.S. App.D.C. 289, 184 F.2d 695 (D.C. Cir. 1950) (count charging A, B, C, and D with keeping gambling table joined with counts charging D with assault on man who lost money at the table and attempted to get it back). More complex are the cases involving repeated illegal sales of certain goods not always involving the same parties. Generally, it can be said that the several sales will be presumed to be part of a common plan if they

occur within a brief span of time at the same location or a related location. Compare *Wiley v. United States*, 277 F.2d 820 (4th Cir. 1960), certiorari denied 81 S.Ct. 47, 364 U.S. 817, 5 L.Ed.2d 47, with *Ward v. United States*, 110 U.S.App.D.C. 136, 289 F.2d 877 (D.C. Cir. 1961).

Assuming an allegation of common scheme or plan, clause (2) (i) will permit joinder where each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses in furtherance of the conspiracy. See, *e. g.*, *United States v. Welsh*, 15 F.R.D. 189 (D.D.C.1953), holding proper the joinder of a count charging several defendants with conspiracy to violate the lottery laws for a certain period of time with other counts charging certain of the defendants with sale of lottery tickets, possession of lottery tickets, and maintaining gambling premises, all during the period of the conspiracy. It is improper to join offenses alleged to have been committed outside the conspiracy period or by defendants not parties to the conspiracy. *United States v. Spector*, 326 F.2d 345 (7th Cir. 1963). Compare Standard 1.2(b), which deals with this latter situation separately.

Model Penal Code § 5.03(4)(a) (ii) provides for the joinder of several conspiracies involving different parties when they "are so related that they constitute different aspects of a scheme of organized criminal conduct." Such a sweeping joinder provision has not been incorporated here because of concern about the fair-

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ness of a trial under such circumstances.

Clause (2)(ii) allows joinder of offenses involving unrelated defendants when the offenses are so closely related that it would be difficult to separate proof of one from the other. Illustrative is *Miciotto v. United States*, 91 U.S. App.D.C. 102, 198 F.2d 951 (D.C. Cir. 1952), in which the driver of a bus and the driver of an auto were both charged with negligent homicide of a motorist whose car was struck by the other vehicles. The language is from *Pointer v. United States*, 14 S.Ct. 410, 151 U.S. 396, 38 L.Ed. 208 (1894).

It must be emphasized that this subdivision only marks the permissible outer boundaries of defendant joinder; defendants, with rare exception, may obtain a severance of defendants upon demand under Rule 472(a), *infra*. Nonetheless, such boundaries are appropriate here notwithstanding their absence in subdivision (d), *supra*. While the defendant and prosecuting attorney (and court, under Rule 473, *infra*) might well all agree that the disposition of several unrelated offenses in a single trial is desirable, the same can hardly be said as to unrelated offenses involving different defendants.

1 (f) Filing. If the prosecuting attorney determines to go forward with the prosecution, the information shall be filed with a
2 [magistrate] in the [county] where the offense was allegedly
3 committed:
4

5 (1) Before he applies for a summons or arrest warrant;

6 (2) If a citation has issued, before the end of the [second]
7 business day preceding the date for appearance specified
8 therein; if it is not so filed the defendant need not appear
9 and the prosecuting attorney shall give notice to the defendant so stating; or
10

11 (3) If the defendant was arrested without a warrant and
12 not released upon issuance of a citation, by the time of his
13 appearance before a [magistrate] or promptly thereafter;
14 failure so to file is ground for release from custody upon
15 application of the defendant or upon the [magistrate's]
16 own motion.

Comment

The opening "if" clause recognizes the prosecutor's discretion not to go forward with the prosecution.

Filing must be with a magistrate in the county of offense. *Accord*, Calif. Penal Code § 849;

Colo.R.Crim.P. 5(a)(1). This is required even in cases where a person arrested without a warrant is brought before a magistrate of a different county, in the belief that record keeping should be centralized in the county of offense

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magistrate, accessible to the prosecuting attorney of the jurisdiction of offense. (Rule 311(4), *infra*, provides that where no information is filed with the magistrate before whom a person arrested without a warrant is brought, a writing stating the essential facts constituting the offense charged and citing the statute, etc. allegedly violated shall be filed with him.)

Clause (1) refers to the prosecuting attorney's applying. For the procedure in situations where the prosecutor is unavailable and someone else requests issuance of a warrant, see Rule 221(c), *supra*.

Clause (2) ensures that the defendant will be notified if an information is not filed in time to avoid an unnecessary trip to the

court house. See ALI Model Code of Pre-Arraignment Procedure § 120.3 (T.D. # 6, 1974).

Clause (3) allows filing of the information "promptly thereafter" as well as "by the time of his appearance before a [magistrate]," because a prosecutor may not be available by the time of appearance. In that event, Rule 311(4), *infra*, would require a writing stating the essential facts constituting the offense charged and citing the provision of law allegedly violated. Compare ALI § 310.1(2) (T.D. # 5, 1972); former Uniform Rule 6(a); F.R. Crim.P. 5(a); Alaska R.Crim.P. 5(a); Colo.R.Crim.P. 5(a)(1); Maine R.Crim.P. 5(a); Mont.Rev. Codes § 95-901(b); Nev.Rev.Stat. § 171.178(1); N.J.Rules of Court 3:4-1; Wis.Stat. § 970.01(2).

1 (g) Amendment.

2 (1) *Before trial.* If trial has not commenced, the prosecuting attorney may amend the information to allege, or to
3 change the allegations regarding, any offense arising out of
4 the same alleged conduct of the defendant that gave rise to
5 any offense alleged or attempted to be alleged in the original
6 information.
7

Comment

Because the information under these Rules is prepared earlier and when the prosecuting attorney has less facts than is generally true with the traditional information, pretrial amendment is freely permitted. This provision

is similar in concept to Calif. Penal Code § 1009, Mont.Rev. Codes § 95-1505(a), and Wis.Stat. § 971.29(1). Compare Colo.R. Crim.P. 7(e); La.Code Crim.P. art. 487(A); N.Y.Crim.P.Law § 100.45(3).

1 (2) *After commencement of trial.* After commencement
2 of trial, the court may permit the prosecuting attorney to
3 amend the information at any time before verdict or finding
4 if no additional or different offense is charged and substantial
5 rights of the defendant are not thereby prejudiced.

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- 6 An amendment may charge an additional or different of-
7 fense with the express consent of the defendant.

Comment

The first sentence hereof is similar in effect to Colo.R.Crim.P. 7(e) and Mont.Rev.Codes § 95-1505. Compare La.Code Crim. P. 487(A). A number of provisions apply this "at any time before verdict or finding if no additional or different offense is charged and substantial rights of the defendant are not thereby prejudiced" standard to *all* amendments, not just those after commencement of trial. See former Uniform Rule 18; F.R.Crim.P. 7

(e); Alaska R.Crim.P. 7(e); Maine R.Crim.P. 7(e); Nev.Rev. Stat. § 173.095; N.J.Rules of Court 3:7-4.

The last sentence hereof covers situations where the defendant wishes to *stand trial* on a different offense (even though it is not a "lesser included offense") as well as where he wishes to plead guilty to a different offense. The latter situation is covered by La. Code Crim.P. art. 487(B).

- 1 (3) *Continuance*. The defendant shall be granted any
2 extension of time, adjournment, or continuance reasonably
3 necessitated by an amendment.

Comment

This is comparable to Calif. 3:7-4, N.Y.Crim.P.Law § 100.45 Penal Code § 1009, La.Code Crim. P. art. 489, N.J.Rules of Court (3), and Pa.R.Crim.P. 220.

- 1 (h) *Dismissal by prosecuting attorney*. The prosecuting at-
2 torney may dismiss the information or any count thereof by
3 filing a notice of the dismissal. The notice shall state the reasons
4 for the dismissal. The dismissal is with prejudice only if trial
5 has commenced or the court has approved a stipulation for dis-
6 missal with prejudice. While a motion for a pretrial judgment
7 of acquittal under Rule 481 is pending, the prosecuting attorney
8 may dismiss the information only with consent of the defendant.

Comment

The first sentence is to the same effect as provision in Alaska R.Crim.P. 43(a) and La.Code Crim.P. art. 691. As stated in 3 Wright—Federal Practice & Procedure § 812 (1969):

It is difficult indeed to see any real or substantial change

or benefit achieved by [requiring court approval]. The court is powerless to compel a prosecutor to proceed in a case which he believes does not warrant prosecution. If the court refuses consent to dismiss, the prosecutor in his opening statement to the jury and in his pre-

sensation of evidence can indicate to the jury the considerations that should work an acquittal.

The second sentence is in line with ABA Standards, The Prosecution Function 4.4 (Approved Draft, 1971), Colo.R.Crim.P. 48(a), Maine R.Crim.P. 48(a), Mont.Rev.Codes § 95-1703(1), and Tex.Code Crim.P. art. 32.02, and is designed to increase the visibility of the dismissal decision.

Under the third sentence, dismissal with prejudice can occur only at a time of high visibility—after trial has commenced or if the court approves. As to the after trial has commenced feature, this is to the same effect as La.Code Crim.P. art. 693 except that the latter requires that the dismissal also be “without the defendant’s consent” in order to bar reprosecution. Compare Alaska R.Crim.P. 43(a) (“Such a dismissal shall not be filed during the trial without the consent of the defendant”). The court ap-

proval feature accords with Nev. Rev.Stat. §§ 178.554, 178.562. See Calif.Penal Code §§ 1385, 1387 (misdemeanor); Mont.Rev.Codes § 95-1703(1), (3) (same). Compare La.Code Crim.P. art. 693(2) (prosecutor’s dismissal *without* court approval in misdemeanor case on appeal for trial de novo bars reprosecution).

The last sentence is included to prevent the deterrence to the motion for a pretrial judgment of acquittal which would exist if the movant faced the prospect that after he educated the prosecuting attorney as to the prosecution’s shortcomings, the prosecutor could respond by merely dismissing without prejudice while he remedied them. Since Rule 481(a)(2), *infra*, allows the motion for a pretrial judgment of acquittal to be made only after the prosecutor has furnished the Rule 422 notice of what evidence and witnesses he intends to use at trial, the prosecutor should not be able to frustrate the Rule 481 motion by dismissing without prejudice, unless the defendant consents.

[Rule 232. [Indictment.]

- 1 (a) Use [; waiver]. Offenses shall be prosecuted by indictment to the extent required by the Constitution of this State.
- 2
- 3 [[If permitted by the Constitution of this State, the] [The]
- 4 defendant, after being informed by the court of the nature of the
- 5 charge and of his rights, may waive prosecution by indictment,
- 6 whereupon prosecution shall be by information. The waiver
- 7 shall be in writing signed by him or made orally in open court.]

Comment

Rule 232 in its entirety is set forth as optional so that it may be omitted by states with constitutions not requiring any use of the indictment. See Comment to Rule 231(a), *supra*. The entire second sentence may be omitted by a state with a con-

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stitution which does not permit any waiver of indictment. A state adopting the second sentence may omit the first option thereof if its constitution does not restrict waiver of indictment.

The second sentence's provision, "after being advised by the court of the nature of the charge and of his rights" accords with former Uniform Rule 14 and Maine R.Crim.P. 7(b). See F.R. Crim.P. 7(b); Alaska R.Crim.P. 7(b). Cf. ALI Model Code of Pre-Arraignment Procedure § 340.1(2) (T.D. # 5, 1972); Pa. R.Crim.P. 215(c); 38 Ill.Stat. § 111-2; N.J.Rules of Court 3:7-2; Tex.Code Crim.P. art. 1.141.

The reference "in writing signed by him" accords with former Uniform Rule 14, Maine R. Crim.P. 7(b) and N.J.Rules of Court 3:7-2. See Pa.R.Crim.P. 215(a), (c), Tex.Code Crim.P. art. 1.141.

The reference "in open court" accords with ALI § 340.1(2), F.R. Crim.P. 7(b), Alaska R.Crim.P. 7(b), 38 Ill.Stat. § 111-2, and Tex.Code Crim.P. art. 1.141. Cf. Pa.R.Crim.P. 215(b).

The concluding words hereof are to make it clear that the prosecutor is not justified in seeking an indictment if the defendant has waived prosecution thereby.

- 1 (b) **Form; joinder; amendment; dismissal.** The indictment
2 shall be in the same form and subject to the same joinder, amend-
3 ment, and dismissal rules as the information [, but an amend-
4 ment may not charge an additional or different offense required
5 by the Constitution of this State to be prosecuted by indictment
6 [unless the defendant makes a waiver under subdivision (a)]]].

Comment

See Rule 231(c), (d), (e), (g), and (h), *supra*. It is quite common to have the form, joinder, amendment, and dismissal rules applicable to informations apply to indictments. See, *e. g.*, former Uniform Rules 16, 18, 20, 53;

Alaska R.Crim.P. 7(c), (d), (e), 8, 43; Calif.Penal Code §§ 950-973, 1385; Mont.Rev. Codes §§ 95-1503, 95-1504, 95-1505, 95-1703. The bracketed optional language may be included by states with constitutions so requiring.

PART 4

PROCEDURES AFTER DETENTION FOR OFFENSE

Rule 241. [Warnings to be Given at Place of Detention.]

- 1 As promptly as reasonable under the circumstances after the
2 arrival of a detained or arrested person at a place of detention,
3 a [law enforcement officer] or designated person shall inform
4 him:

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- 5 (1) Of the offense for which he is being held;
- 6 (2) That he is entitled to the services of a lawyer;
- 7 (3) That if for any reason he is unable to obtain the services
- 8 of a lawyer, a lawyer will be furnished to him;
- 9 (4) That if he is unable to pay for the services of a lawyer,
- 10 the services will be provided for him;
- 11 (5) Of any terms of pre-appearance release;
- 12 (6) That he will be brought before a [magistrate] without
- 13 unnecessary delay if he is not sooner released; and
- 14 (7) Of the right to communicate by telephone or otherwise
- 15 with (i) a relative or friend and (ii) other persons reasonably
- 16 needed to obtain the services of a lawyer and to meet any terms
- 17 of pre-appearance release.

Comment

This Rule applies in all cases, regardless of whether there is attempted any questioning (which would be subject to Rule 243, *infra*).

The reference "or designated person" contemplates that in some localities some or all of the information specified could be given by someone from the public defender, legal aid or court services office. Compare ABA Standards, Providing Defense Services 7.1 (Approved Draft, 1968).

Clause (1) corresponds to ALI Model Code of Pre-Arrestment Procedure § 130.1(2) (T.D. # 6, 1974) and La.Code Crim.P. art. 229(1).

As to clause (2), compare ABA Standard 7.1; Fla.R.Crim.P. 3.111 (c)(1)(i); La.Code Crim.P. art. 229(2).

As to clause (3), compare ALI § 130.1(2).

Clause (4) is rather similar to Model Defense of Needy Persons Act § 3(a). See ABA Standards, Providing Defense Services 7.1; ABA Standards, Pre-trial Release 4.2 (Approved Draft, 1968). *Cf.* Fla.R.Crim.P. 3.111(e)(i)(ii).

Clauses (5), (6), and (7) are similar to ALI § 130.1(2)(a), (c). As to clause (7), compare ABA Standards, The Defense Function 2.1 (Approved Draft, 1971); La. Code Crim.P. art. 229(2).

Rule 242. [Other Duties at Place of Detention.]

- 1 (a) Assistance in communication. A [law enforcement officer]
- 2 or designated person shall make reasonable effort to assist
- 3 a detained or arrested person at a place of detention in communicating
- 4 with (1) a relative or friend and (2) other persons
- 5 reasonably needed to obtain the services of a lawyer [including,
- 6 if appropriate, the [public defender's office] [legal aid service]

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7 [lawyer referral service],] and in meeting any terms of pre-
8 appearance release.

Comment

This is very similar to ALI Model Code of Pre-Arraignment Procedure § 130.1(5) (T.D. # 6, 1974). Compare ABA Standards, Providing Defense Services 5.1, 7.1 (Approved Draft, 1968); ABA Standards, The Defense Function 2.1 (Approved Draft, 1971); Model Defense of Needy Persons Act § 3(a); Alaska R. Crim.P. 5(b); Calif.Penal Code § 851.5(a); Fla.R.Crim.P. 3.111 (c)(2), (3); 38 Ill.Stat. § 103-3; La.Code Crim.P. art. 230. See generally Appendix V, "State Statutes Relating to Telephoning Rights, Access to Counsel, and Other Conditions of Custody," in the ALI draft.

1 **(b) Informing others.** If a detained or arrested person at a
2 place of detention appears to be physically incapable of com-
3 municating with a relative, friend, or lawyer, a [law enforce-
4 ment officer] or designated person shall make reasonable ef-
5 fort to notify a relative or friend of the person's detention or
6 arrest and of the offense for which he is being held.

Comment

This is rather similar to Uni-
form Alcoholism and Intoxication
Treatment Act § 12(f).

1 **(c) Allowing consultation.** A detained or arrested person at a
2 place of detention shall be afforded reasonable opportunity to
3 consult in private with counsel and to consult with a relative or
4 friend.

Comment

This is very similar to N.H. Rev.Stat. § 594.16. Compare Ha-
waii Rev.Stat. § 708-9; Mo.Ann.
Stat. § 544.170. ALI Model Code
of Pre-Arraignment Procedure §
140.7 (T.D. # 6, 1974) ensures
consultation with a relative or
friend in lieu of counsel. Many
current provisions provide for
consultation with attorneys. See
ABA Standards, The Defense
Function 3.1(c) (Approved Draft,
1971); Alaska R.Crim.P. 5(b);
Calif.Penal Code § 825; 38 Ill.
Stat. § 103-4; La.Code Crim.P.
art. 230. See generally Appendix
V, "State Statutes Relating to
Telephone Rights, Access to Coun-
sel, and Other Conditions of Cus-
tody," ALI Model Code of Pre-
Arraignment Procedure (T.D.
6, 1974).

Rule 243. [Procedure for Questioning.]

1 A person who is in custody or otherwise deprived of his free-
2 dom of action in any significant way may not be questioned re-
3 garding any offense unless preliminary to questioning:

4 (1) He is warned of each of the matters specified in Rule
5 212(b) and asked whether he understands each of them;
6 and

7 (2) Having had reasonable opportunity to exercise his
8 rights, he expressly, voluntarily, knowingly, and intelli-
9 gently waived each of them and expressly stated that
10 he is willing to answer questions.

11 If the person in any manner indicates he desires to consult with
12 a lawyer or desires it to stop, questioning shall stop. The in-
13 formation of rights, any waiver thereof, and any questioning
14 shall be recorded upon a sound recording device whenever feasi-
15 ble and in any case where questioning occurs at a place of de-
16 tention. Compliance with Rules 211(b) and 311 may not be
17 delayed for the purpose of questioning.

Comment

The opening reference "in cus-
tody or otherwise deprived of his
freedom of action in any signifi-
cant way" derives from *Miranda*
v. Arizona, 384 U.S. 436, 444, 445,
464, 477, 478, 86 S.Ct. 1602, 16
L.Ed.2d 694, 10 A.L.R.3d 974
(1966), and was re-emphasized in
Orozco v. Texas, 394 U.S. 324, 89
S.Ct. 1095, 22 L.Ed.2d 311 (1969),
where the Court made clear that
its application was not limited to
police stations or other places
within the exclusive control of the
police, but could apply at the scene
of an arrest.

Clause (1)'s requirement that
the person be warned of "each of"
the specified matters and "asked
whether he understands each of
them" and clause (2)'s require-
ment that he "expressly" waive
"each of" the rights are support-
ed by *Miranda* at 470, 475.

The other elements of clause
(2) also appear mandated by *Mir-
anda*. As to the "reasonable op-
portunity" requirement, see *id.* at
479. As to waiver, see *id.* at 444.
As to expressly stating willing-
ness to answer questions, see *id.*
at 475.

The second sentence is very
similar to ALI Model Code of Pre-
Arrest Procedure §§ 120.8
(2) (Official Draft # 1, 1972),
140.8(3) (T.D. # 6, 1974) and
appears mandated by *Miranda* at
444-45.

The penultimate sentence, re-
garding sound recording, is simi-
lar to ALI § 130.4(3) (T.D. # 6,
1974). This will aid the courts
in accurately determining wheth-
er there has been compliance with
the warning and waiver require-
ments and to accurately deter-
mine the contents of an admission

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or confession. Sound recordings appear to be the most effective way for the prosecution to meet the "heavy burden" of demonstrating a knowing and intelligent

waiver imposed upon it by *Miranda* at 475. The last sentence is similar in effect to provision in ALI § 130.2(1)(b).

Rule 244. [Release of Detained or Arrested Persons.]

1 (a) **Mandatory release.** A [law enforcement officer] respon-
2 sible for the custody of a person detained or arrested without an
3 arrest warrant shall promptly release the person without bring-
4 ing him before a [magistrate] or issuing him a citation if it is
5 determined that:

6 (1) No probable cause exists to believe that the person
7 committed an offense for which, apart from these Rules,
8 arrest would be authorized; or

9 (2) The prosecuting attorney has determined not to issue
10 an information against the person.

Comment

Both this and the next subdivision leave it up to the law enforcement departments to determine what officers other than the one who initially detained the person may make the decision to release.

Clause (1) is comparable to ALI Model Code of Pre-Arrestment Procedure §§ 120.9(2) (Official Draft # 1, 1972), 130.2(1)(a), (T.D. # 6, 1974), Calif. Penal Code § 849(b)(1), 38 Ill. Stat. § 107-6, Mont. Rev. Codes § 95-610, N.Y. Crim. P. Law § 140.20(4), and

Wis. Stat. § 968.08. Because of the reference, "an offense for which, apart from these Rules, arrest would be authorized," in many jurisdictions release would be necessary if the person were arrested for an offense committed out of the officer's presence and it was later determined that he had committed only a misdemeanor. See ALI § 120.9(2) (Official Draft # 1, 1972).

Clause (2) is to the same effect as ALI § 130.2(6) (T.D. # 6, 1974).

1 (b) **Permissive release.** Unless it is sooner learned that the
2 prosecuting attorney has determined to issue an information
3 against a person detained or arrested without a warrant, a [law
4 enforcement officer] responsible for the custody of the person
5 may release him in conformity with a departmental enforcement
6 standard without bringing him before a [magistrate] or issuing
7 him a citation.

Comment

This is similar in effect to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Police Standard 4.3 (1973). Compare Calif. Penal Code § 849(b). Release after arrest is sufficiently similar to non-arrest (as to which police discretion is prevalent) to make this type of provision desirable. As stated in ABA Standards, The Urban Police Function 4.1 (Tentative Draft, 1972), "The nature of the responsibilities currently placed upon the police requires that the police exercise a great deal of discretion—a situation that has long existed, but is not always recognized." Absent this kind of provision, an officer may be hesi-

tant to release under subdivision (a), *supra*, even though he believed release was desirable because of a fear it might be construed as admitting false arrest.

The requirement of "conformity with a departmental enforcement standard" tends to insure uniform and equal application, although it is recognized that some standards might provide that officers have discretion in the case of certain types of crimes and it is not required that the standard be in writing. It is anticipated that some such standards would be based upon the fact that the prosecutor does not prosecute certain types of cases.

ARTICLE III

APPEARANCE

PART 1. OBTAINING APPEARANCE

Rule

- 311. Production Before the [Magistrate].
- 312. Appearance by Defendant Not in Custody.
- 313. Procedure upon Defense Lawyer Filing Statement.

PART 2. APPEARANCE IN PERSON

- 321. Appearance in Person.
 - (a) Informing defendant.
 - (b) Providing for lawyer.
 - (c) Defendant in custody.
 - (d) Transmittal of documents.

PART 3. QUESTIONING AFTER APPEARANCE

- 331. Questioning after Appearance.

PART 4. RELEASE BEFORE AND DURING TRIAL

- 341. Release Before and During Trial.
 - (a) Conditions of release.
 - (b) When [magistrate] may require undertaking.
 - (c) Informing defendant.
 - (d) Change in terms or conditions of release.
 - (e) Violation of conditions of release.
 - (f) Limited release from detention.
 - (g) Information considered.
- 342. Release Agency.
 - (a) Duties.
 - (b) Disclosure of information.
- 343. Approval, Forfeiture, and Satisfaction of Undertaking.
 - (a) Justification of sureties.
 - (b) Forfeiture.
 - (1) Declaration.
 - (2) Vacating forfeiture.
 - (3) Enforcement.
 - (4) Remission.
 - (c) Exoneration.

Rule

344. Detention Hearing.

- (a) Right to hearing.
- (b) Scope of hearing.
- (c) Time of hearing.
- (d) Procedures.
- (e) Testimony by defendant.
- (f) Evidence.
- (g) Finding and disposition.
- [(h) Transmittal of documents.]

PART 1

OBTAINING APPEARANCE

Rule 311. [Production Before the [Magistrate].]

An arrested person who is not sooner released shall be brought before a [magistrate] without unnecessary delay. Delay is unnecessary if it is:

(1) For the purpose of questioning under Rule 243;

(2) For investigation purposes except for the time reasonably necessary for the person to participate in a procedure described in Rule 434(c) to obtain relevant nontestimonial evidence which a [law enforcement officer] responsible for the person's custody reasonably believes may be altered, dissipated, or lost if not then obtained;

(3) For recording, fingerprinting, and photographing procedures authorized by law but not promptly performed; or

(4) Caused by an information not having been filed with the [magistrate] before whom the person is brought, in which event there shall be filed with that [magistrate] a writing containing a statement of the essential facts constituting the offense charged and stating the official or customary citation of any statute, ordinance, rule, regulation or other provision of law which the person is alleged to have violated.

If no arrest warrant has issued, the [magistrate] shall determine whether affidavit or testimony shows that the grounds exist for issuance of an arrest warrant under Rule 221(c). Unless those grounds are shown, he shall order the person released from custody.

Comment

The reasons for using the formulation "brought before a [magistrate] without unnecessary delay" are set forth toward the end of the Comment to Rule 222(e), *supra* (form of arrest warrant). See generally Appendix I, "Table of State Statutes Regarding Permissible Length of Detention After Arrest and Prior to First Appearance," ALI Model Code of Pre-Arrest Procedure (T.D. # 6, 1974). No specific number of hours is specified, because there seems reason to fear that a maximum time would become *the* time and because some flexibility appears necessary. Compare ALI § 310.1(1) (T.D. #5, 1972) (24 hours); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.5, Corrections Standard 4.5(1) (1973) (six hours); Alaska R.Crim.P. 5(a)(1) (24 hours); Fla.R.Crim.P. 3.130(b)(1) (24 hours).

Clause (1) is similar in effect to provision in ALI Model Code of Pre-Arrest Procedure § 130.2(1)(b) (T.D. # 6, 1974). See the first part of the Comment to Rule 434(a), *infra*.

Clause (2) is rather similar in effect to ALI § 120.9(1)(b) (Official Draft # 1, 1972).

Clause (3) is similar to N.Y. Crim.P.Law § 140.20(1).

Clause (4) hereof is designed to assure that production will not be delayed because a prosecutor cannot be found or because an information has been filed with a magistrate other than the one before whom the person is brought. It is expected that the officer

making the "writing" in lieu of an information will often telephone the prosecuting attorney (even if in another part of the state) to discuss what should be set forth therein. Compare ALI §§ 130.2(5) (T.D. # 6, 1974), § 310.1(2) (T.D. # 5, 1972).

The last two sentences hereof are similar in concept to F.R. Crim.P. 5(a) and Idaho Crim.R. 5(d). Cf. Alaska R.Crim.P. 5(e) (1)(i); N.J. Rules of Court 3:4-1. Compare ALI § 310.1(6) (T.D. # 5, 1972). They are designed to provide a prompt after-the-fact determination as to whether there exist the grounds for custody specified in Rule 221(c). Accordingly, the magistrate must order the person released from custody unless he finds both (1) probable cause to believe that an offense has been committed and that the person committed it and (2) either (a) that the offense or the manner in which it was committed involved violence to person or imminent and serious bodily injury or the risk or threat thereof or (b) that the offense is punishable by incarceration and the person would not respond to a summons. If the person is released from custody, it is still open to the prosecutor to proceed by citation (as he could have initially, in which event this Rule would not have come into play), but he would very rarely do so if the ground for the magistrate's action was a lack of probable cause.

Unlike the detention hearing provided by Rule 344 (to which persons arrested *with* as well as

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without warrants are entitled if they have not secured pre-appearance release), the procedure provided in the last two sentences may be *ex parte* in nature. However, it need not be wholly *ex*

parte, and it is anticipated that in some circumstances the magistrate will exercise his discretion to allow some participation by the accused or his attorney.

Rule 312. [Appearance by Defendant Not in Custody.]

- 1 A defendant not in custody shall appear in person at the time
- 2 and place specified in the citation, summons, or terms of release,
- 3 but he is deemed to have appeared if his lawyer, on or before
- 4 that time, files a statement that he represents the defendant.

Comment

Since the purposes of first appearance are to inform the defendant of certain matters, to provide for his being represented by counsel, and to provide for his pretrial release, an appearance seems unnecessary if the defendant is not in custody and has a lawyer who can inform him regarding his case. Much court time can be saved by a provision like this. *Cf.* N.J. Rules of Court 3:9-1(b) (defendant represented

by attorney may plead not guilty by filing statement). Compare Colo.R.Crim.P. 10(a), (b); Fla.R. Crim.P. 3.370(a); La.Code Crim. P. art. 553; N.Y.Crim.P. Law § 170.10(1)(b).

The filing provided for is deemed an appearance for purposes of Rule 331, *infra* (questioning after appearance) and Rule 411, *infra* (setting times for discovery and other pretrial procedures).

Rule 313. [Procedure upon Defense Lawyer Filing Statement.]

- 1 Upon receiving a statement filed under Rule 312, the [magis-
- 2 trate] shall furnish the defendant's lawyer a copy of any docu-
- 3 ment filed with the [magistrate] in support of the charge.
- 4 [If the next proceeding is to be before a different court, the
- 5 [magistrate] shall transmit to that court all documents in
- 6 the case, but transcripts of recorded proceedings shall be made
- 7 or transmitted only if requested by that court.]

Comment

The first sentence parallels provision in Rule 321(a) *infra*.

The last sentence is identical to Rule 321(d), *infra*, and would be omitted in a state with a unitary court system.

PART 2

APPEARANCE IN PERSON

Rule 321. [Appearance in Person.]

- 1 (a) Informing defendant. If the defendant appears in per-
2 son, the [magistrate] shall furnish him a copy of any document
3 filed with the [magistrate] in support of the charge and inform
4 him:
- 5 (1) Of the charge against him and the maximum possi-
6 ble incarceration that may be imposed upon conviction;
- 7 (2) Of his right to remain silent, that anything he says,
8 orally or in writing, will be used against him, and that if he
9 has made a statement he has the right not to say anything
10 further;
- 11 (3) Of his right to be assisted by a lawyer at every stage
12 of the proceedings;
- 13 (4) That he will not be questioned by any person regard-
14 ing any offense unless he consents and that he has the right
15 to consult with a lawyer before being questioned or saying
16 anything and to have a lawyer present during any question-
17 ing;
- 18 (5) That if at any time during any questioning regard-
19 ing any offense he desires to consult with a lawyer or de-
20 sires it to stop, questioning will stop; and
- 21 (6) Of the general nature of the further proceedings to
22 be taken in the case.

Comment

The documents, copies of which are to be furnished per the introductory portion hereof, include:

(1) In citation cases, the information.

(2) In summons cases, the information and any affidavit supporting the summons' issuance.

(3) In arrest warrant cases, the information, if filed, or if not filed, the affidavit per

Rule 221(c), *supra*, setting forth the charge, and (if the defendant is before the court which issued the warrant) any affidavit supporting the arrest warrant's issuance.

(4) In warrantless arrest cases, the information, if filed, or if not filed, the writing per Rule 311(4), *supra*, setting forth the charge, and any affidavit per Rule 311, *supra*, supporting the existence of the

grounds required for issuance of an arrest warrant.

(In the summons, arrest warrant, and warrantless arrest cases, there would be no supporting affidavits if exclusive reliance was placed upon recorded testimony.) Cf. ALI Model Code of Pre-Arrest Procedure § 310.1(2), (3), (T.D. # 5, 1972). Compare ABA Standards, Pretrial Release 4.3(b) (Approved Draft, 1968); Alaska R.Crim.P. 5(c); Calif. Penal Code § 859; 38 Ill.Stat. § 109-1(b)(1); N.J. Rules of Court 3:4-2; N.Y. Crim.P. Law § 180.10 (1); Pa.R.Crim.P. 119(a); Wis. Stat. § 970.02(1)(a).

The first part of clause (1) accords with former Uniform Rule 6(b), Calif. Penal Code § 858, Fla.R.Crim.P. 3.130(b)(2), 38 Ill.Stat. § 109-1(b)(1), Mont. Rev. Codes § 95-902(a), and Wis. Stat. § 970.02(1)(a). See ALI § 310.1 (3); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.5 (1973).

The last part of clause (1) derives from Wis. Stat. § 970.02(1) (3).

Clause (2)'s reference to informing the person "of his right to remain silent" accords with provision in Tex. Code Crim.P. art. 15.17. Compare ABA Standard 4.3(b)(1); ALI § 310.1(4). The words "right to remain silent" are the ones uniformly employed by the Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), in describing the "Miranda warning." See *id.* at 444, 468, 469, 473, 479. This seems preferable to specifying "that he

is not required to make a statement," as is done in F.R.Crim.P. 5(c) and several state provisions. Some defendants may construe "statement" to mean a formal written document. See Project, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1613-14 (1967).

Clause (2) also requires informing the defendant "that anything he says, orally or in writing, will be used against him." The Court in *Miranda* used several different phrases to describe this portion of the "Miranda warning": that any statement he does make may be used against him" (*id.* at 444), "that anything said can and will be used against the individual in court" (*id.* at 469), and "that anything he says can be used against him in a court of law" (*id.* at 479). The words "anything he says" accord with ALI § 310.1(4)(a), ABA Standard 4.3(b)(i), and Fla.R.Crim.P. 3.130(b)(2). The reference "orally or in writing" is similar to provision in ALI § 310.1(4)(a). Use of the word "will" rather than "can" or "may" (be used against him) accords with the second of the above quotations from *Miranda*, and seems to better highlight to the defendant the danger of making statements. The words "used against him" accord with ABA Standard 4.3(b)(i), former Uniform Rule 6(b), F.R.Crim.P. 5(c) (1972), Alaska R.Crim.P. 5(c), Colo.R.Crim.P. 5(b)(1), Fla. R.Crim.P. 3.130(b)(2)(i), Maine R.Crim.P. 5(b), Nev. Rev. Stat. § 171.186, N.J. Rules of Court 3:4-2, and Tex. Code Crim.P. arts. 15.17, 16.03.

Clause (2)'s reference "that if he has made any statement he has the right not to say anything further," is similar in concept to ALI § 310.1(4)(c) which calls for informing the person "if appropriate under the circumstances, that he may be able to challenge the admissibility of any statement he has made previously."

Clause (3) is substantially identical to ALI § 310.1(5), Calif.Penal Code § 858, and N.Y.Crim.P.Law § 180.10(3)(4).

Clause (4) is very similar to ALI § 310.1(4). Compare Tex. Code Crim.P. art. 15.17.

Clause (5) is similar to Tex. Code Crim.P. art. 15.17.

It seems desirable to have the magistrate inform the defendant of his rights regarding questioning even though that duty is also imposed upon the peace officers involved. See Note to ALI § 310.1.

Clause (6) is similar to ABA Standard 4.3(c). Cf. ALI § 310.1(3); Fla.R.Crim.P. 3.122(a)(2); N.Y.Crim.P.Law § 180.10(1).

1 **(b) Providing for lawyer.** If the defendant is charged with
2 an offense punishable by incarceration and has no lawyer, the
3 [magistrate] shall inform him that if for any reason he is unable
4 to obtain the services of a lawyer, one will be appointed to assist
5 him, and that if he is unable to pay for the services of a lawyer,
6 the services will be provided for him. If the [magistrate] so
7 informs him and does not accept a waiver of counsel under Rule
8 711, the [magistrate] shall:

9 (1) Direct him to retain a lawyer at his own expense and
10 inform him how he might do so;

11 (2) If he is financially unable to retain a lawyer, ap-
12 point or arrange for the prompt appointment of a lawyer
13 to assist him; or

14 (3) If he is otherwise unable to retain a lawyer, assist
15 him in obtaining a lawyer and, if other alternatives are
16 unavailable, appoint or arrange for the prompt appointment
17 of a lawyer who shall be entitled to reasonable compensation
18 from the defendant.

Comment

This subdivision provides a right to appointed counsel in all cases where "the defendant is charged with an offense punishable by incarceration." See 38 Ill. Stat. § 113-3(b); Tex.Code Crim. P. art. 26.04(a).

This subdivision on its face does not go quite as far as does the standard in Alaska, entitling to appointed counsel one charged

with "any offense a direct penalty for which may be incarceration in a jail or penal institution, *which may result in the loss of a valuable license, or which may result in a heavy enough fine to indicate criminality*," *Alexander v. City of Anchorage*, 490 P.2d 910, 915 (1971), or that in New Hampshire, so entitling a defendant charged with a felony or a

misdemeanor except a "misdemeanor, the penalty for which does not provide for imprisonment or a fine exceeding five hundred dollars," N.H.Rev.Stat. §§ 604-A:1, 604-A:2. However, the practical effect is similar because it seems doubtful that offenses which do not carry incarceration as a possible penalty will be the basis of loss of a valuable license or that the legislature will provide for "a heavy enough fine to indicate criminality" or one over \$500 without also making the offense punishable by incarceration.

Some would support extending the right to appointed counsel further than does this subdivision. See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 13.1 (1973), which provides that appointed counsel should be available in *all* criminal cases, reasoning that if most nontraffic offenses are decriminalized (as recommended elsewhere in the Standards), "nonjailable misdemeanors will constitute a very small category of cases" and that "given the minimal incremental cost involved * * * extending the right of public representation to such nonjailable misdemeanors would produce adequate returns in terms of assurances of fairness and would enhance the image of criminal justice in the lower courts." California allows appointed counsel for any offense, including a traffic violation, *In re Johnson*, 62 Cal.2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); *Blake v. Municipal Court, Oakland-Piedmont Judicial Dist.*, 242 C.A.2d 731, 51 Cal.Rptr. 771 (1966), and *N.Y.*

Crim.P.Law § 170.10(3)(c) for any offense except a traffic infraction.

In *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L. Ed.2d 530 (1972), the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger's* "incarceration in fact" approach has appeal, but this subdivision goes beyond it, to an "incarceration in law" standard, for several reasons.

First, it seems the right to appointed counsel should, and in time may be held by the Supreme Court to extend to at least some nonfelony cases wherein the defendant is not in fact ultimately incarcerated. Mr. Justice Powell, joined by Rehnquist, J., stated in his concurring opinion in *Argersinger*:

Many petty offenses will * * * present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves. The consequences of a misdemeanor conviction [such as] * * * the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label "petty."

* * * Stigma may attach to a drunken driving conviction or a hit-and-run escapade. Los-

ing one's driver's license is more serious for some individuals than a brief stay in jail. * * *

When the deprivation of property rights and interest is of sufficient consequence [foot-note: "A wide range of civil disabilities may result from misdemeanor convictions, such as forfeiture of public office * * * disqualification for a licensed profession * * * and loss of pension rights * * *"], denying the assistance of counsel to indigents *who are incapable of defending themselves* is a denial of due process.

* * * * *

* * * The thrust of the Court's position indicates * * * that when the decision must be made, the rule will be extended to all petty offense cases except perhaps the most minor traffic violations. [*Id.* at 47-48, 51. (Emphasis added.)]

This might suggest formulating a rule establishing a right to appointed counsel in all cases of either incarceration in fact or a sufficient degree of complexity, stigma, or civil disability. But the difficulties of formulating meaningful and workable definitions of these concepts seem insurmountable. See generally, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash.L. Rev. 685, 704 (1968); Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L.Rev. 1249, 1254-56 (1970). Accordingly, the bright-line standard of this subdivision appears preferable. It seems fair to conclude that no significant complexity, stigma, or civil consequences will

attend prosecutions for offenses not punishable by incarceration.

A second reason for using an "incarceration in law" rather than an "incarceration in fact" standard is that it seems inappropriate for the magistrate to make a determination as to sentence, ruling out incarceration for an offense for which the legislature has provided it, before hearing the case. See Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash.L.Rev. 685, 709 (1968). Mr. Chief Justice Burger, in his *Argersinger* concurring opinion, observed that "the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term" and that "this need to predict will place a new load on courts already overburdened," but went on to say that this could be done and to describe how it could be done in *jury* cases (noting that in a nonjury case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment). 407 U.S. at 42 (concurring opinion). It remains questionable how the magistrate could properly make a pre-trial determination as to whether the sentence is likely to include incarceration in *non-jury* cases, at least where he will hear the case (even a different magistrate hearing the case would be able to surmise that a brother magistrate found a bad record if the defendant has appointed counsel although charged with an of-

fense usually carrying only a fine).

A different type of "incarceration in fact" test focusses upon *classes* of offenses, rather than upon the particular defendant's case. See ABA Standards Providing Defense Services 4.2 (Approved Draft, 1968). The difficulty with this approach, at least when run in tandem (as it would have to be) with the *Argersinger* rule (so that if appointed counsel were denied because the defendant was charged with a type of offense for which incarceration was not *likely* to be imposed, the defendant could not *in fact* be punished by incarceration no matter how aggravated his commission of the offense or how atrocious his previous record), is that the courts, in establishing classes of offenses for which no incarceration would be imposed, would for all practical purposes be rewriting the criminal codes and repealing statutes providing incarceration as an available penalty. This would seem to be a judicial usurpation of legislative authority, and would be of a wholly different nature than exercise of the judicial function in sentencing of determining not to employ incarceration as a penalty *in a particular case*.

It does not seem that the cost in terms of money and legal manpower of implementing this subdivision will be excessive. See Brief of the National Legal Aid and Defender Association as Amicus Curiae in *Argersinger*. Cf. Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L.Rev. 1249 (1970). As noted at

the outset of this Comment, at least five states already go at least this far. Because of the much lower cost of counsel for nonfelony cases, it appears that less than 10% of nonfelony defendants meet indigency standards, as opposed to 60-65% of felony defendants. Interview with Mr. C. Paul Jones, Minnesota State Public Defender, November 11, 1972. Accordingly, although there are considerably more non-felony defendants than felony defendants, in jurisdictions where free counsel is available to all indigent defendants charged with offenses punishable by incarceration, only about one and one half times as many nonfelony defendants as felony defendants are represented by appointed counsel. NLADA Brief, *supra*, at 11. A lawyer can effectively handle at least twice as many nonfelony cases as felony cases. *Ibid.*; Interview, *supra*; Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 13.12 (1973).

In regard to the availability of lawyers, the *Argersinger* opinion notes that the number of lawyers is expected to double by 1985. 407 U.S. at 37n.7. The concurring opinion of Brennan, J. (joined by Douglas and Stewart, JJ.) speaks to the question of financial as well as manpower costs in observing "law students as well as practicing attorneys may provide an important source of legal representation for the indigent." *Id.* at 40. Further, legislatures in states adopting these Rules will no doubt desire to reclassify some minor offenses presently punishable by incarceration. Many leg-

islatures will likely go further in response to the suggestion in footnote 9 of the *Argersinger* opinion which states:

One partial solution to the problem of minor offenses may well be to remove them from the court system. The American Bar Association Special Committee on Crime Prevention and Control recently recommended, *inter alia*, that: "Regulation of various types of conduct which harm no one other than those involved (*e. g.* public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts. The handling of these matters should be transferred to non-judicial entities, such as detoxification centers, narcotics treatment centers and social service agencies. The handling of other non-serious offenses, such as housing code and traffic violations, should be transferred to specialized administrative bodies." [*Id.* at 38n.9.]

The inability to obtain a lawyer's services covered by this subdivision is not limited to financial inability. *Accord*, ALI Model Code of Pre-Arrest Procedure § 120.8(1)(d)(iv) (Official Draft #1, 1972); F.R.Crim.P. 44(a); Calif.Penal Code § 987; Fla.R.Crim.P. 3.160(e); Mont. Rev.Codes § 95-1001; Pa.R.Crim.P. 318(b)(1). Although inability to obtain counsel is usually financial, sometimes it is for other reasons, the most notable of which is the unpopularity of the defendant or his cause.

The numbered clauses set forth the magistrate's duties regarding

provision of defense counsel where a lawyerless defendant is charged with an offense punishable by incarceration and the magistrate has not accepted a waiver of counsel. The first appearance is none too soon to make provision for defense counsel. See ABA Standards, Pretrial Release 4.2 (Approved Draft, 1968); ABA Standards, Providing Defense Services 5.1 (Approved Draft, 1968); ALI § 310.1(5) (T.D. # 5, 1972); Nat'l Advisory Commission on Criminal Justice Standards and Goals, Courts Standards 4.5, 13.1 (1973); F.R.Crim.P. 44(a); Nev. Rev.Stat. § 178.397; N.J.Rules of Court 3:4-2; N.Y.Crim.P.Law §§ 170.10(3), 180.10(3).

Those clauses authorize the magistrate to provide for defense counsel either by directing the defendant to obtain a lawyer at his own expense, see *United States v. Sampson*, 161 F.Supp. 216, 217 (D.D.C.1958), or by appointing or arranging for the appointment of a lawyer. The magistrate's informing the defendant how he might obtain a lawyer at his own expense could involve, *e. g.*, reference to the existence of a local attorney referral service. If a non-indigent defendant does not make a competent waiver of counsel pursuant to Rule 711, *infra*, it does not seem objectionable to direct him to obtain a lawyer at his own expense or to appoint a lawyer who shall be entitled to reasonable compensation from the defendant. See Note, 49 Minn.L. Rev. 1133, 1148n.90 (1965). As stated in *Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn.L.

Rule 321 RULES OF CRIMINAL PROCEDURE

Art. 3

Rev. 1, 27 (1963), "compelled financial support of one's legal defense is surely no more objectionable than 'compelled financial support of group activities' to which the member is indifferent or even opposed" countenanced in *Lathrop v. Donohue*, 367 U.S. 820, 828, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).

(c) Defendant in custody. If the defendant is in custody, the [magistrate] shall:

(1) Prescribe terms and conditions of release under Rule 341 but if he is in custody under an arrest warrant of another court, appears without a lawyer, and does not make a waiver of counsel which is accepted under Rule 711, the [magistrate] may not require an undertaking under Rule 341(b) with which the defendant is unable to comply without first hearing from a lawyer provided under subdivision (b); the [magistrate] may provide that the lawyer need assist the person only for purposes of this appearance;

(2) If he appears without a lawyer and is not released from custody, inform him of his right to communicate by telephone or otherwise with (i) a relative or friend and (ii) other persons reasonably needed to obtain the services of a lawyer and to meet any terms of release;

(3) If he is in custody under an arrest warrant of another court and is not released from custody, order that if he does not sooner meet the terms of release he be transported forthwith to the [sheriff] of the [county] of the court which issued the warrant; and

(4) If he is not released from custody, advise him of his right to a detention hearing under Rule 344 and, if a detention hearing will be held, set the time for the hearing.

Comment

This subdivision sets forth special requirements for situations where the defendant is in custody when he first appears before a magistrate. Some of the requirements apply in all such cases, and others only when a defendant in custody under an arrest warrant is brought before a court other than that which issued the warrant.

Clause (1) requires the magistrate to prescribe terms and con-

ditions of release pursuant to the procedures set forth in Rule 341. The purpose of the special provision for the defendant in custody under an arrest warrant of another court is to minimize the burden upon the defendant and the state of transporting the defendant in custody away from the area of his arrest. Compare Commentary to Nat'l Advisory Comm'n on Criminal Justice

Standards and Goals, Courts
Standard 4.5 (1973):

If the accused has an attorney who cannot appear at the hearing, if he needs time to employ counsel, or if he professes indigency and the question of entitlement to counsel on the basis of indigency cannot be resolved immediately, the court should appoint counsel for the limited purpose of representing the accused at this hearing. The hearing should not be adjourned or continued and the accused incarcerated while such questions are resolved.

Clause (2) is substantially identical to clause (7) of Rule 241, *supra* (warnings at place of detention). Similar first appearance advice is required by ABA Standards, Pretrial Release 4-3(b)(iii) (Approved Draft, 1968) ALI Model Code of Pre-Arrestment Procedure § 310.1(4)(b)

(T.D. #5, 1972), and N.Y.Crim. P.Law §§ 170.10(3), (4), 180.10(3)(4). Compare Calif.Penal Code § 859; Fla.R.Crim.P. 3.122 (c).

With clause (3) hereof, compare Calif.Penal Code § 821; N.Y.Code Crim.P. § 120.90(3), (4); Pa.R.Crim.P. 117(d); Tex.Code Crim.P. arts. 15.19, 15.20, 15.21.

Clause (4) provides for notice to the defendant of his right to a detention hearing if he is not released from custody. Under Rule 341(a), *infra*, a defendant will remain in custody only if the magistrate finds all other conditions insufficient and thus requires an undertaking under Rule 341(a)(5) and in addition the defendant is unable to comply with the undertaking as set. For the reasons why a detention hearing should be afforded such a defendant, see the Comment to Rule 344(a), *infra*.

- 1 (d) Transmittal of documents. If the next proceeding is to be
- 2 before another court, the [magistrate] shall transmit to that
- 3 court all documents in the case, but transcripts of recorded pro-
- 4 ceedings shall be made or transmitted only if requested by that
- 5 court.

Comment

In a state with a unitary court system, the only application of this subdivision would be where a defendant arrested with a warrant is brought before a court other than that which issued the warrant.

In many cases it will not be necessary to have prepared a writ-

ten transcript of the first appearance proceedings or of the recorded testimony, if any, taken as a basis for issuing a summons or arrest warrant or for determining that grounds required for issuance of a warrant exist as to a person arrested without a warrant.

PART 3

QUESTIONING AFTER APPEARANCE

Rule 331. [Questioning after Appearance.]

1 Unless the defendant's lawyer consents or is present at the
 2 questioning, or the defendant has waived counsel under Rule 711,
 3 no [law enforcement officer] or prosecuting attorney, or his
 4 agent, may question a defendant after his appearance and during
 5 the pendency of the prosecution (1) regarding any offense, if he
 6 is in custody, or (2) if he is not in custody, regarding (i) the
 7 offense charged, (ii) any related offense as defined under Rule
 8 471(a), or (iii) any offense of the same or similar character
 9 committed before he appeared.

Comment

In *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Court stated:

We hold that the petitioner was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

ABA Code of Professional Responsibility DR 7-104(A) provides:

During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows

to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

The Commentary to ABA Standards, The Prosecution Function 4.1(b) (Approved Draft, 1971) (which Standard makes it unprofessional conduct "for a prosecutor to engage in *plea discussions* directly with an accused who is represented by counsel, except with counsel's approval") states that DR 7-104(A) "is at least as

applicable in a criminal case as in civil litigation."

The effect of this Rule is not limited to situations where the person in fact already has counsel. Unless the magistrate accepts a waiver of counsel, he must provide for the person to receive

the assistance of counsel (either by directing him to obtain counsel, assisting him in obtaining counsel, or appointing or arranging for the appointment of counsel), and the mere accident of when counsel is in fact obtained should not bear upon police ability to obtain a statement.

PART 4

RELEASE BEFORE AND DURING TRIAL

Rule 341. [Release Before and During Trial.]

1 (a) Conditions of release. Whenever the [magistrate] sets
2 the terms of release under Rule 321(c)(1), he shall order the de-
3 fendant released before and during trial on his promise to ap-
4 pear or upon his execution of an unsecured undertaking to ap-
5 pear, in an amount set by the [magistrate], unless the defendant
6 is charged with an offense punishable by incarceration and the
7 [magistrate] determines that the above methods of release will
8 not reasonably assure the appearance of the defendant as re-
9 quired or the safety of any person or the community. If that
10 determination is made, the [magistrate], in lieu of or in addition
11 to the above methods of release, shall impose upon the defendant
12 for the period of release one or more of the least onerous of the
13 following conditions which will reasonably assure his appearance
14 as required and the safety of any person or the community:

15 (1) That he remain under the supervision of a designated
16 person or organization;

17 (2) That he comply with specified restrictions on his
18 travel, association, or place of abode; and

19 (3) That he not engage in specified activities, including
20 the use or possession of a dangerous weapon, an intoxicant,
21 or a [controlled substance], if the [magistrate] believes
22 that they could lead to criminal conduct similar to that
23 charged or of which he has been previously convicted.

Comment

The procedures set forth in this subdivision are applicable when- of release under Rule 321(c)(1),
that is, whenever the defendant
ever the magistrate sets the terms is in custody and appears in per-

son before the magistrate. Under these Rules, many defendants will not be in custody, and as to them the magistrate will not have occasion to set conditions of release. (See Rule 211 on the limited circumstances in which a police officer may arrest without a warrant in lieu of issuing a citation, and Rule 221 on the limited circumstances in which a magistrate may issue an arrest warrant in lieu of a summons.) That is, if the defendant has been proceeded against by resort to a citation or summons, he is not in custody and there is no need to set terms of release. (But see subdivision (d), *infra*, as to the authority of the prosecuting attorney to seek a setting of conditions because of relevant facts not known or considered at the time the summons or citation was issued.)

The thrust of the first sentence hereof is that there is a presumption in favor of unconditional release. As stated in the Commentary to ABA Standards, Pretrial Release 5.1 (Approved Draft, 1968):

Presently, bail is set in practically every case, however minor or serious, without respect to its particular facts. Without reflection, courts assume that bail is a necessary element of the criminal process. Note, *A Study of the Administration of Bail in New York City*, 106 U.Pa.L.Rev. 693, 721 (1958). There is in fact an unspoken presumption that bail should be set in every case unless the defendant makes a showing to the contrary. The historical pref-

erence for pretrial freedom, as well as recent research indicating that release without bail may safely be increased, supports a reversal of the presumption. This is the approach taken in the Bail Reform Act of 1966, 18 U.S.C. 3146. This will not result in the automatic release of all defendants, but will simply require an adequate showing of such facts as justify the imposition of conditions on the defendant's release.

If release on an unsecured promise to appear or upon the execution of an unsecured appearance bond will not reasonably assure the appearance of the defendant or the safety of any person or the community, then the magistrate may set one or more of the listed conditions. In contrast to 18 U.S.C. § 3146, there is no priority order in the listing of conditions (1) through (4). While it is required that the least onerous condition or conditions sufficient to provide the stated assurance should be set, it does not follow, for example, that the condition in clause (1) would always be the least onerous.

Conditions upon release may be imposed to protect the community from harm. As noted in the Commentary to ABA Standard 5.5:

The standards recommended here go very far in spelling out alternative methods of curbing crime. Central to the structure is a vigorous use of restraining orders embodying carefully-defined restrictions on the activities of the released defendant. The standards borrow

from the power frequently exercised by courts when they put convicted defendants on probation. These, coupled with the conditions set forth in section 5.2, *supra*, provide varied methods of controlling the defendant thought to be likely to engage in criminal conduct when released. His movements, his associations and his activities can be carefully circumscribed. He may be prohibited from possessing any weapon. He may be put under the close supervision of a probation officer. New ground may be broken here. Some jurisdictions have statutory or rule provisions authorizing the court to include in the bail bond certain stipulations as to acts the defendant will do or will not do. See, *e. g.*, Ariz.R.Crim. Proc. 38. So far as the Committee is aware, these provisions have not been tested but they at least tend to support the existence of authority to impose restraints short of detention on released defendants. It may be argued that if constitutional strictures preclude detention to prevent future crime restrictions short of detention should be equally vulnerable. This would be a controlling argument, however, only if preventive detention is unconstitutional for the sweeping reason that predictions of future wrongful conduct cannot be made for any reason until the defendant has been convicted. This would amount to saying that it is the presumption of innocence that bars preventive detention. It is un-

likely that any court would go so far. See Note, *Preventive Detention Before Trial*, 79 Harv.L.Rev. 1489, 1500 (1966). It seems more probable that the constitutional defects in preventive detention, if they in fact exist, lie in due process limitations on predicting future criminal conduct. At the heart of the problem is the inherent difficulty in making such predictions with sufficient accuracy. Where the consequence of a mistaken prediction is unwarranted detention, due process of law may be violated. Arguably the same should not be said of restrictions on movements and associations that might be imposed needlessly. The proposals advanced here are obviously not without difficulty. Nevertheless the Advisory Committee believes that carefully drafted statutes providing courts with the authority, analogous to the equitable power to temporarily restrain litigants pending trial of a divorce case, should survive constitutional attack.

It must be emphasized that this subdivision deals with release before *and* during trial. By contrast, in the federal system, 18 U.S.C. § 3146 is limited to release pending trial, and F.R.Crim.P. 46(b) reads: "A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not

obstruct the orderly and expeditious progress of the trial." Such a provision has not been added here for several reasons. For one, virtually all of the states have traditionally dealt with bail before and during trial (or, as it is usually expressed, before conviction) in the same terms. That is, it is not assumed that an absolute denial of bail or consideration of factors other than the risk of nonappearance is appropriate merely because the defendant's trial has commenced. Given this history, there may be serious doubt about whether the proce-

dures authorized under F.R.Crim. P. 46(b) would be found to comply with state constitutional provisions on bail. Secondly, it does not seem that special rules on bail are required for the trial period. It appears that revocation of bail during trial seldom occurs in the federal system, see Wright, *Federal Practice & Procedure—Criminal* § 769 (1969). Also, the power to revoke may be improperly exercised for punitive reasons; see *Bitter v. United States*, 389 U.S. 15, 88 S.Ct. 6, 19 L.Ed.2d 15 (1967).

(b) When [magistrate] may require undertaking. If no condition or combination of conditions under subdivision (a) will reasonably assure the defendant's appearance as required and the safety of any person or the community, the [magistrate] may require the defendant, either in lieu of or in addition to one or more conditions under subdivision (a), to execute a secured undertaking in a specified amount. The [magistrate] may set different amounts for the undertaking depending upon whether it will be secured by:

(1) The obligation of sufficiently solvent uncompensated sureties;

(2) The deposit of property or a combination of property and cash; or

(3) The deposit of cash.

Comment

This subdivision expressly provides that financial conditions may be set only when no condition or combination of conditions under subdivision (a) will reasonably assure the defendant's appearance as required and the safety of any other person or the community. Compare ABA Standards, *Pretrial Release* 5.3 (a) (Approved Draft, 1968), which states, "Money bail should be set only when it is found that

no other conditions on release will reasonably assure the defendant's appearance in court." While there is some authority to the effect that financial conditions may be set *only* for the purpose of reasonably assuring the appearance of the defendant, see, e. g., *Gusick v. Boies*, 72 Ariz. 233, 233 P.2d 446 (1951), there is some more recent authority which appears to permit consideration of public safety as well, e.

g., *Martin v. State*, 517 P.2d 1389 (Alaska 1974), apparently on the ground that the risk of future criminal conduct is related to the risk of nonappearance.

This subdivision permits the magistrate to set the undertaking in different amounts, depending upon how it will be secured. The assumption is that the nature of the security will often be relevant in determining what would be an appropriate amount. For example, a lesser amount should generally suffice when the defendant is to make a deposit in cash as compared to the other two forms of security listed. Similarly, a deposit of property by the defendant in a certain amount will often be comparable, in terms of assuring appearance, to the obligation of a third-party surety in a larger amount.

The limitation to "uncompensated" sureties in clause (1) conforms to ABA Standard 5.4, which states in part, "No person should be allowed to act as a surety for compensation." The Commentary thereto fully supports this position:

The professional bondsman is a feature of the criminal process almost unique to the United States. Only the United States and the Philippines apparently give him a major role in the criminal process. In U.S. courts his function is so important that it has often been said that it is he, not the court, who actually makes the effective bail decision. As stated by Judge J. Skelly Wright:

Certainly the professional bondsman system as used in

this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act at surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fee remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C.Cir.1963) (concurring opinion).

Where the bondsman writes bonds on credit and without collateral, no real risk of immediate financial loss deters the defendant from fleeing. The indemnity agreement usually required by the bondsman represents in these cases nothing more than the defendant's personal recognizance. The bondsman's practice has effectively negated the judge's bail setting, and the defendant might just as well have been released by the court on personal recognizance. Where the bondsman demands full collateral, he may frustrate the bail setting if the judge assumed that only the payment of a premium would be required. Where the bondsman absolutely refuses to write a bond no matter what the circumstances, the whole bail system is undermined.

The bail bond business is subject to a variety of allega-

tions of corruption. The charges range from alleged tie-ins with police and court officials, involving kickbacks for steering defendants to particular bondsmen, to collusion and corruption aimed at setting aside forfeitures of bonds where the defendants have failed to appear. *Report of the Third February, 1954, Grand Jury of New York County*, reprinted in 17 Law Guild Rev. 149 (1957); *Report of Fifth March, 1960, Grand Jury of General Sessions (New York County)*. See generally *Bail or Jail*, 19 The Record of the Association of the Bar of the City of New York 11 (1964); *Bail in the United States* 22-38. There even have been instances of bondsmen's strikes or refusal to write bonds when they have felt the authorities were too vigorously enforcing bond forfeitures.

There is little doubt that, as a result of the heavy reliance on money bail, the professional bondsman siphons off large sums of money that might otherwise be put to more constructive use in the preparation of the defendant's case or in the support of his family.

In original theory the bondsman served to maintain close contact with the defendant in order to deter his flight. In urban communities this is now seldom true. The D.C. bail study reports that bondsmen make little effort to stay in contact with their clients pending trial. The Bail System of the District of Columbia 13.

Another justification advanced for the bondsman's existence is that he saves the state money by recapturing the defendant who fails to appear. The argument highlights the anomalous role of the bondsman in an era when procedural rights or criminal defendants are so carefully protected. The bondsman has an ancient right to arrest and surrender his principal at any time and for any reason sufficient to himself. Note, *Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966 (1961). Moreover, if the bail-jumper being sought by the bondsman leaves the state, the bondsman may pursue and recapture him without the necessity of complying with any of the rigorous extradition safeguards required of law enforcement agencies seeking a fugitive. *United States v. Trunko*, 189 F.Supp. 559 (E.D. Ark.1960); Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 Yale L.J. 1098 (1964). California has restricted the activities of out-of-state bondsmen by requiring them to secure a warrant authorizing police officers to arrest the defendant and take him before a magistrate. Cal. Pen.Code § 847.5 (1963 Supp.). The majority of states have no such statute, and the methods often employed by bondsmen are hardly likely to promote respect for the administration of justice. See examples quoted in *Bail in the United States* 31. Finally, there is considerable doubt whether recapture is al-

ways accomplished without expense to the state. Bondsmen rely on police information and frequently call on local police to assist them in making arrests. In fact, it appears that in one state, Illinois, the expense of returning fugitives who have left the state is borne by the public treasury, and the argument that bondsmen pay the costs is, in the word of an authoritative official, fallacious. Bowman, *The Illinois Ten Percent Bail Deposit Provision*, 1965 U.Ill.L.F. 35, 39-40. No doubt in some jurisdictions, under a bail system that has not been improved in years, the professional bondsman occasionally saves the state some costs of recapture in those few instances of willful bail jumping. It is more doubtful, however, that the net savings are very large or that, under an improved system, the money saved would in any measure justify continuing to delegate an important law enforcement

function to private individuals whose own money is at stake.

Efforts to regulate the activities of bondsmen have proved largely ineffective. Most regulatory schemes are aimed at protecting the state from losses due to uncollectible forfeitures. Pa.Stat. tit. 40, § 831 et seq. New York permits bonds to be written only by agents of licensed surety companies. N.Y. Code Crim.Proc. § 554(b). Premiums are regulated in some states and not in others; but the practices of bondsmen are almost wholly unregulated. The Uniform Bail Bond Act, promulgated by the National Association of Insurance Commissioners, requires all bondsmen to prove good character, regulates the premium they may charge and the collateral they may require, and prohibits kickbacks to public officials and attorneys. Such legislation is found only in a few jurisdictions. See, e. g., Cal.Ins.Code § 1800 et seq.; Fla.Stat. § 903.01 et seq. (1963); 23 D.C. Code § 601 et seq. (1961).

1 (c) Informing defendant. A [magistrate] authorizing the
2 release of a defendant under this Rule shall inform him of:

- 3 (1) The conditions imposed, if any;
- 4 (2) The penalties applicable to violations of the condi-
5 tions of his release; and
- 6 (3) The fact that a warrant for his arrest may be issued
7 immediately upon any violation.

Comment

This subdivision is based upon specified will aid in ensuring compliance with the conditions.
18 U.S.C. § 3146(c). Informing the defendant of the matters

1 (d) Change in terms or conditions of release. Upon motion of
 2 the prosecuting attorney or defendant alleging facts bearing on
 3 the terms or conditions of release not known or considered at
 4 the time a defendant charged with an offense punishable by in-
 5 carceration was issued a summons or citation or at the time the
 6 conditions of release were imposed, the [magistrate] shall hold
 7 a hearing to determine whether the conditions of release should
 8 be changed. If the motion is by the prosecuting attorney and
 9 affidavit or testimony shows probable cause to believe that the
 10 defendant would not otherwise appear at the hearing, the [mag-
 11 istrate] by order may direct a [law enforcement officer] to
 12 bring the defendant forthwith before the [magistrate]. If the
 13 change in conditions results in detention of the defendant, the
 14 [magistrate] shall inform him of his right to a detention hearing
 15 under Rule 344 and, if a detention hearing will be held, set the
 16 time for the hearing.

Comment

Under Rule 344, *infra*, a defend-
 ant who is unable to obtain his
 release will obtain a *reconsidera-*
tion of the terms of release deci-
 sion. By contrast, the instant
 subdivision provides a means
 whereby the defendant or (more
 likely) the prosecuting attorney
 may seek a change in the terms or
 conditions of release because of
 relevant facts not known or con-
 sidered at the time the defend-
 ant's conditions were set or at the
 time he was issued a summons or
 citation. If there did not exist
 this vehicle whereby the prosecu-

tor may show that the risk of the
 defendant's nonappearance is
 more substantial than previously
 thought, there would be more re-
 luctance to utilize the summons or
 citation alternatives or nonfinan-
 cial conditions of release. The
 last sentence makes it clear that if
 the change in conditions results in
 detention of the defendant, then
 he must be afforded the opportu-
 nity for a detention hearing under
 Rule 344, just as if those condi-
 tions had been set initially and
 he had been unable to gain his re-
 lease.

1 (e) Violation of conditions of release. Upon motion of the
 2 prosecuting attorney and a showing that the defendant while
 3 released has willfully failed to appear as required, committed an
 4 offense involving violence to person or serious bodily injury or
 5 the risk or threat thereof, or violated a condition of his release
 6 imposed under subdivision (a), the [magistrate] may:

- 7 (1) Impose additional or different conditions under sub-
 8 division (a) or (b); or
- 9 (2) Order the defendant detained, either continuously
 10 or during specified hours.

- 11 If affidavit or testimony shows probable cause to believe that
12 the defendant would not otherwise appear at the hearing on the
13 motion, the [magistrate] by order may direct a [law enforcement
14 officer] to bring the defendant forthwith before the [magistrate].
15 If the [magistrate] sets conditions which result in detention of
16 the defendant or orders him detained, the [magistrate] shall
17 inform the defendant of his right to a detention hearing under
18 Rule 344 and, if a detention hearing will be held, set the time for
19 the hearing.

Comment

Under this subdivision, a violation of the conditions of release may result in the magistrate setting more onerous conditions or, when the circumstances warrant, in revocation of release in which case the defendant may be detained continuously or may be required to return to custody on a daily basis during specified hours. One condition, of course, is the standing condition that the defendant appear as required. Another standing condition—which thus need not be specifically set under subdivision (a)—is that the defendant not commit an offense involving violence to person or bodily injury or the risk or threat thereof. Clearly, it is permissible to condition pretrial release by a requirement that the defendant “conduct himself as a law-abiding citizen.” *State v. Cassius*, 110 Ariz. 485, 520 P.2d 1109 (1974). In addition, the defendant may be proceeded against under this subdivision because he violated some condition of release imposed under subdivision (a).

This subdivision is consistent with ABA Standards, Pretrial Release 5.7 (Approved Draft, 1968), which reads, “After hearing and upon finding that the defendant has willfully violated reasonable

conditions imposed on his release, the court should be authorized to impose different or additional conditions upon defendant’s release or revoke his release.” As stated in the Commentary thereto:

This section represents an accommodation between the decision not to propose outright preventive detention and the proposal that courts take the risk of future criminal activity into account when imposing conditions on the defendant’s release. Upon a showing that the defendant has violated a condition related either to risk of nonappearance or risk of criminal activity, the court would be authorized to revoke his release. To the extent that risk of nonappearance is involved, the power to revoke release rests on the ancient authority of a surety to arrest and surrender his principal at any time before trial. Similarly, courts have been held to have authority to revoke bail where the defendant’s continued liberty would, through intimidation or harm to witnesses or jurors, constitute a threat to the trial process itself. *Carbo v. United States*, 288 F.

2d 686 (9th Cir. 1961, *cert. denied*, 365 U.S. 861 (1961)); *cf.* Carbo v. United States, 82 S.Ct. 662, 668 (Douglas, Cir. Justice, 1962); United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961). Whatever force constitutional arguments against preventive detention have is surely diminished if the defendant has once been released but has demonstrated a deliberate intent to violate reasonable restrictions aimed at protecting public safety. The power to revoke release has been analo-

gized to the exercise of the contempt power. D.C. Crime Commission 526. If the conditions imposed on release are reasonable and within the authority of the court, the analogy is apt. But the revocation power must stand on its own feet, and its reception by the courts will depend on whether the conditions imposed are reasonable and whether procedural safeguards are employed in order to avoid distortion of the device into a camouflaged system for preventive detention.

- 1 (f) **Limited release from detention.** Upon motion of a defend-
2 ant detained under this Rule, which may be heard by the court
3 ex parte, the court for cause shown may order the defend-
4 ant released in the custody of a [law enforcement officer] or oth-
5 er appropriate person, for limited periods of time and under ap-
6 propriate conditions, to permit the defendant to prepare his de-
7 fense or for other purposes.

Comment

This subdivision gives recognition to the fact that a defendant who is unable to obtain his release may nonetheless have good cause to be released temporarily, perhaps in the custody of an officer, when such release may aid him in preparing his defense. The point has been recognized in some of the recent cases. See, *e. g.*, United States v. Reese, 463 F.2d 830, 149 U.S.App.D.C. 427 (D.C.Cir. 1972) (where limited custodial release offered only means by which the defendant could present a viable defense to a murder charge, considering defendant's good faith representation that there were witnesses who could exculpate him but that he knew them by sight

and not by name, defendant would be released in the custody of a U.S. marshal to obtain witnesses); Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) (similar facts, except that charges arising out of a schoolyard fight were pending in juvenile court, and court stressed that defendant and potential witnesses were black but defense counsel was white and would have great practical difficulty in interviewing and lining up the witnesses). Provision is made for the defendant's motion to be heard ex parte so that the defendant need not reveal matters concerning his defense to the prosecuting attorney.

- 1 (g) **Information considered.** Information offered in proceed-
2 ings under this Rule need not conform to the rules of evidence.

Comment

This subdivision, which is based upon 18 U.S.C. § 3146(f), reflects the generally accepted view that the rules governing the admissibility of evidence do not apply. This permits the magistrate or judge to consider all available relevant facts in making his determination.

In prescribing terms and conditions of release, all relevant fac-

tors may be taken into account, including the nature and circumstances of the offense charged, the weight of the evidence against the defendant, his residential, employment, or family ties, his financial condition, his character, his mental condition, his record of convictions, and his record of appearance or nonappearance at previous court proceedings.

Rule 342. [Release Agency.]

- 1 (a) **Duties.** A court, by local rule, may establish or designate
2 a release agency, and may assign to the agency appropriate du-
3 ties, including:
- 4 (1) Collecting and reporting information relevant to pre-
5 scribing terms and conditions of release;
- 6 (2) Supervising released defendants placed under the
7 supervision of the agency;
- 8 (3) Keeping account of the whereabouts of defendants
9 released without supervision;
- 10 (4) Coordinating the supervision of released defendants
11 by other organizations and persons;
- 12 (5) Collecting and reporting information as to the eligi-
13 bility, availability, and capacity of other organizations and
14 persons to supervise released defendants;
- 15 (6) Assisting released defendants in securing employ-
16 ment or necessary medical or social services;
- 17 (7) Notifying released defendants of required court ap-
18 pearances;
- 19 (8) Reporting the failure of released defendants to com-
20 ply with the conditions of their release; and
- 21 (9) Collecting and reporting information on the reliabil-
22 ity and solvency of prospective sureties on undertakings.

Comment

This gives express recognition to the power of a court to establish or designate a bail agency by local rule. It is based in part upon D.C.Code § 23-1303 and in part upon Pa.R.Crim.P. 4008(a), adopted July 23, 1973. Agencies performing the listed functions are in existence in many localities, and the services of these agencies have been of great assistance. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 131-32 (1967); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *The Courts* 41-42 (1967); National Conference on Bail and Criminal Justice, *Proceedings*, ch. 2 (1965); Institute on the Operation of Pretrial Release Projects, *Proceedings—Bail and Summons* (1966); *Proceedings of the Conference on Bail and Indigency*, 1965 U.Ill.L.F. 1.

- 1 (b) **Disclosure of information.** Information obtained from or
- 2 concerning the defendant by a release agency may not be dis-
- 3 closed to any person other than counsel for the defendant, ex-
- 4 cept as necessary to advise the appropriate [magistrate] or court
- 5 concerning prescribing or amending conditions of release.

Comment

This is quite similar to Pa.R. Crim.P. 4008(b).

Rule 343. [Approval, Forfeiture, and Satisfaction of Undertaking.]

- 1 (a) **Justification of sureties.** Every surety on an undertaking
- 2 shall justify under oath or affirmation and may be required to
- 3 describe the property by which he proposes to justify and the
- 4 incumbrances thereon, the number and amount of other under-
- 5 takings entered into by him and remaining undischarged and all
- 6 his other liabilities. No undertaking shall be approved unless
- 7 the surety thereon appears to be qualified.

Comment

This sets forth the procedures essentially the same as former for justification of sureties. It is Uniform Rule 51(d).

- 1 (b) **Forfeiture.**
- 2 (1) *Declaration.* If there is a breach of a condition of
- 3 an undertaking, the court may declare a forfeiture. The
- 4 court shall cause notice of the forfeiture to be mailed forth-

5 with to the defendant and his sureties, if any, at their last
6 known address.

7 (2) *Vacating forfeiture.* The court may direct that a for-
8 feiture be vacated in whole or in part, upon conditions the
9 court may impose, if it appears that justice does not require
10 the enforcement of the forfeiture.

11 (3) *Enforcement.* If a forfeiture is not vacated within
12 [one month] after declaration of the forfeiture, the court on
13 motion shall direct the entry of a judgment of default. By
14 entering into an undertaking an obligor submits to the ju-
15 risdiction of the court and irrevocably appoints the [clerk
16 of the court] as his agent upon whom any papers affecting
17 his liability may be served. The liability may be enforced
18 on motion without an independent action. The motion and
19 such notice of the motion as the court prescribes may be
20 served on the [clerk of the court], who shall forthwith mail
21 copies to each obligor at his last known address.

22 (4) *Remission.* After entry of judgment, the court may
23 remit the forfeiture in whole or in part under the conditions
24 for vacating a forfeiture under paragraph (2).

Comment

Subdivision (b) concerns for- of a forfeiture by a judgment,
feiture upon a breach of a condi- and the remission of such a judg-
tion of an undertaking, including ment. It is essentially the same
the declaration and setting aside as former Uniform Rule 51(e).
of a forfeiture, the enforcement

1 (c) *Exoneration.* If the condition of an undertaking has been
2 satisfied or a forfeiture has been vacated or remitted in whole, the
3 court shall exonerate the obligors and release any property
4 deposited. If a forfeiture has been vacated or remitted in part,
5 the court shall correspondingly exonerate the obligors and release
6 part of any property deposited. A surety on an undertaking may
7 be exonerated and obtain a release of property deposited at any
8 time by a deposit of cash in the amount of the undertaking or by
9 a surrender of the defendant into custody.

Comment

This subdivision, concerning ex- ly the same as former Uniform
oneration of obligors, is essential- Rule 51(f).

Rule 344. [Detention Hearing.]

- 1 (a) Right to hearing. A defendant has a right to a detention
2 hearing if he is detained because of:
 - 3 (1) A continuing inability to meet conditions of release
4 set under Rules 321(c), 341(d), or 341(e) ; or
5 (2) An order of detention under Rule 341(e).

Comment

Rule 344 generally

It is commonly asserted that there "are two functions served by the preliminary hearing which * * * are central to any system of fair criminal procedure: (1) screening of the charge in an adversary hearing to determine whether the defendant should be required to stand trial; and (2) sufficient discovery of the prosecution's case to enable the defendant to prepare for trial." ALI Model Code of Pre-Arrestment Procedure § 330.1, Note (T.D. #5, 1972). This is a fair statement of the use to which the preliminary hearing is put in current practice in most jurisdictions. However, it does not describe the function to be served by the detention hearing in these Uniform Rules.

To understand why this is so, it is necessary to consider provisions appearing elsewhere in these Rules. The first function listed above, preventing trial when there is not evidence sufficient to justify a trial, is primarily served by Rule 481, *infra*, which permits the defendant to move for a pretrial judgment of acquittal, after which the court must decide upon the basis of the materials which were subject to discovery whether the prosecutor's evidence would sup-

port a guilty verdict; if it would not, the defendant is acquitted and the state is precluded from instituting a subsequent prosecution for the same offense. The second function listed above, discovery, is served by the liberal discovery provisions of these Rules.

By contrast, the detention hearing provided for in this Rule is primarily intended to implement fully the constitutional protections against unreasonable seizures of the person and excessive bail. This explains why the hearing is available only to defendants in custody, and also why the inquiry is not limited to probable cause but also extends to the need to continue custody. Compare Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.5(3) (1973).

While most court decisions have viewed the preliminary hearing as a discovery device or a check against improper prosecution, the functions to be performed by this Rule have also received attention in recent years. In *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387, holding the Alabama preliminary hearing to be a "critical stage" for right-to-counsel purposes, the Court emphasized that "counsel can also be

influential at the preliminary hearing in making effective arguments for the accused on such matters as * * * bail." The Court has also indicated that the magistrate's probable cause determination is important as a means for protecting Fourth Amendment values; this theme runs through *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), which, it must be noted, were decided on the basis of the Court's supervisory power over federal criminal justice. In *McNabb*, it was noted that virtually all states by statute require prompt appearance of arrestees before a judicial officer, and this legislation was said to provide "an important safeguard" by "requiring that the police must with reasonable promptness show legal cause for detaining arrested persons." *Id.* at 342, 344. And in *Mallory*, it was observed that police may arrest only on probable cause and that an arrested person should be taken "before a judicial officer as quickly as possible so that * * * the issue of probable cause may be promptly determined." *Id.* at 454. Similarly, some members of the Court have attempted to explain the fact that "this Court has regularly affirmed the validity of warrantless arrests without any indication whatever that there was no time to get a warrant" (in contrast to the Court's view concerning search for and seizure of property) on the ground that the issue of probable cause "can be de-

termined very shortly after the arrest." See *Chimel v. California*, 395 U.S. 752, 779, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (White, J., joined by Black, J., dissenting).¹

The need for a prompt post-arrest probable cause determination because of Fourth Amendment considerations has also received attention in recent lower court decisions. See, e. g., *Brown v. Fauntleroy*, 143 U.S.App.D.C. 116, 442 F.2d 838 (D.C.Cir. 1971); *Cooley v. Stone*, 134 U.S.App.D.C. 317, 414 F.2d 1213 (D.C.Cir. 1969); *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D.Fla.1971).

While it is thus true that by virtue of Rules 221(c) and 311, *supra*, in every case covered by this Rule there has already been a finding by a magistrate of probable cause and need for custody, it must be noted that this has been an ex parte determination. This is of necessity so in the arrest warrant situation, and will most likely be the case under Rule 311 as well (which permits a finding on the basis of affidavit and does not expressly authorize the presentation of evidence on behalf of the defendant). The fundamental assumption underlying this Rule is that the ex parte determination should not suffice in those instances in which the defendant has been ordered detained for violation of the conditions of his release under Rule 341(d), *supra*, or has been unable to meet conditions of release set under Rules 321(c), 341(c), or 341(d), *supra*.

Support for this assumption is to be found in the recent Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). At issue in *Morrissey* was the question of what procedures are required as a matter of due process in revoking parole. The Court, in an opinion by Burger, C. J., held that while "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations," due process requires "two important stages in the typical process of parole revocations." The first of these is a preliminary hearing at the place of arrest, and the second is a revocation hearing at the correctional institution.² As to the first, the Court observed:

There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser v. Reed*, 115 U.S.App.D.C. 254, 318 F.2d 225 (1963). Such an inquiry

should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. Cf. *Goldberg v. Kelley*, 397 U.S. at 267-271 [*Id.* at 485.]

The court in *Morrissey* then proceeded to identify the necessary characteristics of this preliminary hearing: (1) it need not be before a judicial officer, and may be before "someone such as a parole officer other than the one who has made the report of parole violations or his recommended revocation"; (2) the parolee must be given notice of the hearing, its purpose, and the parole violations alleged; (3) at the hearing "the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer"; (4) on request of the parolee, "persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence;" except that the hearing officer need not subject an informant to confrontation and cross-examination if he would be subjected to risk of harm; and (5) the hearing officer must make a summary or digest of what transpires at the hearing and must set forth the reasons for his determination and the evidence he relied upon.

It is less than clear what impact *Morrissey* will ultimately have in relation to the longstanding rule that a preliminary hearing is not constitutionally required in criminal cases.³ It might well be argued that if such a hearing is required in the parole revocation process, where some lesser degree of due process is required than in regular criminal proceedings, then it follows that no less will suffice in a criminal case. On the other hand, there are reasons why it might be concluded that a *Morrissey*-type hearing is more important in parole revocation proceedings than in pretrial proceedings of a criminal case, so that it is required by due process in the former but not in the latter.⁴

In any event, this Rule is consistent with the spirit of the *Morrissey* decision. By providing for an adversary hearing for defendants who have been ordered detained or who have been unable to meet conditions of release, this Rule reaches those defendants who find themselves in circumstances most closely analogous to those of the parolees discussed in *Morrissey*. (The Court in *Morrissey* emphasized the need for a hearing "to warrant the parolee's continued detention" where there would be a "substantial time lag between the arrest and the eventual determination by the parole board.") Although the Rule does not provide for an adversary hearing in other cases, this does not appear to run contrary to any foreseeable application of *Morris-*

sey to the pretrial proceedings in criminal cases.⁵

Subdivision (a)

Not limited to felony cases. The adversary detention hearing provided under this Rule is not limited to cases in which the crime charged is a felony. *Accord*, Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.5(3) (1973). Such a limitation is not uncommon under existing rules and statutes on preliminary hearings, *e. g.*, Calif. Penal Code § 859b; La. Code Crim.P. art. 291; Mont. Rev. Codes § 95-1201; Tex. Code Crim.P. art. 16.01; Wis. Stat. § 970.03, although the limitation is sometimes expressed in terms of cases not triable by the magistrate, *e. g.*, F. R. Crim.P. 5(c); 38 Ill. Rev. Stat. § 109-1(b)(3).

Whatever one might think about the wisdom of confining the right to a traditional preliminary hearing to felony cases, it seems clear that the right to a detention hearing under these Rules should not be so limited. In view of the purposes of this hearing, as described above, misdemeanor defendants are equally deserving of its protection. Extending the right to a detention hearing to misdemeanor defendants will not impose a great burden upon magistrates, as relatively few of such defendants will come within the terms of this Rule. A misdemeanor defendant who does not want his trial delayed by the scheduling of a detention hearing could waive or not demand such a hearing, as provided in subdivision (b), *infra*.

Limitation to defendants in custody. Under this Rule, in contrast to Rule 481, *infra*, on the pretrial judgment of acquittal, the procedure is available only if the defendant is detained, either because he has been ordered detained or because he has been unable to meet conditions of release.

Existing rules and statutes on preliminary hearings do not limit the right to defendants in custody, which is certainly understandable in light of the traditional functions of the preliminary hearing, as discussed above. But in these Rules those functions are more directly served by other provisions which are not limited to defendants in custody. This Rule is primarily intended as a protection against unconstitutional and unnecessary pretrial detention, and thus is properly limited to the situations indicated. The defendant who has obtained his pretrial release only by meeting the financial or other conditions imposed by the magistrate at the defendant's in-custody appearance has not gone without protection; he has received an *ex parte* determination as to probable cause and need for taking custody under either Rule 221(b) or Rule 311. See *M. A. P. v. Ryan*, 285 A.2d 310 (D.C.App.1971), holding that there is "nothing fundamentally unfair in not affording the juvenile the right to a probable cause hearing when the juvenile is not detained prior to trial."

Right notwithstanding indictment. Under present law, the prosecutor may cut off a defendant's right to a preliminary hearing either by securing an indictment

before arrest or by obtaining one after arrest but before the scheduled time of the preliminary. See, *e. g.*, *United States v. Gilchrist*, 347 F.2d 715 (2d Cir. 1965); *Burke v. Superior Court In and For Pima County*, 3 Ariz. App. 576, 416 P.2d 997 (1966). The notion is that the function of the preliminary—to test probable cause—is mooted by a grand jury indictment, which itself furnishes probable cause.

It has been questioned, however, whether the defendant's right to a preliminary hearing "should depend upon the outcome of a race between counsel * * * and the grand jury acting upon the charge." *Blue v. United States*, 119 U.S.App.D.C. 315, 342 F.2d 894 (D.C.Cir. 1964), certiorari denied 380 U.S. 944, 85 S.Ct. 1029, 13 L.Ed.2d 964. ALI Model Code of Pre-Arraignment Procedure § 350.1(1) (T.D. # 5, 1972) rejects the position under existing law, which is explained in the Commentary in these terms: "Because of the importance the Code puts on the screening function of the preliminary hearing and because of the recognition of discovery as a legitimate function of the hearing in a system that does not provide for depositions in criminal cases * * * the grand jury indictment is not an adequate or fair substitute for a preliminary hearing."

Because the detention hearing under these Rules performs different functions, the failure to limit the hearing to cases in which the defendant has not been indicted rests upon somewhat dif-

ferent grounds. The hearing is intended to comply with the spirit of the *Morrissey* decision, *supra*, and thus the underlying assumption is that constitutional protection against unnecessary custody is best served by a prompt adversary hearing. This is no less true where the prosecuting attorney has first obtained an indictment in secret ex parte proceedings. Moreover, the hearing un-

der these Rules is not limited to the probable cause issue, and thus the argument that the matters to be considered at the hearing have been mooted by the indictment is not valid.

It should be kept in mind that under these Rules offenses may be prosecuted by indictment only to the extent required by state constitution.

¹ It has been noted, however, that such comments as these are apparently based upon an erroneous assumption that a probable cause determination is commonly made promptly upon the arrestee's appearance before a judicial officer. See Advisory Committee Note to Proposed Amendment to F.R.Crim.P. 5 (Preliminary Draft, 1970); LaFave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 Mich.L.Rev. 987, 996-99 (1965).

² The latter must include: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 489.

³ An indicted defendant is not constitutionally entitled to a preliminary hearing. As held in *Goldsby v. United States*, 160 U.S. 70, 73, 16 S.Ct. 216, 40 L.Ed. 343 (1895): "The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guarantee to be confronted by the witnesses, by mere statement demonstrates its error."

Goldsby left open the question whether a defendant proceeded against only by an information is entitled to a probable cause hearing. An affirmative answer was suggested by the Supreme Court when it first held, in *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), that grand jury indictment was not required as a matter of due process. At issue was a California constitutional provision that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." The Court held: "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." It was specifically noted that the California preliminary examination procedure "carefully considers and guards the substantial interest of the prisoner."

This language in *Hurtado* intimated that due process does not require indictment if (and only if) some other procedure is available to ensure that

defendants are not put to trial (at least in serious cases) without an advance determination of probable cause. However, the Court ruled otherwise in *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913). This case involved a challenge of the former Oregon procedure whereby prosecution by information was permitted without any verification other than the prosecutor's official oath and also without any requirement of a preliminary examination as a condition precedent. The Court summarily dismissed the defendant's argument: "The distinction sought to be drawn between the present case and that of *Hurtado*, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable. * * * [S]ince, as this court has so often held, the 'due process of law' clause does not require the State to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney, is obligatory upon the States." *Lem Woon* was later relied upon in *Ocampo v. United States*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914), upholding, as consistent with the due process requirement in the Philippines constitution, a procedure for prosecution by information, without a preliminary hearing, where the information was subscribed and sworn to by the prosecutor on the basis of the summoning and examining of witnesses.

⁴ The *Morrissey* case itself provides little assistance in this regard, but the following arguments might be made:

(a) The Court in *Morrissey* emphasized the "substantial time lag between the arrest and the eventual determination by the parole board" and that often "the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation," and went on to say that "given these factors" due process requires a probable cause determination promptly after arrest. Later, the Court added that the probable cause determination "would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." (The importance of this is highlighted by the strong disagreement of Justice Douglas on this point; he would require that "if a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail.") Thus, it might be argued that a probable cause determination of the *Morrissey*-type is uniquely important in the parole revocation process because of the serious consequences which flow from the first decision of the parole officer: incarceration without opportunity for release on bail or otherwise away from the parolee's home, in the state prison for a substantial time until the parole board acts on the case. By contrast, in a criminal case the defendant will have the opportunity to obtain his release on bail and, at most, will be held in the local jail. (This distinction may lose some of its force when account is taken of the fact that many defendants are unable to gain pretrial release and are held until trial—as to which there may also be a "substantial time lag"—in the local jail, where conditions may be as bad or even worse than in the state prison.)

(b) It may also be argued that the nature of the parole revocation process is such that there is a greater need for an immediate marshalling and preservation of relevant evidence than in a criminal case. In *Morrissey* the Court emphasized the need for an inquiry "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available," and noted that the revocation hearing held later might well be "at a place distant" from the point of the arrest or alleged violation. (By contrast, a criminal trial is held in the locale of the alleged offense.) If witnesses are not immediately tracked down and called in to give their story, it may be quite difficult to ensure their appearance some months later at a hearing held at a distant part of the

state. Also, the parolee is in a less favorable position than the criminal defendant in terms of his ability to keep track of witnesses and evidence, for (i) he will be in custody during the entire interval, (ii) he will be held at a distant place, making it much more difficult for him to communicate with friends, relatives, and counsel, and (iii) he may not have the assistance of counsel (the Court in *Morrissey* declined to pass on that issue).

(c) In addition, it might be argued that a *Morrissey*-type hearing is of greater importance, in the due process sense, in the parole revocation setting because the chances of an initial mistaken judgment by the supervising parole officer are greater than an error by the prosecutor in deciding to commence a prosecution. For one thing, the parole officer is not a lawyer and may not understand what constitutes proof of a violation or precisely what conduct is proscribed. The chance of error as to the latter is compounded by the fact (as noted in *Morrissey*) that parole conditions restrict parolees' "activities substantially beyond the ordinary restrictions imposed by law on an individual citizen" and are often quite vague, such as "the typical requirement that the parolee avoid 'undesirable' associations or correspondence." Also, the prosecutor, confronted with the ultimate necessity of proving the defendant's guilt beyond a reasonable doubt, will be reluctant to proceed in a doubtful case, but the parole officer is not similarly restrained—for this reason, as noted in *Morrissey*, revocation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."

⁵ See Note 4 *supra*.

- 1 (b) **Scope of hearing.** The detention hearing shall include:
- 2 (1) Unless waived by a defendant with counsel, a deter-
- 3 mination of whether there is no less onerous condition or
- 4 combination of conditions under Rule 341(a) or (b) which
- 5 will reasonably assure the defendant's appearance as re-
- 6 quired and the safety of any person or the community and,
- 7 if the defendant is detained by reason of a ruling under
- 8 Rule 341(e), the additional determination of whether clear
- 9 and convincing evidence shows that the defendant committed
- 10 conduct justifying the ruling; and
- 11 (2) If the defendant has made a timely motion therefor
- 12 or has waived counsel, a determination of whether there is
- 13 the probable cause to believe that an offense has been com-
- 14 mitted and that the defendant committed it required by
- 15 Rule 221(c). The motion is timely if made at or before
- 16 the time fixed for the detention hearing on the circumstan-
- 17 ces other than probable cause or the time at which that
- 18 hearing is waived.

Comment

This subdivision deals with the the wishes of the defendant. Un-
 scope of the hearing, which may der clause (1), there is to be
 vary somewhat depending upon a determination of whether there
 the circumstances of the case and is no less onerous condition or

combination of conditions under Rule 341(a) or (b) which will reasonably assure the defendant's presence as required and the safety of any person or the community. In addition in those cases where the defendant is detained by reason of a ruling under Rule 341(e), there must also be a determination by clear and convincing evidence that the defendant engaged in the conduct justifying that ruling.

Clause (1)(ii), by comparison, applies only when the defendant is in custody under a detention order. Two additional determinations are then called for: first, that there is clear and convincing evidence that the defendant violated a condition of his release, as alleged by the prosecutor under Rule 341(d); and second, whether there is no less onerous condition or combination of conditions of release under Rule 341(a) which will reasonably assure the safety of any person or the community.

Clause (2) covers the traditional probable cause determination. It applies to defendants in custody under a detention order and also defendants in custody because of inability to meet their financial conditions of release. Statutes and court rules typically state, without explanation, that it is "probable cause" which is to be determined at the preliminary examination. Because this is the same term which is used to describe the amount of evidence needed to arrest, the question has

been raised whether the same quantum of evidence is needed at the preliminary as is required for a lawful arrest. See Miller, *Prosecution* 86-87 (1970); LaFave, *Arrest* 324-27 (1965). It is sometimes said that the preliminary hearing probable cause is "approximately the same" test as that required for issuance of an arrest warrant, *e. g.*, *People v. Stout*, 66 Cal.2d 184, 424 P.2d 704, 57 Cal.Rptr. 152 (1967). But some commentators, *e. g.*, Weinberg and Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing*, 67 Mich.L.Rev. 1361, 1369-99 (1969); Note, 1963 Wash.U.L.Q. 102, have questioned this on the ground that the purpose of the preliminary examination should be to determine whether there is evidence sufficient to justify subjecting the defendant to the expense and inconvenience of trial, that is, whether there is a probability of conviction. Consistent with this view is the approach taken in some jurisdictions, either as a matter of law or as a matter of practice, that probable cause is to be determined by the so-called "prima facie case" test—whether a trial judge would overrule a motion to dismiss for failure to make a submissible case. Miller, *supra*, at 88. Also consistent with this position is ALI Model Code of Pre-Arrestment Procedure § 330.5(3) (T.D. #5, 1972).

The specific reference back to Rule 221(c), *supra*, makes it clear that the term "probable cause"

refers to the same test as applied when an arrest warrant is sought. However one might come out in the debate referred to above in the context of the traditional preliminary hearing, it is clear that this is the proper result under this Rule, for (as discussed at length in the Comment to subdivision (a), *supra*) one major function of the detention hearing is the protection of Fourth Amendment rights. The question of whether the defendant may be forced to go to trial is confronted later in the Rule 481 pretrial judgment of acquittal procedure, where the higher standard is applied.

The clause (1) determinations are to be made unless waived by the defendant, while the clause (2) determination is to be made only upon demand of the defendant. This distinction rests upon the assumption that detained defendants will not often wish to question the existence of probable cause, while they will most likely want a determination of the other need-for-custody considerations.

Both the demand and waiver provisions are qualified as to a defendant without counsel. Under clause (1), waiver is permitted only by a defendant with counsel. Under clause (2), no demand is required if the defendant has waived counsel. ALI § 330.1

(2) provides that waiver of preliminary examination is possible only by a defendant represented by counsel; as the draftsmen noted: "It is particularly important in the case of an unrepresented defendant to have some judicial test of the evidence at least at one stage in the case before trial." An additional consideration is the fact that an unrepresented defendant may not make an intelligent waiver. See Miller, Prosecution: The Decision to Charge a Suspect with a Crime ch. 6 (1969), noting the subtle influences which are used to obtain waivers from uncounseled defendants. For these reasons, the practice has developed in some jurisdictions not to accept a waiver of the preliminary from a defendant not represented by counsel. *Ibid.*

Former Uniform Rule 6(c) states: "Notwithstanding a waiver of preliminary examination, the magistrate on the demand of the prosecuting attorney shall examine the witnesses for the State and have their testimony reduced to writing or taken in shorthand and transcribed." No comparable provision has been included here as to the detention hearing; if the prosecutor desires to preserve testimony he may take advantage of the procedures set forth in Rule 431, *infra*.

- 1 (c) Time of hearing. The detention hearing shall be held
- 2 within a reasonable time not later than [five] days after the com-
- 3 mencement of a defendant's detention, but:
- 4 (1) With the consent of the defendant and upon a show-
- 5 ing of cause, taking into account the public interest in the
- 6 prompt disposition of criminal cases, the hearing may be
- 7 continued one or more times; and

(2) In the absence of consent by the defendant, the hearing may be continued only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Comment

Time limits

In a number of jurisdictions the rules or statutes express the policy that the preliminary hearing should be held rather promptly following the appearance before the magistrate, but do not set a specific outside limit on the time interval. See, *e. g.*, La.Code Crim.P. art. 293 ("promptly"); Maine R.Crim.P. 5(c) ("within a reasonable time"); N.Y.Crim.P. Law § 180.10(2) ("a prompt hearing"). Elsewhere time limits fixed in terms of days are specified. See *e. g.*, F.R.Crim.P. 5(c) ("within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and not later than 20 days if he is not in custody"); Alaska R.Crim.P. 5(e)(2)(iii) (same); Calif.Penal Code § 859b ("not less than two days, excluding Sundays and holidays," and, if the defendant is in custody, "within 10 court days"); Colo.R.Crim.P. 5(c), 5(c)(1) ("within thirty days"); Fla.R. Crim.P. 3.131(b) (within 72 hours except where defendant not in custody or in capital or life case seven days); Nev.Rev.Stat. § 171.196 ("within 15 days"); Pa.R.Crim.P. 119(f) ("not less than three nor more than ten days after the preliminary arraignment"); Wis.Stat. § 970.03(2) ("within 20 days after the initial appearance of the defend-

ant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of \$500"). ALI Model Code of Pre-Arraignment Procedure § 310.5(3) (T.D. #5, 1972) provides for a hearing "within ten days if the defendant is in custody and within thirty days if he is not in custody."

This subdivision follows the most recent revision of the Federal Rules and the ALI provision just cited in setting an outside time limit which must be met, except when extended due to unusual circumstances. Although there is always some danger that fixed time limits will be taken as the rule of thumb in practice, such practice would not be consistent with this Rule, which (unlike some of the provisions quoted above) does not merely require that the hearing occur within that time. Fixing a usual outer limit is deemed preferable to a mere "reasonable time" requirement standing alone, given the inherent ambiguity in that phrase. The period of five days was selected on the assumption that a longer time would be inconsistent with the purposes of the hearing, and that a shorter time might be unrealistic in practice, leading to adjournment as a matter of routine. As the draftsmen of the ALI provision noted, "it seems

preferable to provide periods that would enable the magistrate to exert some pressure against protracted delay."

Extensions

Existing rules and statutes commonly recognize that it is sometimes necessary to delay the hearing longer than usually is allowed. See, *e. g.*, Calif. Penal Code § 861 (postponement allowed "for good cause shown," but not "for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant"); Colo. R. Crim. P. 5(c)(1) (continuance upon showing of "good cause"); Nev. Rev. Stat. § 171.196

(extension "for good cause shown"); Pa. R. Crim. P. 1119(f) (extension "for cause shown"); Wis. Stat. § 970.03(2) (extension "on stipulation of the parties or on motion and for cause").

This subdivision does not use the traditional language; instead, it follows very closely the language in recently revised F.R. Crim. P. 5(c) and Alaska R. Crim. P. 5(e)(2). This language is preferred, as it stresses (a) that the process may not be delayed by a continuance at this point merely because the defendant consents, and (b) that in the absence of such consent a particularly strong showing must be made by the prosecuting attorney.

- 1 (d) **Procedures.** The [magistrate] shall issue process
- 2 necessary to summon witnesses within the State for either the
- 3 prosecuting attorney or the defendant. The prosecuting attorney
- 4 shall offer evidence in support of the continuation of the
- 5 defendant's custody. The defendant may offer evidence in his
- 6 behalf. Each witness, including a defendant testifying in his
- 7 own behalf, shall testify under oath or affirmation and may be
- 8 cross-examined. The [magistrate] may make any order with respect
- 9 to the conduct of the hearing that he could make at the
- 10 trial of a criminal case.

Comment

Process for witnesses

Existing preliminary hearing rules and statutes which go into some detail on procedures often state that the magistrate shall issue process as may be necessary for the summoning of witnesses for either side. See, *e. g.*, Calif. Penal Code § 859b; Fla. R. Crim. P. 3.131(d); Pa. R. Crim. P. 122.

Cf. Alaska R. Crim. P. 5.1(c). Former Uniform Rule 6(c) contains such a provision. That provision is carried over into this Rule on the detention hearing on the ground that it is wise to give explicit recognition of the right of compulsory process for the benefit of both the prosecuting attorney and the defendant. See

Note, 51 Iowa L.Rev. 164, 170 (1965), pointing out that some magistrates feel they do not have the power to subpoena witnesses.

ant may testify, but it is wise to make this clear, as is done in ALI § 330.4(5) and in the Alaska and Florida rules just cited.

Role of prosecutor

Although seldom treated in existing rules, it seems wise to take note of the prosecutor's role so as to complete the chronological picture of what is to happen at the detention hearing. Cf. ALI Model Code of Pre-Arraignment Procedure § 330.4(1) (T.D. #5, 1972), which state that the state shall be represented by the district attorney. As observed in the Note to that section: "In some jurisdictions, the State is not represented by an attorney and the preliminary hearing is handled by the arresting officer or by the judge."

Cross-examination

The right of the defendant to cross-examine the witnesses against him is frequently given explicit recognition. See, *e. g.*, F.R.Crim.P. 5.1(a); Alaska R. Crim.P. 5.1(b); Calif. Penal Code § 865; Fla.R.Crim.P. 3.131(e). Less common are provisions expressly recognizing the prosecution's right to cross-examine any defense witnesses, see *e. g.*, Wis. Stat. § 970.03(5), including the defendant if he testifies, see *e. g.*, Alaska R.Crim.P. 5.1(c); Fla.R. Crim.P. 3.131(f).

Defendant may introduce evidence

Provisions to the effect that the defendant may introduce evidence on his own behalf are quite common. See, *e. g.*, F.R.Crim.P. 5.1(a); Alaska R.Crim.P. 5.1(c); Calif. Penal Code § 866; Colo.R.Crim.P. 5(c)(2); Fla.R. Crim.P. 3.131(f). It is less often expressly stated that the defend-

Magistrate's conduct of the hearing

The last sentence hereof is substantially identical to that of ALI § 330.4(6). Under this provision, the magistrate may, for example, provide for the exclusion and separation of witnesses, see Alaska R.Crim.P. 5.1(f); Fla.R.Crim.P. 3.131(g), and may decline to admit evidence which is irrelevant or cumulative.

- 1 (e) **Testimony by defendant.** If the defendant testifies at the
- 2 hearing, he may nonetheless decline to testify at trial, in which
- 3 case his testimony at the hearing is not admissible in evidence.
- 4 If the defendant testifies at trial, his testimony at the detention
- 5 hearing is admissible in evidence to the extent permitted by law.

Comment

No waiver of privilege at trial

The first part of the first sentence accords with the general rule that the defendant's giving of

testimony at preliminary proceedings does not constitute a waiver of his privilege not to testify at trial, 8 Wigmore, Evidence § 2276

(McNaughton rev. 1961). See, e. g., *Overend v. Superior Court of City and County of San Francisco*, 131 Calif. 280, 63 P. 372 (1900) (testimony by defendant at preliminary hearing); *People v. Williams*, 25 Ill.2d 562, 185 N. E.2d 686 (1962) (testimony of defendant on motion to suppress physical evidence); *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 133 N.W.2d 753 (1965), certiorari denied 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed.2d 1039 (testimony of defendant on motion to suppress confession).

Admissibility of testimony at trial

Generally, it appears that testimony given by the defendant at preliminary proceedings is admissible against him at trial; see Wigmore, *supra*. Thus, it has been held that testimony given by the defendant at a preliminary hearing may be admitted at his trial without conflicting with his exercise of the privilege at the trial. *Bennett v. State*, 68 Fla. 494, 67 So. 125 (1914).

However, account must be taken of *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L. Ed.2d 1247 (1968), where the Court held that testimony given by a defendant in order to establish his standing to object to illegally seized evidence may not be used against him at his trial on the question of guilt or innocence:

Those courts which have allowed the admission of testimony given to establish standing

have reasoned that there is no violation of the Fifth Amendment's Self-incrimination Clause because the testimony was voluntary. As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. [*Id.* at 393-94.]

It might be argued that the analysis in *Simmons* supports the position that testimony given by a defendant at a detention hearing should never be admissible against him at trial. Given the

fact that the hearing is intended primarily to protect the constitutional rights to non-excessive bail and to be free of unreasonable seizures, the contention might be made that the defendant should be allowed to testify in support of those rights without waiving the privilege. Otherwise, so the argument goes, one constitutional right would "have to be surrendered in order to assert another." Yet, the analogy to *Simmons* is hardly perfect. In *Simmons*, the defendant found himself in a particularly troublesome dilemma, as his Fourth Amendment claim could not be considered at all unless he first established his standing, and the kind of testimony required to establish standing (that the defendant owned the suitcase in which the implements and fruits of a robbery were found) was certain to be extremely damaging. The Court placed great stress upon these two factors. By contrast, testimony by the defendant is not inherently necessary to the protection of his constitutional rights at the detention hearing, and such testimony is not of necessity prejudicial in character. Indeed, one would ordinarily expect the testimony to be exculpatory in nature.

For this reason, the *Simmons* rule is not adopted in this subdivision. Rather, the defendant's testimony at the hearing is barred from the trial only if the defendant declines to take the stand; otherwise it is admissible to the extent permitted by law. This is an appropriate compromise between a *Simmons*-type rule and the general rule of admissibility. The defendant who elects to take the stand is thus not free from impeachment if he relates a story which is inconsistent with his prior testimony. On the other hand, a defendant who prefers not to take the stand at trial may follow that preference rather than take the stand in an effort to explain away his prior testimony. Were it otherwise in the latter instance, there would be a significant (though perhaps not unconstitutional) "chilling" of his right to remain silent. Cf. *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972), holding that a statute requiring the defendant to testify before any other testimony for the defense is heard violates the privilege against self-incrimination.

(f) **Evidence.** Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the detention hearing. Hearsay evidence may be received, if there is a substantial basis for believing:

- (1) That the source of the hearsay is credible;
- (2) That there is a factual basis for the information furnished; and

8 (3) If the evidence concerns whether there is probable
9 cause to believe that an offense has been committed and
10 that the defendant committed it, that it would impose an
11 unreasonable burden on one of the parties or on a witness
12 to require that the primary source of the evidence be pro-
13 duced at the hearing.

Comment

Illegally obtained evidence

The first sentence hereof corresponds to a provision to the same effect in F.R.Crim.P. 5.1(a) and is consistent with existing law. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). But see ALI Model Code of Pre-Arraignment Procedure § 330.3 (T.D. #5, 1972).

As noted in the Advisory Committee Note to Federal Rule 5.1: "Allowing objections to evidence on the ground that evidence has been illegally obtained would require two determinations of admissibility, one before the United States magistrate and one in the district court. The objective is to reduce, not increase, the number of preliminary motions." Moreover, if motions to suppress were to be ruled upon at the detention hearing, this would tend to delay the holding of the hearing because of the need to obtain the presence of additional witnesses. And as acknowledged in the Note to ALI § 330.3, in most cases "it would be unrealistic and unworkable to expect the suppression issue to be resolved at the preliminary hearing unless the preliminary hearing were to be postponed until there had been an opportunity for the defense to engage in enough discovery to know what possibly excludable evidence will be offered by the prosecutor and

what grounds may be available to the defendant for suppression."

The position taken herein on this point is not really inconsistent with ALI § 330.3, as the preliminary hearing under the ALI provisions serves a different function; the question is whether the prosecution has evidence sufficient to convict, and dismissal normally bars subsequent prosecution for the same offense. Thus, the ALI preliminary is more akin to the motion for a pretrial acquittal provided for in judgment of Rule 481, *infra*, which is determined by the trial court and which may be made subsequently to determination of any suppression motion.

Hearsay

In most jurisdictions the rules of evidence do not apply to the preliminary hearing, *e. g.*, *Delay v. Brainard*, 182 Neb. 509, 156 N.W.2d 14 (1968); *People v. Jones*, 75 Ill.App.2d 332, 221 N.E.2d 29 (1966), although there is some authority to the contrary, *e. g.*, *Goldsmith v. Sheriff of Lyon County*, 85 Nev. 295, 454 P.2d 86 (1969). The issue is seldom dealt with in rules and statutes dealing with preliminary hearings (*but see* F.R.Crim.P. 5.1(a), providing that "the finding of probable cause may be based upon hearsay evidence in whole or in part";

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Alaska R.Crim.P. 5.1(d), providing that "the admissibility of evidence other than written reports of experts shall be governed by Criminal Rule 26 [evidence]"; Colo.R.Crim.P. 5(c)(2), providing that the magistrate "may temper the rules of evidence in the exercise of sound judicial discretion"), and as a result the practice varies considerably. For example, magistrates may generally apply one rule of evidence (*e. g.*, requiring the establishment of corpus delicti before admitting defendant's confession) while ignoring another (*e. g.*, hearsay). See Note, 1963 Wash.U.L.Q. 102 at 118.

The second sentence is quite similar to ALI Model Code of Pre-Arrestment Procedure §

330.4(4). Cf. Proposed Amendment to F.R.Crim.P. 5.1(a) (Preliminary Draft, 1970) (not ultimately adopted in same form).

In support of permitting use of hearsay under the circumstances described in this subdivision, it may be observed that: (1) such hearsay will provide a reliable basis for decision; (2) were the rule otherwise magistrates would have to be equipped to deal with the hearsay rule and all the subtle exceptions thereto; (3) were the rule otherwise witnesses would be more reluctant to assist police because of the need to make an additional appearance in court; and (4) one of the issues before the magistrate is probable cause, as to which hearsay has traditionally been accepted.

- 1 (g) **Finding and disposition.** If the [magistrate] makes a
2 determination adverse to the prosecuting attorney under subdivi-
3 sion (b), he shall order the defendant released on terms and con-
4 ditions appropriate under Rule 341, but the [magistrate] shall
5 not require an undertaking under Rule 341(b) with which
6 the defendant is unable to comply. Otherwise, he shall con-
7 tinue the previous conditions of release or order of detention.
8 [If the defendant's detention is continued, the defendant may
9 move the court having jurisdiction to try the offense with which
10 he is charged to amend the order; the motion shall be deter-
11 mined promptly.]

Comment

The first sentence deals with the disposition when the magistrate "makes a determination adverse to the prosecuting attorney under subdivision (b)." Such a determination would be any of the following: as to any defendant who made the necessary request, that there is not probable cause; as to a defendant unable to meet

financial conditions, that less onerous conditions will reasonably assure the presence of the defendant; and, as to a defendant in custody under a detention order, either that there is not clear and convincing evidence that the defendant engaged in the conduct alleged by the prosecutor under Rule 341 (d) or that less onerous conditions

will reasonably assure both the presence of the defendant and the safety of any person or the community.

If a determination adverse to the prosecutor is made, then the magistrate is required to release the defendant on appropriate terms and conditions, except that he may not require an undertaking under Rule 341(b) which the defendant cannot meet. This means that whenever there is a determination adverse to the prosecutor, the defendant will gain his release.

In support of the conclusion that only release from custody should follow a finding of no probable cause at the detention hearing, the following observations may be made: (1) a defendant not then in custody is not entitled to an adversary hearing on the probable cause issue at all, so merely requiring release upon a finding of no probable cause places the previously detained defendant in a situation comparable to other defendants; (2) even if dismissal of the charge were a consequence, under these Rules the prosecutor could easily begin anew merely by starting over without custody of the defendant, in which case there would be no probable cause determination in an adversary setting; (3) the defendant, whether or not in custody, will have an opportunity to challenge the prosecutor's decision to go to trial by resort to the Rule 481 pretrial judgment of acquittal procedure; and (4) the prosecutor is unlikely to proceed further with a case in which no probable cause was found, unless he knows of other evidence.

No appeal by defendant

No provision is made for appeal by the defendant. See ALI Model Code of Pre-Arrestment Procedure § 330.6 (T.D. # 5, 1972) which reads in part: "The court's decision upon preliminary hearing that there is reasonable cause to hold the defendant for trial shall not be subject to appeal by the defendant." As observed in the Note thereto:

Some states permit some form of higher court review of the decision to hold the defendant for trial; most do not. It is doubtful whether a right of pretrial review would result in enough reversals to justify providing such a procedure. A California study disclosed very few cases in which the defendant was released by an appellate court for lack of reasonable cause. See Graham and Letwin, *The Preliminary Hearing in Los Angeles*, 18 U.C.L.A.L. Rev. 636, 697 (1971). It is not clear that appellate review could generally be had any sooner than trial, and to grant the defendant a right to appeal would introduce an additional pretrial step with the possibility of greater pretrial delay.

However, the last sentence of the instant subdivision provides that the defendant may seek release from the trial court. That provision, based upon 18 U.S.C. § 3147, is placed in brackets because it will be inapplicable in a state with a unitary court system.

No appeal by prosecution

No provision is made for appeal by the prosecution. Even in jurisdictions which permit the

prosecution to appeal from pretrial rulings which result in dismissal of the charge on other grounds (*e. g.*, that the charge does not state an offense, double jeopardy, denial of speedy trial) or from pretrial rulings suppressing evidence, it is generally not open to the prosecution to appeal the magistrate's finding of no probable cause at a preliminary hearing. See, *e. g.*, Ill.S.Ct.Rule 604. Although not free from ambiguity, ABA Standards, Criminal Appeals 1.4(a) (Approved Draft, 1970) appears to reach the same result.

This state of the law is certainly understandable, for the magistrate's decision that there is not probable cause in a real sense lacks finality. It is generally true that the prosecutor is still free to seek an indictment against the defend-

ant (resulting in no further need for a preliminary hearing) or to otherwise "start over" against the same defendant on the same charge with another preliminary hearing. Compare § 330.6, which permits the state to appeal, a desirable result under the ALI scheme, as the preliminary hearing cannot be mooted by indictment (§ 330.1) and dismissal of the complaint for lack of probable cause bars further prosecution unless the prosecutor obtains reinstatement within 60 days by a showing of new evidence (§ 330.7).

Given the fact that under these Rules the defendant is released but the charge is not dismissed, there is no need to permit the prosecution to appeal an adverse decision by the magistrate.

- 1 [(h) Transmittal of documents. The [magistrate] shall trans-
- 2 mit to the court before whom the defendant will next appear all
- 3 documents in the case, but transcripts of recorded proceedings
- 4 shall be made or transmitted only if requested by that court.]

Comment

This is the counterpart of Rule 321(e), *supra*. See Comment accompanying that Rule. This sub-

division is placed within brackets, as it will not be applicable in a state with a unitary court system.

ARTICLE IV

PRETRIAL PROCEDURES

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 - (3) Protective order.
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- 422. Notice by Prosecuting Attorney.
 - (a) Matters furnished automatically.
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- 431. Depositions.
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Rule

431. Depositions—Continued

- (g) Payment of expenses.
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- (a) Authority.
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- (e) Persons present.
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433. Physical or Mental Examination of Prospective Witness.

- (a) Order for examination.
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434. Obtaining Nontestimonial Evidence from Defendant upon Prosecution Motion.

- (a) Authority.
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- (d) Contents of order.
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435. Obtaining Nontestimonial Evidence from Accused Person upon His Motion.

- (a) Authority.
- (b) Contents of order.
- (c) Implementation of order.

436. Investigatory Nontestimonial Evidence Order.

- (a) Authority.
- (b) Contents of order.
- (c) Service.
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- (e) Modification and challenge.
- (f) Implementation of order.
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- (h) Disposition of evidence.

Rule

437. Obtaining Nontestimonial Evidence from Third-Person upon Accused Person's Motion.
 - (a) Authority.
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PART 5. PRETRIAL MOTIONS GENERALLY

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451. Pretrial Motions.

- (a) Use.
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- (a) For prejudice in the [county].
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- (d) Claim not precluded.
- (e) Proceedings on transfer.

PART 7. JOINDER AND SEVERANCE

471. Joinder or Dismissal of Offenses upon Defendant's Motion.

- (a) Related offenses defined.
- (b) Joinder of related offenses.
- (c) Dismissal of related offenses.
- (d) Joinder of unrelated offenses.

472. Severance of Offenses and Defendants upon Party's Motion.

- (a) When granted.
- (b) Effect of severance on collateral estoppel.

473. Joinder or Severance upon Court's Own Motion.

- (a) Joinder.
- (b) Severance.

PART 8. PRETRIAL JUDGMENT OF ACQUITTAL

481. Pretrial Judgment of Acquittal.

- (a) Motion.
- (b) Production by prosecuting attorney.
- (c) Ruling.
- (d) Effect of acquittal.
- (e) No appeal by defendant.

PART 9. PRETRIAL CONFERENCE

491. Pretrial Conference.

PART 1

GENERAL PROVISIONS

Rule 411. [Setting Times.]

1 After the defendant has appeared, the court having jurisdic-
2 tion to try the offense shall promptly set the time:

3 (1) On or before which the prosecuting attorney shall
4 furnish the matters specified in Rule 422(a);

5 (2) After which the defendant may request the matters
6 specified in Rule 422(b);

7 (3) On or before which the defendant shall furnish the
8 matters specified in Rule 423(a);

9 (4) After which the prosecuting attorney may request
10 access to the matters specified in Rule 423(b);

11 (5) After which discovery depositions under Rule 431
12 may be taken only with leave of court;

13 (6) On or before which pretrial motions under Rule 451
14 may be made;

15 (7) On or before which a motion for a pretrial judgment
16 of acquittal under Rule 481 may be made;

17 (8) If there is to be a pretrial conference under Rule 491,
18 when it will be held; and

19 (9) After which, if the case is not disposed of by plea or
20 otherwise, the court will set it for trial.

Comment

This sets forth in one place references to times to which later Rules refer. It would be possible for this Rule to specify the times, at least in brackets, but it seems they should be left to the court's

discretion because they should vary according to the nature and complexity of the case, whether the defendant is in custody, and local conditions and practices.

Rule 412. [Investigations Not to be Impeded.]

1 Except as to matters to which the prosecuting attorney need
2 not allow access under Rule 421(b) and except as to the defend-
3 ant's lawyer advising the defendant, no party or agent of a party
4 may discourage or obstruct communication between any person
5 and any party or otherwise obstruct a party's investigation of
6 the case.

Comment

This is to the same effect as ABA Standards, Discovery and Procedure Before Trial 4.1 (Approved Draft, 1970, Alaska R. Crim.P. 16(d)(1), and Fla.R. Crim.P. 3.220(e). See ABA Standards, The Prosecution Function 3.1(c) (Approved Draft, 1971), ABA Standards, The Defense Function 4.3(c) (Approved Draft, 1971). Cf. ABA Code of Professional Responsibility DR 7-109(B).

PART 2

DISCLOSURE BY PARTIES

Rule 421. [Prosecuting Attorney to Allow Access.]

(a) **Duty of prosecuting attorney.** Upon the defendant's written request, the prosecuting attorney, except as provided in subdivision (b), shall allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate in any way to the case, including statements, [portions of grand jury minutes or transcripts,] [law enforcement officer] reports, expert reports, reports on prospective jurors, papers, photographs, objects, and places, and the identity of persons having information relating to the case. The prosecuting attorney's obligation extends to matters within the possession or control of any member of his staff and of any official or employee of this State who has participated in the investigation or evaluation of the case and who either regularly reports or with reference to the particular case has reported to his office. In affording this access, the prosecuting attorney shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made. If a scientific test or experiment of any matter may preclude or impair any further tests or experiments, the prosecuting attorney shall give the defendant and any person known or believed to have an interest in the matter reasonable notice and opportunity to be present and to have an expert observe or participate in the test or experiment.

Comment

Rather than require the defendant to secure a court order as a condition to gaining access to certain matters, this subdivision gives him access automatically. See ABA Standards, Discovery and Procedure Before Trial 2.1 through 2.4 (Approved Draft, 1970); Nat'l Advisory Comm'n on Criminal Justice Standards

and Goals, Courts Standard 4.9 (1973); F.R.Crim.P. 16(a)(1); Alaska R.Crim.P. 16(b); Fla.R. Crim.P. 3.220(a); N.J.Rules of Court 3:13-3(a); Wis.Stat. § 971.23.

Instead of enumerating at great length matters to which the prosecutor must automatically allow the defendant access, this subdivision makes the general rule that the defendant must be permitted access to all matters within the prosecutor's possession or control which relate in any way to the case. Compare F.R.Civ.P. 26(b)(1). It seems that the only bases for giving the defendant less are adequately covered in the "exceptions" specified in subdivision (b), *infra*. See Commentary to Nat'l Advisory Comm'n 4.9.

The reference to matters within the prosecutor's "possession or control" derives from ABA Standard 2.1(a) and Alaska R.Crim.P. 16(a)(1). See F.R.Crim.P. 16(a)(1)(A), (C), (D); Idaho Crim.P. 16(a)(1)(iv); N.J.Rules of Court 3:13-3(c). The reference is to the prosecutor in his official capacity, and does not cover private files of a part-time prosecutor or a prosecutor who formerly engaged in private practice.

The reference "relate in any way to the case" is intended to denote a breadth similar to that created in the civil discovery area by F.R.Civ.P. 26(b)(1).

The reference seems broad enough to include matters relating not only to the offense charged, but to included offenses, punishment, and codefendants. As stated in the Commentary to ABA Standard, "Despite its dif-

ficulties, it would seem that discovery would be unworkable without the criterion of relevance," and "To implement appropriately the system * * * the prosecutor and the trial judge should not be stingy in interpreting the meaning of relevance."

In following the statement of the general standard with several illustrative examples, this subdivision is similar to F.R.Civ.P. 26(b)(1) and Nat'l Advisory Comm'n. The reference to "portions of grand jury minutes or transcripts" (compare ABA Standard 2.1(a)(iii); Fla.R. Crim.P. 3.220(a)(1)(v), N.J. Rules of Court 3:13-3(a)(3)), is placed in brackets so that it may be omitted by states not making any use of grand juries.

As to deferring disclosure of the identity of persons having information relating to the case, see subdivision (b)(3)(i), *infra*. Cf. Unif.R.Ev. 509.

The second sentence hereof derives from ABA Standard 2.1(d) and Alaska R.Crim.P. 16(b)(4).

The penultimate sentence is rather similar to ABA Standard 2.2(b)(ii) and Fla.R.Crim.P. 3.220(a)(1). Current provisions generally specify "inspect and copy or photograph," see, *e. g.*, former Uniform Rule 28; F.R.Crim.P. 16(a)(1)(A), (C), (D), but several refer to testing, see Fla.R.Crim.P. 3.220(a)(1); Mont.Rev.Codes § 95-1803(c); Wis.Stat. § 971.23(5). The limitations "in any reasonable manner" and "reasonable tests" are designed to allow the prosecuting attorney to put reasonable limitations upon the manner of inspecting, photographing,

copying, or testing necessary to safeguard the subject materials or objects, even without moving for a protective order under subdivision (b)(3)(ii), *infra*. If the defense thinks the limitations unreasonable, it may move the court for relief per subdivision (e), *in-*

fra, on the ground that the prosecuting attorney is not complying with this Rule.

The last sentence is rather analogous to provision in Mont. Rev. Codes § 95-1803(c), and is a *quid pro quo* for the provision of subdivision (b)(3)(ii), *infra*.

(b) Exceptions.

(1) *Legal work product*. The prosecuting attorney need not allow access to:

(i) Legal research; or

(ii) Those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

Comment

This is substantially identical to ABA Standards, Discovery and Procedure Before Trial 2.6(a) (Approved Draft, 1970), Alaska R.Crim.P. 16(b)(8), and Fla.R. Crim.P. 3.220(c)(1). The reasons for having this type of exception are indicated in the Commentary to the ABA Standard.

The word "legal" is included in the title hereof to make immediately obvious what appears in the text, that the "work" must be the "product" of the prosecuting attorney or members of his *legal* staff, rather than of investigatory or expert personnel. Accordingly, police reports and laboratory reports are not within this exception, and must be disclosed except as provided in clauses (3) of this subdivision, *infra*, regarding protective orders.

It should also be noted that the "work" is protected only to the extent that it contains prosecution lawyers' opinions, theories, or conclusions. As stated in the

Commentary to the ABA Standard:

If the maker is a lawyer on the prosecutor's staff, the source of the particular material or information then becomes relevant: whether that source is the lawyer's own thought processes, or instead, some external event. Thus, to the extent that material or information is comprised of opinions of lawyers, *e. g.*, as to the truthfulness of a witness, as contrasted with knowledge of some facts, *e. g.*, what a witness has said, then that material or information is work product under subsection (a). Similarly, to the extent that material or information consists of theories, *e. g.*, about who may have fired a gun, rather than facts, *e. g.*, whose fingerprints were found on it, or the results of ballistics tests, that material or information is work product as here defined.

* * * [T]he report of an attorney as to what he had heard, seen, or otherwise perceived with his senses or implements would not be protected

from disclosure, because the report would reflect information other than his own opinions, theories or conclusions.

- 1 (2) *Pending motion for protective order.* If upon the
- 2 defendant's written request for access under subdivision (a)
- 3 the prosecuting attorney informs the defendant that he in-
- 4 tends to, and does in fact, move promptly and not later than
- 5 [ten] days thereafter for a protective order, the prosecuting
- 6 attorney may deny access, pending the court's ruling on the
- 7 motion, to the extent that he reasonably believes the pro-
- 8 tective order will permit him to do so.

Comment

Although subdivision (b)(3) of this Rule, *infra*, puts the burden on the prosecuting attorney to move for a protective order and to show the bases therefor, this

paragraph allows him to maintain the status quo pending the making and consideration of the motion.

- 1 (3) *Protective order.*
- 2 (i) *Risk of harm, intimidation, or bribery; continu-*
- 3 *ing investigation.* The court may permit the prose-
- 4 cuting attorney to defer access for a specified time to
- 5 the extent that earlier access would create a substantial
- 6 risk to any person of physical harm, intimidation, or
- 7 bribery or to the extent justified by the need to protect
- 8 the integrity of a continuing investigation. Deferral
- 9 may not be permitted which prejudices a right of the
- 10 defendant or which allows insufficient time before trial
- 11 for the defendant to make beneficial use of the informa-
- 12 tion sought, including any additional pretrial discovery
- 13 thereby necessitated.

Comment

This provides for protective orders limited to deferring disclosure. As to the risk of harm, intimidation, or bribery, compare ABA Standards, Discovery and Procedure Before Trial 2.5(b) (Approved Draft, 1970), Colo.R. Crim.P. 16(c)(2), Fla.R.Crim.P. 3.220(a)(4), and N.J.Rules of

Court 3:13-3(d)(1). *Cf.* Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9 (1973); Idaho Crim.R. 16(a)(1)(vi). As to protecting the integrity of a continuing investigation, compare Fla.R.Crim.P. 3.220(a)(1)(ii); N.J.Rules of Court 3:13-3(g)(1).

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Cf. ABA Standard 2.6(b); Fla.R. similar to provision in ABA Standard 4.4 and Alaska R.Crim.P. 16(d)(4).
Crim.P. 3.220(c)(2). The proviso requiring access in time for the defense to make beneficial use is

- 1 (ii) *Protecting evidentiary value.* The court may
2 impose reasonable terms or conditions as to the manner
3 of inspection, photographing, copying, or testing, to
4 the extent necessary to protect the evidentiary value of
5 any matter to which the defendant seeks access or the
6 prosecuting attorney proposes to test.

Comment

This is rather similar to the 3.220(a), (b); Maine R.Crim.P. 16(a); Mont.Rev.Stat. § 95-1803 many provisions which authorize the court to specify the time, place and manner and "prescribe such terms and conditions as are just". See, e. g., former Uniform Rule 28; F.R.Crim.P. 16(d)(2); Colo. R.Crim.P. 16(e); Fla.R.Crim.P. 3.220(a), (b); Maine R.Crim.P. 16(a); Mont.Rev.Stat. § 95-1803 (c); Nev.Rev.Stat. § 174.265; Wis.Stat. § 971.23(4). Cf. ABA Standards, Discovery and Procedure Before Trial 4.4 (Approved Draft, 1970), Alaska R.Crim.P. 16(d)(4); Fla.R.Crim.P. 3.220(h).

- 1 (4) *Excision.* If only part of a matter is within an ex-
2 ception prescribed by this subdivision, the prosecuting at-
3 torney shall allow access to a copy of the matter from which
4 the part within the exception has been excised in a manner
5 showing that there has been excision.

Comment

This is similar in concept to proved Draft, 1970) and Alaska ABA Standards, Discovery and R.Crim.P. 16(d)(5).
Procedure Before Trial 4.5 (Ap-

- 1 (c) *Continuing duty.* If any matter which relates to the case,
2 other than legal work product specified in subdivision (b)(1),
3 comes within the prosecuting attorney's possession or control
4 after the defendant has had access under this Rule, the prose-
5 cuting attorney shall promptly so inform the defendant.

Comment

This is similar in concept to a Justice Standards and Goals, number of current provisions. Courts Standards 4.9 (1973); See ABA Standards, Discovery F.R.Crim.P. 16(c); Alaska R. and Procedure Before Trial 4.2 Crim.P. 16(d)(2); Colo.R.Crim. (Approved Draft, 1970); Nat'l P. 16(h); Fla.R.Crim.P. 3.220 Advisory Comm'n on Criminal (f); Mont.Rev.Codes § 95-1803

(c); Nev.Rev.Stat. § 174.295^a; N. Crim.P.Law § 240.40; Wis.Stat. J.Rules of Court 3:13-3(f); N.Y. § 971.23(7).

1 **(d) Matters held by other governmental personnel.** Upon writ-
 2 ten request of the defendant for access to specified matters re-
 3 lating to the case which are within the possession or control of
 4 an official or employee of any government but which are not
 5 within the control of the prosecuting attorney, the prosecuting
 6 attorney, except as provided in subdivision (b), shall use diligent
 7 good faith efforts to cause the official or employee to allow the
 8 defendant access at any reasonable time and in any reasonable
 9 manner to inspect, photograph, copy, or have reasonable tests
 10 made.

Comment

This is extremely similar to ABA Standards, Discovery and Procedure Before Trial 2.4 (Approved Draft, 1970) and Alaska R.Crim.P. 16(b)(5). If the prosecutor's diligent good faith ef-

orts to cause the official or employee to grant the defendant access are unsuccessful, the defendant has available the deposition and subpoena provisions of these Rules.

1 **(e) Sanctions for noncompliance.** If the prosecuting attorney
 2 fails to comply with this Rule, the court on motion of the defend-
 3 ant or on its own motion shall grant appropriate relief, which
 4 may include one or more of the following: requiring the prose-
 5 cuting attorney to comply, granting the defendant additional
 6 time or a continuance, relieving the defendant from making a
 7 disclosure required by Rule 423, prohibiting the prosecuting at-
 8 torney from introducing specified evidence, and dismissing
 9 charges.

Comment

Except for specifying exclusion of "specified evidence" rather than "material not disclosed" and for specifying relief from a disclosure duty and dismissing charges, this is similar to F.R. Crim.P. 16(d)(2), Colo.R.Crim.P. 16(h), Fla.R.Crim.P. 3.220(j)(1), Nev.Rev.Stat. § 174.295, and N.J. Rules of Court 3:13-3(i). Com-

pare ABA Standards, Discovery and Procedure Before Trial 4.7 (Approved Draft, 1970); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9 (1973); Alaska R.Crim.P. 16(e); Mont. Rev.Codes § 95-1803(c); N.Y. Crim.P.Law § 240.40; Wis.Stat. § 971.23(7).

1 **(f) In-camera proceedings.** Upon the hearing of any motion
 2 under this Rule, the court may permit all or part of any showing

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3 of cause for denial or deferral of access to be made in camera
4 and out of the presence of the defendant and his counsel. Any
5 in camera proceedings shall be recorded. If the court allows any
6 access to be denied or deferred, the entire record of the in camera
7 proceedings shall be sealed and preserved in the court's records,
8 to be made available to the appellate court in the event of an ap-
9 peal.

Comment

This is quite similar to ABA Colo.R.Crim.P. 16(f), Fla.R.Crim.
Standards, Discovery and Proce- P. 3.220(i), Nev.Rev.Stat. § 174.-
dure Before Trial 4.6 (Approved 275, N.J.Rules of Court 3:13-3(d)
Draft, 1970); F.R.Crim.P. 16(d) (2), and N.Y.Crim.P.Law § 240.-
(1), Alaska R.Crim.P. 16(d)(6), 40(5).

Rule 422. **[Notice by Prosecuting Attorney.]**

1 (a) **Matters furnished automatically.** On or before the time
2 set by the court, or promptly upon discovering the matter, the
3 prosecuting attorney shall furnish to the defendant:

4 (1) A statement describing any testimony or other evi-
5 dence intended to be used against the defendant which:

6 (i) Was obtained as a result of a search and seizure,
7 wiretapping, or any form of electronic or other eaves-
8 dropping;

9 (ii) Consists of or resulted from any confession, ad-
10 mission, or statement made by the defendant; or

11 (iii) Relates to a lineup, showup, picture, or voice
12 identification of the defendant,

13 and informing the defendant that if he contends that any
14 of the evidence is subject to suppression under Rule 461, he
15 must move the court, by a specified time set by the court,
16 to suppress the evidence;

17 (2) A statement describing any confession, admission, or
18 statement of a codefendant intended to be used at the trial;

19 (3) A statement precisely describing any offense which
20 the prosecuting attorney intends to show as part of the
21 proof that the defendant committed the offense charged, if
22 the defendant has not been prosecuted for the offense and
23 the offense was allegedly committed at a time other than
24 that of the offense charged; and

25 (4) A statement describing any matter or information
26 known to the prosecuting attorney which may not be known

27 to the defendant and which tends to negate the defendant's
 28 guilt as to the offense charged or would tend to mitigate his
 29 punishment.

Comment *

Rule 422 Generally

This Rule provides for the prosecutor to inform the defendant of certain matters which the defendant may be unable to discover merely by utilizing the access provided in Rule 421. Principally, these relate to what evidence and witnesses the prosecutor intends to offer at trial. Subdivision (a) specifies what matters must be furnished automatically, subdivision (b) what must be furnished on request, and subdivision (c) sanctions for noncompliance.

Subdivision (a)

Clause (1) requires the prosecutor to inform the defendant of his intent to use certain types of evidence which might be subject to a motion to suppress. Compare ABA Standards, Discovery and Procedure Before Trial 2.1(a)(ii), (v), (b)(ii), 2.3 (Approved Draft 1970); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9(2), (4) (1973); F.R.Crim.P. 12(d), 16(a)(1)(A), (C); Alaska R.Crim.P. 16(b)(1)(ii), (v), (2)(ii), (6); Fla.R.Crim.P. 3.220(a)(1)(iii), (vi), (viii), (ix); 38 Ill.Stat. § 114-10; La.Code Crim.P. art. 768; Mont. Rev.Codes § 95-1804; N.Y.Crim.P.Law § 710.30.

Clause (2) requires the prosecutor to inform the defendant of his intent to use a codefendant's confession, admission or state-

ment at the trial. See Nat'l Advisory Comm'n 4.9. Cf. ABA Standard 2.1(a)(ii); Alaska R.Crim.P. 16(b)(1)(iii); Fla.R.Crim.P. 3.220(a)(1)(iv).

Clause (3) is designed to assure the defendant fair notice of offenses other than the offense charged which the state intends to show as part of its proof that he committed the offense charged. The state is generally permitted to show such other offenses to establish such matters as motive, intent, absence of mistake or accident, identity of a perpetrator, sex crimes, or a common scheme or plan. See McCormick, Evidence § 190 (2d ed. 1972); 2 Wigmore, Evidence §§ 300-370 (3d ed. 1940). In conditioning its doing so upon its giving advance notice except in certain circumstances, clause (3) codifies the result reached in *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Cf. *State v. Prieur*, 277 So.2d 126 (La.1973). McCormick, Evidence 453n.56 recommends this approach. Since notice is required only regarding offenses intended to be shown as part of the proof that the defendant committed the offense charged, this provision has no bearing upon the question whether the state should be able to show prior offenses to impeach the testifying defendant's credibility. It seems unnecessary to notify the defendant regarding offenses for which he has been

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prosecuted or offenses committed at the same time as the offense charged.

Clause (4) is very similar to ABA Standard 2.1(c) and Alaska R.Crim.P. 16(b)(3). Cf. Nat'l

Advisory Comm'n 4.9; Fla.R. Crim.P. 3.220(a)(2). Disclosure of this type appears constitutionally required under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

(b) Matters furnished upon request. Upon the defendant's written request made after the time set by the court, the prosecuting attorney shall furnish to the defendant and file with the court:

(1) A statement generally describing any book, paper, document, photograph, or tangible object intended to be used in evidence against the defendant and not described under subdivision (a);

(2) A statement setting forth the name, address, and occupation of each person intended to be called as a witness against the defendant and, so far as reasonably ascertainable by the prosecuting attorney, any record of criminal convictions of each person; and

(3) A statement setting forth, so far as reasonably ascertainable by the prosecuting attorney, any record of criminal convictions of the defendant.

Comment

Clause (1) assures the defendant information as to all books, papers, documents, photographs and tangible objects intended to be used in evidence against him. *Accord*, ABA Standards, Discovery and Procedure Before Trial 2.1(a)(v) (Approved Draft, 1970); F.R.Crim.P. 16(a)(1)(C). See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9 (1973); Fla.R.Crim.P. 3.220(a)(1)(xi); Mont.Rev.Codes § 95-1803(c); Wis.Stat. § 971.23(4).

Except for specifying "occupation," clause (2) is very similar to provision in ABA Standard 2.1(a)

(i), (vi) and F.R.Crim.P. 16(a)(1)(E). Compare Nat'l Advisory Comm'n 4.9(1); Alaska R.Crim.P. 16(b)(1)(i), (vi); Fla.R.Crim.P. 3.220(a)(1)(i); Idaho Crim.R. 16(a)(1)(vi); 38 Ill.Stat. § 114-9; Mont.Rev.Codes § 95-1803(a); Wis.Stat. §§ 971.23(3)(a), 971.25(1). As to the "occupation" reference, compare ABA Standard 2.3(c); N.Y.Crim.P.Law § 250.20(1).

Clause (3) is similar to F.R.Crim.P. 16(a)(1)(B), Alaska R.Crim.P. 16(b)(vi), N.J.Rules of Court 3:13-3(a)(5), and Wis.Stat. § 971.23(2).

(c) Sanctions for noncompliance. If the prosecuting attorney fails to comply with this Rule, the court on motion of the defend-

3 ant or on its own motion shall grant appropriate relief, which
4 may include one or more of the following: requiring the prose-
5 cuting attorney to comply, granting the defendant additional time
6 or a continuance, relieving the defendant from making a dis-
7 closure required by Rule 423, prohibiting the prosecuting attor-
8 ney from introducing specified evidence, and dismissing charges.

Comment

This is identical to Rule 421(e),
supra.

Rule 423. [Disclosure by Defendant.]

1 (a) **Matters to be furnished.** On or before the time set by the
2 court, or promptly upon discovering the person or matter, the
3 defendant shall furnish to the prosecuting attorney:

4 (1) If he intends to call as a witness any person other
5 than himself to show that he was not present at the time
6 and place specified in the information [or indictment], a
7 statement of that fact and of the name and address of the
8 person; and

9 (2) If he intends to call as a witness any person other
10 than himself for testimony relating to any mental dis-
11 ease, mental defect, or other condition bearing upon his
12 mental state at the time the offense was allegedly committed,
13 a statement of that fact and of the name and address of
14 the person.

15 A statement filed under this subdivision is not admissible in evi-
16 dence at trial. Information obtained as a result of a statement
17 filed under this subdivision is not admissible in evidence at trial
18 except to refute the testimony of a witness whose identity this
19 subdivision requires to be disclosed.

Comment

Rule 423 Generally

This Rule provides for disclo-
sure by the defendant. This sub-
division (a) provides for the de-
fendant to inform the prosecutor
of his intent to use certain types
of testimony and of the witnesses
he intends to call to furnish that
testimony; subdivision (b), *in-*
fra, requires him upon the prose-
cutor's request to allow the prose-

cutor access to certain matters;
subdivision (c), *infra*, covers
sanctions for failure to comply.

This Rule is intended to re-
quire disclosures by the defend-
ant to the maximum extent per-
mitted by the defendant's privi-
lege against being "compelled in
any criminal case to be a witness
against himself." It has been
argued that that privilege pre-

cludes requiring the defendant to make any disclosure which might in any way aid the state in making its case against the defendant, see *Williams v. Florida*, 399 U.S. 78, 110, 112, 113, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (Black, J., joined by Douglas, J., dissenting in part), but it seems clear that the majority in *Williams* rejected that approach, reasoning that requiring certain pre-trial disclosure (the substance of which is not introduced in evidence against the defendant) is constitutionally indistinguishable from allowing the state a continuance at trial on the ground of surprise, during which continuance the state could take depositions and find rebuttal evidence. See *id.* at 83-86 (majority opinion).

Subdivision (a)

Subdivision (a) requires the defendant by such time as the court shall set to disclose to the prosecutor his intent to call persons as witnesses on certain issues and to identify those persons. See ABA Standards, Discovery and Procedure Before Trial 3.3 (Approved Draft, 1970).

Clause (1) requires this as to alibi. See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9 (1973); F.R.Crim.P. 12.1. Noting that at least 16 states appear to have alibi notice requirements of one sort or another, the Supreme Court upheld this type of requirement in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970),

rejecting the defendant's contention that requiring him before trial to supply the name and address of an intended alibi witness violated his privilege against self incrimination and his right to due process. *But see Scott v. State*, 519 P.2d 774 (Alaska 1974).

This duty exists only if the defendant intends to call someone "other than himself" as an alibi witness. See Nat'l Advisory Comm'n 4.9. This produces a result similar to that of the Florida rule involved in *Williams* and other provisions which except from permissible sanctions for noncompliance exclusion of the defendant's own testimony. See F.R.Crim.P. 12.1(e); Fla.R.Crim.P. 3.200; Maine R.Crim.P. 16(b).

Clause (1)'s reference, "the time and place specified in the information [or indictment]" must be read in light of Rule 231(c), *supra*, which requires the information to state "as particularly as possible, the time and place of the defendant's alleged commission of the offense," and Rule 232 (b), *supra*, which makes the same requirement applicable to the indictment. Accordingly, no other document need be issued to trigger the defendant's obligation to comply with clause (1). *Accord*, former Uniform Rule 26; Nev. Rev.Stat. § 174.087; N.J.Rules of Court 3:11-1; N.Y.Crim.P.Law § 250.20; Wis.Stat. § 971.23(8).

The defendant must disclose only his intent to call alibi witnesses and their identity. See Mont.Rev.Codes § 95-1803. He need not specify the place where

he claims to have been at the time of the alleged offense. It seems that if he were required to do that, he would be "compelled in [a] criminal case to be a witness against himself." See *Scott v. State*, 519 P.2d 774, 786-87 (Alaska 1974). The defendant's specification of where he claims to have been is undeniably testimonial, and it seems that attaching *any* trial consequences to it would violate the defendant's privilege against being compelled to be a witness against himself. If no trial consequences can be attached, the requirement would be unenforceable and it would be misleading to set it forth as a duty.

Clause (2) imposes a similar requirement as to testimony regarding a mental disease, defect or other condition bearing upon the defendant's mental state at the time the offense was allegedly committed.

The clause (2) requirement applies not only where the defendant intends to show that he was insane at the time the offense was committed, see Nat'l Advisory Comm'n 4.9; F.R.Crim.P. 12.2(a); Alaska R.Crim.P. 16(c)(3); Fla.R.Crim.P. 3.210(b); Mont. Rev.Codes §§ 95-503(b)(1), 95-1803(d); N.J.Rules of Court 3:12; N.Y.Crim.P.Law § 250.10, but in other situations where mental disease, defect, or other condition bearing upon the defendant's mental state at the time the offense was allegedly committed would be in issue, see F.R.Crim.P. 12.2(b) ("mental disease, defect, or other condition bearing upon the issue

of whether he had the mental state required for the offense charged"); Mont.Rev.Codes § 95-503(b)(2) (similar); N.J.Rules of Court 3:12 ("insanity or mental infirmity either as a defense, as affecting the degree of the crime charged, or as a matter which should be considered by the jury in determining the penalty").

In requiring identification of the intended witnesses, clause (2) accords with ABA Standard 3.3 ("subject to constitutional limitations"); Fla.R.Crim.P. 3.210(b) (insanity); Mont.Rev.Codes § 95-1803(d) (insanity).

This subdivision does not require the defendant to identify *all* prospective witnesses. Compare F.R.Crim.P. 16(b)(1)(C); Fla.R.Crim.P. 3.220(b)(3). (See also the *reciprocal* witness disclosure provisions of N.J.Rules of Court 3:13-3(d)(2) and Wis.Stat. § 971.23(3)(a).) Notwithstanding the last two sentences hereof, defense disclosure of witnesses carries some risk of providing leads to evidence for the prosecution's case in chief. This risk seems justifiable only in the situations covered by clauses (1) and (2), where the state has a strong need for the information in order to avoid surprise. See generally *Scott v. State*, 519 P.2d 774, 785-86 (Alaska 1974).

The penultimate sentence hereof is similar in concept to F.R.Crim.P. 16(b)(3) ("The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon

a failure to call a witness”), Alaska R.Crim.P. 16(c)(3) (“Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial”), Mont.Rev.Codes § 95-1803(d) (disclosure “for purpose of notice only and to prevent surprise”), and Wis.Stat. § 971.23(3)(b) (“No comment or instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such comment or instruction is the fact the name of the witness appears upon a list furnished pursuant to this section”). This type of provision seems necessary for Fifth Amendment reasons. If the defendant were compelled to supply a pretrial statement of intent to offer a particular defense or to call witnesses, which statement

could be used in evidence against him if he failed to offer the defense or call the witnesses, it would seem he would have been “compelled in [a] criminal case to be a witness against himself.” Compare *Williams v. Florida*, 399 U.S. 78, 84 n. 15, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

The final sentence hereof is designed to protect against the defendant’s compelled statement being used as a lead to evidence in the prosecution’s case in chief which the prosecutor would not have obtained but for the statement. Cf. Alaska R.Crim.P. 16(c)(2) (“Information obtained by the state under the provisions of this section [defense disclosure of expert reports] shall be used only for cross-examination or rebuttal of defense testimony”).

(b) Access to documents and objects. Upon the prosecuting attorney’s written request after the time set by the court, the defendant shall allow him access at any reasonable times and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant’s possession or control and which:

(1) The defendant intends to offer in evidence, except to the extent that it contains any communication of the defendant;

(2) Is a report or statement as to a physical or mental examination or scientific test or experiment made in connection with the particular case prepared by and relating to the anticipated testimony of a person whom the defendant intends to call as a witness; or

(3) Is a report on prospective jurors which relates to the case, but if parts of the report are only the opinions, theories, or conclusions of the defendant, his lawyer, or his lawyer’s legal staff, the defendant shall allow access to a copy of the report from which those parts have been excised in a manner showing that there has been excision.

22 If the defendant subsequently ascertains that he has possession
 23 or control of such a matter, he shall promptly so inform the prose-
 24 cuting attorney. The fact that the defendant, under this sub-
 25 division, has indicated an intent to offer a matter in evidence
 26 or to call a person as a witness is not admissible in evidence at
 27 trial. Information obtained as a result of disclosure under this
 28 subdivision is not admissible in evidence at trial except to refute
 29 the matter disclosed.

Comment

This subdivision is a parallel to Rule 421, *supra*, "Prosecuting Attorney to Allow Access." Its scope is necessarily narrower than that of Rule 421 because of the defendant's privilege not to be a witness against himself. See *Scott v. State*, 519 P.2d 774, 786 (Alaska 1974). It operates only "after the time set by the court" so that the defendant will either have counsel or have waived counsel under Rule 711, *infra*.

Clause (1) is similar in effect to F.R.Crim.P. 16(b)(1)(A), (2). *Cf.* Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.9 (1973); Mont.Rev.Codes § 95-1803(c); Wis.Stat. § 971.23(4), (5). Compare the reciprocal disclosure provisions of Colo.R.Crim.

P. 16(d), Fla.R.Crim.P. 3.220(b)(4), Nev.Rev.Stat. § 174.255, N.J. Rules of Court 3:13-3(b), and N.Y.Crim.P.Law § 240.20(4).

Clause (2) is quite similar to F.R.Crim.P. 16(b)(1)(B). *Cf.* ABA Standards, Discovery and Procedure Before Trial 3.2 (Approved Draft, 1970). Compare the reciprocal disclosure provisions of Fla.R.Crim.P. 3.220(b)(4) and N.J. Rules of Court 3:13-3(d)(2).

Clause (3) provides as to reports on prospective jurors a parallel to the prosecutor's duty under Rule 421(a), *supra*, subject to a legal work product excision based upon Rule 421(b)(1) and (4), *supra*.

1 **(c) Sanctions for noncompliance.** If the defendant fails to
 2 comply with this Rule, the court on motion of the prosecuting
 3 attorney or on its own motion shall grant appropriate relief,
 4 which may include one or more of the following: requiring the
 5 defendant to comply, granting the prosecuting attorney addition-
 6 al time or a continuance, and granting a mistrial.

Comment

This subdivision parallels Rule 421(e), *supra* (prosecuting attorney to allow access—sanctions for noncompliance), and Rule 422(c), *supra* (notice by prosecuting attorney—sanctions for noncompliance). Each of the provisions cited in the Comment to Rule 421

(e), *supra*, applies to defense as well as prosecution failure to comply.

It will be noted that this subdivision does not include a parallel to Rule 421(e)'s reference, "relieving the defendant from making a disclosure required by Rule 423." It seems that relieving the prosecutor from a disclosure duty would be inappropriate and at any rate would not be a meaningful sanction since the defendant's failure to comply will almost never be discovered prior to trial, by which time the prosecutor will have made his disclosures.

Nor is there any parallel to Rule 421(e)'s reference, "prohibiting the prosecuting attorney from introducing specified evidence." Even a provision such as "if the failure was deliberate and the nondisclosure substantially prejudices the prosecution's ability to refute the evidence, prohibiting the defendant from introducing undisclosed evidence or testimony of undisclosed witnesses," seems inappropriate because it may result in punishing the defendant by conviction of the substantive offense for what was really only his lawyer's default, and because even if the defendant were responsible for the nondisclosure, he might not have anticipated this severe a sanction. Many notice of alibi provisions provide for excluding testimony in the event of failure to comply. See former Uniform Rule 26; F.R.Crim.P. 12.1(e); Colo.R.Crim.P. 12.1; 38 Ill.Stat. § 114-14; Maine R.Crim.P. 16 (b); Mont.Rev.Codes § 95-1803 (d); Nev.Rev.Stat. § 174.087(1); N.Y.Crim.P.Law § 250.20(2); Pa.R.Crim.P. 312(b); Wis.Stat.

§ 971.23(8)(b). Compare F.R.Crim.P. 12.2(b), (d) (notice of insanity defense or of expert testimony on mental state); Fla.R.Crim.P. 3.210(b) (notice of insanity); Mont.Rev.Codes §§ 95-503(b)(2), 95-1803(d) (notice of expert testimony on mental state; notice of insanity or self-defense); N.Y.Crim.P.Law § 250.10 (notice of mental disease or defect excluding criminal responsibility). The Florida notice of alibi rule involved in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) included this type of provision, but the Court, after noting that the threatened sanction was permissive and did not run to the defendant's own testimony, *id.* at 80 & n. 6, stated:

We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore." [*Id.* at 83 n. 14.]

See generally Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342 (1972).

The reference to granting a mistrial accords with Fla.R.Crim.P. 3.220(j)(1). Because of double jeopardy considerations, this sanction should not be used without the defendant's consent if

the matter may be remedied by a v. *Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).
continuance. See *United States*

PART 3

OTHER DISCOVERY

Rule 431. [Depositions.]

1 (a) When taken. At any time after the defendant has ap-
2 peared, any party may take the testimony of any person by
3 deposition, except:

4 (1) The defendant may not be deposed unless he consents
5 and his lawyer, if he has one, is present or his presence is
6 waived;

7 (2) A discovery deposition may be taken after the time
8 set by the court only with leave of court;

9 (3) A deposition to perpetuate testimony may be taken
10 only with leave of court, which shall be granted upon mo-
11 tion of any party if it appears that the deponent may be able
12 to give material testimony but may be unable to attend a
13 trial or hearing; and

14 (4) Upon motion of a party or of the deponent and upon
15 a showing that the taking of the deposition does or will un-
16 reasonably annoy, embarrass, or oppress the deponent or a
17 party, the court in which the prosecution is pending or the
18 court of the [district] where the deposition is being taken
19 may order that the deposition not be taken or continued or
20 may limit the scope and manner of its taking. Upon de-
21 mand of the objecting party or deponent, the taking of the
22 deposition shall be suspended for the time necessary to make
23 the motion.

24 Attendance of witnesses and production of documentary evidence
25 and objects may be compelled by subpoena under Rule 731.

Comment

In permitting depositions to be taken for discovery purposes without court approval, this subdivision accords with F.R.Civ.P. 25.10; N.H.Rev.Stat. § 517.13; Vt.R.Crim.P. 15(a). See Fla.R.Crim.P. 3.220(d) (by the defendant).

30(a) and several states' criminal procedure provisions. See Mo. Stat. § 545.400; Mo.R.Crim.P. A number of provisions are somewhat similar in that, while they require court approval, they

are broad enough to permit approval of depositions for discovery purposes. See ABA Standards, Discovery and Procedure Before Trial 2.5(a) and Commentary (Approved Draft, 1970); F.R.Crim.P. 15(a); Alaska R. Crim.P. 15(a); Mont.Rev.Codes § 95-1802(a)(1); Ohio Rev.Code § 2945.50; Tex.Code Crim.P. art. 39.02.

Rather than requiring court approval of discovery depositions, this subdivision changes the emphasis by allowing them without court approval, subject to the right of a party or deponent to move under clause (4) hereof to have the court order that the deposition not be taken or continued.

A survey of all prosecutors, judges of all criminal courts, and many defense lawyers in Vermont, where the opportunity to take depositions in criminal cases has been generally available since 1961, found "no indication that these procedures were used for blind fishing expeditions," that they are probably resorted to in less than 8% of criminal cases, that the great majority of respondents stated that depositions decreased the likelihood of trial and "not a single prosecutor, judge or defense attorney indicated that the likelihood was increased," and that there was not a single "mention of an instance of abuse of these statutes" or call "for a return of the old law." Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A. J. 732, 733-34 (1967). The author stated:

The parade of "horribles" escaping from Pandora's box as

proposed by the opponents of change in this are numerous. They include possible intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on the prosecution officer, increased costs of the administration of criminal law, etc. The interesting thing shown by Vermont's experience is that all of these "horribles" are imaginary. [*Id.* at 734.]

Making the opportunity to take depositions generally available seems especially justifiable in light of these Rules' eliminating preliminary hearings where the defendant is not in custody. Compare Commentary to ABA Standard 2.5(a). Depositions provide much greater flexibility in scheduling than do preliminary hearings, and cost less because they do not require the presence of a judicial officer or the use of a courtroom. Further, since they will normally occur at a later point in the proceedings than would the preliminary hearing, the parties will be more likely to dispense with them if they find that they can obtain sufficient information by such means as interviewing the witnesses or examining their statements. The parties are unlikely to resort to the use of depositions unless they think it is necessary, and clause (4) is available to prevent abuse. The greater availability of information made possible by depositions will increase the likelihood of disposing short of trial.

In requiring a defendant's consent before being deposed, clause (1) accords with F.R.Crim.P. 15

(d)(1), Alaska R.Crim.P. 15(c), and Vt.R.Crim.P. 15(d)(1), and seems necessitated by the Fifth Amendment.

Under clause (2), the court will set a time after which discovery depositions cannot be taken without leave of court. Compare Alaska R.Crim.P. 15(a); Vt.R.Crim.P. 15(a).

Clause (3) is similar to, but not quite as demanding as, a number of current provisions which specify that upon motion the court may order a deposition "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." See former Uniform Rule 27(a)(1); Maine R.Crim.P. 15(a); Nev.Rev.Stat. § 174.175(1); Wis.Stat. § 967.04. Cf. Colo.R.Crim.P. 15(a); N.J.Rules of Court 3:13-2(a). Compare F.R.Crim.P. 16(a)(1)(E), 16(b)(1)(C); Calif.Penal Code § 1336; Nev.Rev.Stat. § 174.515(1); N.Y.Crim.P.Law § 660.20; Wis.Stat. § 971.23(6).

It seems important to distinguish depositions to perpetuate testimony from discovery depositions. See Fla.R.Crim.P. 3.190(i), 3.220(d). It seems that the parties should be put on notice that a deposition is to perpetuate testimony, because they will likely examine differently than if it were a discovery deposition. Further, the defendant generally must be present at a perpetuation deposition. See subdivision (f), *infra*. This may produce additional

expense, see subdivision (g), *infra*; if he is in custody it will require a custodian and, as to a deposition outside the state, will often be infeasible, see subdivision (e), *infra*.

If upon taking a discovery deposition a party becomes aware of the advisability of perpetuating the deponent's testimony, it is open to him to seek leave to take a perpetuation deposition under clause (3). Or he might be able to accomplish his purpose under subdivision (j), *infra*, which specifies, "Nothing in this Rule precludes the taking of a deposition * * * or the use of a deposition, by agreement of the parties."

Clause (4) is very similar to F.R.Civ.P. 30(d) except in providing for relief before as well as during the deposition. It allows the court to intervene in the event of abuses of the deposition procedure.

The last sentence derives from F.R.Civ.P. 30(a) ("The attendance of witnesses may be compelled by a subpoena as provided in Rule 45," and Alaska R.Crim.P. 15(a) ("Any designated book, paper, document, record, recording, or other material not privileged may be subpoenaed at the same time and place of the taking of the deposition"). Other provisions on subpoenaing witnesses for depositions include Colo.R.Crim.P. 15(a), Fla.R.Crim.P. 3.220(d), N.Y.Crim.P.Law § 660.50(3), and Tex.Code Crim.P. art. 39.04. A number of provisions specify that the court may order "that any designated books, papers, documents or tangible objects, not privileged, be produced

at the same time and place." See 1802(a)(1); Nev.Rev.Stat. § 174.-former Uniform Rule 27(a)(1); 175(1); N.J.Rules of Court § 3:13-F.R.Crim.P. 15(a); Fla.R.Crim. 2(a); Wis.Stat. § 967.04(1). Cf. P. 3.190(j)(1); Maine R.Crim. F.R.Crim.P. 15(a); Colo.R.Crim. P. 15(a); Mont.Rev.Codes § 95- P. 15(a).

1 **(b) Witness who would not respond to subpoena.** If a party
2 is granted leave to take a deposition to perpetuate testimony, the
3 court, upon motion of the party and a showing of probable cause
4 to believe that the deponent would not respond to a subpoena,
5 by order shall direct a [law enforcement officer] to take the de-
6 ponent into custody and hold him until the taking of the deposi-
7 tion commences but not to exceed [six] hours and to keep the de-
8 ponent in custody during the taking of the deposition. If the
9 motion is by the prosecuting attorney, the court, upon further
10 motion by the prosecuting attorney and a showing of probable
11 cause to believe that the defendant would not otherwise attend
12 the taking of the deposition, may make the same order as to the
13 defendant.

Comment

The first sentence is quite similar in effect to Colo.R.Crim.P. 15(b). See Mont.Rev.Codes § 95-1802(a)(2); Wis.Stat. § 967.04(1). Cf. former Uniform Rule 27(a)(2); F.R.Crim.P. 15(a); Alaska R.Crim.P. 15(a); Maine R.Crim.P. 15(a); Nev.Rev.Stat. § 174.175(2); N.J.Rules of Court 3:13-2(a). Compare Calif.Penal Code § 882. These Rules do not provide for requiring bail of a material witness.

The second sentence is to ensure confrontation so that the State will be able to use the deposition at trial. See subdivision (h), *infra*.

1 **(c) Notice of taking.** The party at whose instance the deposi-
2 tion is to be taken shall give all parties reasonable written notice
3 of the name and address of each person to be examined, the time
4 and place for the deposition, and the manner of recording. Upon
5 motion of a party or of the deponent the court may change the
6 time, place, or manner of recording.

Comment

This is generally similar to a number of current provisions which specify:

The party at whose instance a deposition is to be taken shall give to every other party rea-

sonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the

court for cause shown may extend or shorten the time.

See former Uniform Rule 27(b); Alaska R.Crim.P. 15(b); Colo.R. Crim.P. 15(c); Maine R.Crim.P. 15(b); Mont.Rev.Codes § 1802(b); Nev.Rev.Stat. § 174.185; Wis.Stat. § 967.04(2).

In providing for a motion to change the place as well as the time of the deposition, this accords with F.R.Crim.P. 15(b), Fla.R.Crim.P. 3.220(d) and Vt.R. Crim.P. 15(b). Upon a motion

to change the time, the judge may take into account whether the parties have had an opportunity to interview the witnesses and examine their statements. Compare Alaska R.Crim.P. 15(a); Mont.Rev.Codes § 95-1802(a). It will be noted that this subdivision allows the deponent as well as the party to make the motion to change time, place, or manner of recording.

As to manner of recording, see subdivision (d)(2), *infra*, and Comment.

1 **(d) How taken.** The deposition shall be taken in the manner
2 provided in civil actions, except:

3 (1) If the deposition is taken at a place over which this
4 State lacks jurisdiction, it may be taken instead in the man-
5 ner provided by the law of that place;

6 (2) It shall be recorded by the means specified in the no-
7 tice; and

8 (3) Upon motion of a party and a showing that a party
9 or the deponent is engaging in serious misconduct at the
10 taking of a deposition, the court by order may direct that the
11 deposition's taking be continued in the presence of a [judge],
12 in which case the [judge] may preside over the remainder
13 of the deposition's taking.

Comment

In making the general rule that the deposition shall be taken in the manner provided in civil actions, this subdivision accords with former Uniform Rule 27(c), F.R.Crim.P. 15(d), Alaska R. Crim.P. 15(c), Fla.R.Crim.P. 3.220(d), Maine R.Crim.P. 15(d), Mont.Rev.Codes § 95-1802(c), N. J.Rules of Court 3:13-2(a), Tex. Code Crim.P. art. 39.04, and Wis. Stat. § 967.04(3).

Clause (1) covers depositions on Indian reservations and enclaves over which the State lacks

jurisdiction as well as depositions outside the state's physical boundaries. In providing that such depositions may be taken per the place of taking's law instead of per the prosecuting state's civil procedure, clause (1) is somewhat similar to that part of F.R. Civ.R. 28(b) which provides, "In a foreign country, depositions may be taken * * * before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United

States.” Some current criminal procedure provisions treat extra-state depositions, but they do so in greatly varying amounts of detail. See *e. g.*, Calif.Penal Code §§ 1349 through 1362; Fla.R. Crim.P. 3.190(j); N.Y.Crim.P. Law §§ 680.10 through 680.80; Tex.Code Crim.P. arts. 39.04, 39.07, 39.09; Vt.R.Crim.P. 15(h); Wis.Stat. § 967.04(4)(b). As to bringing out of state witnesses to the prosecuting state, see Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (1931), which, according to this Conference’s 1973 Reference Book, has been adopted by every state except Alabama, Alaska, and Georgia.

In allowing depositions to be recorded by other than stenographic means clause (2) accords with F.R.Civ.P. 30(b)(4), except that the latter allows this only upon court order. This provides a means by which the cost of deposition may be minimized. See Rule 754(b), *infra*, regarding the term “recorded”.

As to clause (3), it should be noted that some states authorize depositions or “conditional examinations” to be conducted before judges or magistrates. See Calif.Penal Code § 1339; Colo.R. Crim.P. 15(d); N.Y.Crim.P. Law § 660.50(2), Tex.Code Crim.P. art. 39.03.

- 1 (e) **Place of taking.** The deposition shall be taken in a build-
2 ing where the trial may be held, at a place agreed upon by the
3 parties, or at a place designated by special or general order of
4 the court. If the defendant is in custody or subject to terms of
5 release which prohibit leaving the State and does not appear
6 before the court and understandingly and voluntarily waive the
7 right to be present, a deposition to perpetuate testimony shall
8 not be taken at a place which requires transporting the defend-
9 ant within a jurisdiction which does not confer upon [law en-
10 forcement officers] of this State the right to transport prisoners
11 within it.

Comment

The first sentence is taken from Fla.R.Crim.P. 3.220(d). Because of the need for the prosecutor and, sometimes, an incarcerated defendant to be present, the court-house will usually be the most

convenient place for the deposition.

The last sentence corresponds to Wis.Stat. § 967.04(4)(b).

- 1 (f) **Presence of defendant.**

- 2 (1) *At discovery deposition.* The defendant may be pres-
3 ent at the taking of a discovery deposition, but if he is in
4 custody he may be present only with leave of court.

Comment

Normally the defendant's interest in being on hand to assist his lawyer at the deposition should impel the court to grant the defendant's request to be present. As to the effect of the defendant's presence upon the State's ability to use a discovery deposition as substantive evidence at trial, see subdivision (h), *infra*.

(2) *At deposition to perpetuate testimony.* The defendant must be present at the taking of a deposition to perpetuate testimony, but if his counsel is present at the taking:

(i) The court may excuse the defendant from being present if he appears before the court and understandingly and voluntarily waives the right to be present;

(ii) The taking of the deposition may continue if the defendant, present when it commenced, thereafter voluntarily absents himself therefrom; or

(iii) If the deposition's taking is presided over by a [judge], the [judge] may direct that the deposition's taking or part thereof be conducted in the defendant's absence if the [judge] has justifiably excluded the defendant because of his disruptive conduct.

Comment

This is an adaptation of Rule 713(b), *infra*. However, clause (ii) hereof is patterned after F.R.Crim.P. 43(b)(1) rather than Rule 713(b)(2), *infra*, because the defendant would not be informed by the court as required by the latter, respecting a deposition. See Comment to Rule 713(b), *infra*.

(3) *Unexcused absence.* If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony and his absence has not been excused:

(i) Its taking may proceed, in which case the deposition may be used only as a discovery deposition; or

(ii) If the deposition is taken at the instance of the State, the prosecuting attorney may direct that the commencement of its taking be postponed until the defendant's attendance can be obtained, and the court, upon application of the prosecuting attorney, by order may direct a [law enforcement officer] to take the defendant into custody and keep him in custody during the taking of the deposition.

Comment

Under clause (i), either the defense or the prosecution may proceed with its perpetuation deposition in the defendant's unexcused absence, but the deposition may then be used only as a discovery deposition, with restricted admissibility. See subdivision (h),

infra. But clause (ii), which is patterned after Rule 713(c), *infra*, gives the prosecutor the further option of having the defendant brought in so that the deposition will have the greater admissibility of a perpetuation deposition.

- 1 **(g) Payment of expenses.** If the deposition is taken at the
- 2 instance of the State, the court may, and in all cases where the
- 3 defendant is unable to bear the expense the court shall, direct
- 4 the State to pay the expense of taking the deposition, including
- 5 the reasonable expenses of travel and subsistence of defense
- 6 counsel and, if the deposition is to perpetuate testimony or if the
- 7 court permits as to a discovery deposition, of the defendant in
- 8 attending the deposition.

Comment

This is rather similar to F.R. Mont.Rev.Codes § 95-1802(g);
Crim.P. 15(c) and Vt.R.Crim.P. Nev.Rev.Stat. § 174.195; N.J.
15(c). Compare former Uniform Rules of Court 3:13-2(e); Wis.
Rule 27(c); Fla.R.Crim.P. 3.220 Stat. § 967.04(4)(b).
(k); Maine R.Crim.P. 15(c), (g);

- 1 **(h) Substantive use on grounds of unavailability.** So far as
- 2 otherwise admissible under the rules of evidence, a deposition to
- 3 perpetuate testimony may be used as substantive evidence at the
- 4 trial or upon any hearing if the deponent is unavailable [as de-
- 5 fined in Rule 804(a) of the Uniform Rules of Evidence]. A dis-
- 6 covery deposition then may be so used if the court determines that
- 7 the use is fair in light of the nature and extent of the total exami-
- 8 nation at the taking thereof, but it may be offered by the State
- 9 only if the defendant was present at its taking. [The deponent
- 10 is unavailable for purposes of this subdivision if he:

- 11 (1) Is exempted by ruling of the court on the grounds of
- 12 privilege from testifying concerning the subject matter of
- 13 his statement;
- 14 (2) Persists in refusing to testify concerning the subject
- 15 matter of his statement despite an order of the court to do
- 16 so;
- 17 (3) Testifies to a lack of memory of the subject matter of
- 18 his statement;

- 19 (4) Is unable to be present or to testify at the trial or
 20 hearing because of death or then existing physical or mental
 21 illness or infirmity; or
- 22 (5) Is absent from the trial or hearing and the proponent
 23 of his statement has been unable to procure his attendance
 24 by process or other reasonable means,
 25 unless his exemption, refusal, claim of lack of memory, inability,
 26 or absence is due to the procurement or wrongdoing of the pro-
 27 ponent of his statement for the purpose of preventing the de-
 28 ponent from attending or testifying.] If only a part of a deposi-
 29 tion is offered in evidence by a party, an adverse party may re-
 30 quire him to offer or may himself offer all of it which is relevant
 31 to the part offered.

Comment

This subdivision treats only the matter of *substantive* use on grounds of *unavailability* because it seems that only as to that matter do depositions call for special rules.

A state may either incorporate a definition of "unavailable" by making a cross-reference like the bracketed language at the end of the first sentence or set forth such a definition as is done in

the bracketed third sentence. The latter is substantially identical to F.R.Crim.P. 15(g).

The last sentence is to the same effect as provision in F.R.Crim.P. 15(e), Alaska R.Crim.P. 15(d), Maine R.Crim.P. 15(e), Mont. Rev.Codes § 95-1802(e), Nev. Rev.Stat. § 174.215(3), Vt.R. Crim.P. 15(e), and Wis.Stat. § 967.04(5)(b).

- 1 (i) **Objections to admissibility.** Objections to receiving in
 2 evidence a deposition or part thereof may be made as provided
 3 in civil actions.

Comment

This is identical to former Uni- form Rule 27(e), Alaska R.Crim. P. 15(f), Maine R.Crim.P. 15(f), Mont.Rev.Codes § 95-1802(f), Nev.Rev.Stat. § 174.225, N.J. Rules of Court 3:13-2(c), and

Vt.R.Crim.P. 15(f). See Tex. Code Crim.P. art. 39.05; Wis. Stat. § 967.04(6). Compare F.R. Crim.P. 15(f); Calif.Penal Code § 1345; N.Y.Crim.P.Law § 670.- 20.

- 1 (j) **Deposition by agreement not precluded.** Nothing in this
 2 Rule precludes the taking of a deposition, orally or upon written
 3 questions, or the use of a deposition, by agreement of the parties.

Comment

This accords with Vt.R.Crim. p. 15(i). F.R.Crim.P. 15(h) and Alaska R.Crim.P. 15(g) differ only in adding, "with the consent of the court." Compare Alaska R. Crim.P. 15(d) ("At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evi-

dence, may be used [*inter alia*] by stipulation of the parties"); Tex. Code Crim.P. art. 39.11 ("The State and defense may agree upon a waiver of any formalities in the taking of a deposition other than that the taking of such deposition must be under oath").

Rule 432. [Investigatory Deposition.]

- 1 (a) **Authority.** The prosecuting attorney may take the testi-
- 2 mony by deposition of any person believed to possess informa-
- 3 tion concerning the possible commission of an offense within the
- 4 prosecuting attorney's jurisdiction.

Comment

Rule 432 generally

There is general recognition of the need for prosecutorial investigative authority to obtain relevant information from persons who will not voluntarily furnish that information. In most jurisdictions, the grand jury is utilized for that purpose. These Rules encourage states to discard the grand jury as a screening agency in light of available alternative procedures. See Comment to Rule 231(a), *supra*. Similarly, the granting of direct authority to the prosecutor to obtain investigatory depositions is viewed as preferable to the use of the grand jury for that purpose. Reliance upon the investigatory deposition avoids many of the complexities that arise in the grand jury setting because of the combination of the grand jury's investigatory and screening functions. Thus such issues as secrecy, presence of counsel, and scope of examination may be viewed some-

what differently when concern is directed at the interests of the prosecutor and witness apart from the grand jury function of determining probable cause. A preference for a separate prosecutor investigative authority is also reflected in the Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 12.8 (1973). As stated in the Commentary thereto:

One important tool necessary to the proper investigation of criminal cases is suggested by this standard: the prosecutor should have the authority to issue subpoenas requiring those with knowledge of possible criminal activity to appear for questioning. At present, the prosecution must either rely upon voluntary cooperation (which in a significant number of cases is not forthcoming) or utilize the cumbersome device of the grand jury to obtain information concerning crim-

inal activity. This standard proposes the more straightforward approach of a subpoena issued directly by the prosecutor.

Several states now have provisions authorizing investigatory deposition procedures on the initiative of the prosecutor. See, *e. g.*, Art.Stat. § 43-801; Fla.Stat. § 32.20 (and former § 34.14); Kan. Stat. Ann. § 22.3101; La.Code Crim.P. art. 66. The Model Crime Investigation Commission Act recommends that similar authority be granted to such commissions. See, *e. g.*, N.Y.Unconsol.Laws § 7501.

Subdivision (a)

This subdivision grants authority to the prosecutor to take an investigatory deposition. The standard for determining who may be deposed is derived from N.Y.Crim.P.Law § 190.50 ("The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge"). The limitation of investigation to possible offenses

within the prosecutor's jurisdiction (ordinarily offenses committed within the district from which he is elected) is common to grand jury investigations. See, *e. g.*, Calif.Penal Code § 388; Fla.Stat. § 905.16; N.Y.Crim.P.Law § 190.55. See also 22 Okla.Stat. § 258 (prosecutor authority to subpoena witnesses for examination before the prosecutor limited to felony cases triable in that county).

Current investigatory deposition provisions are divided as to whether application must be made to the court to utilize that procedure. Compare La.Code Crim.P. art. 66 (court may issue subpoena upon written application of prosecutor) with Ark.Stat. § 43-801 (prosecutor "shall have authority to issue subpoenas in all criminal matters"). This Rule adopts the latter approach, which is also utilized in most grand jury provisions. See, *e. g.*, Calif.Penal Code § 939.2; Tex.Code Crim.P. art. 20.10. If the prosecutor misuses his authority, the witness may object pursuant to subdivisions (c) and (j), *infra*.

- 1 (b) Attendance. Attendance of witnesses and production of
- 2 documentary evidence and objects may be compelled by sub-
- 3 poena under Rule 731. A written notification of the matters
- 4 specified in subdivision (g) shall be served along with the sub-
- 5 poena.

Comment

The issuance of the subpoena will be governed by Rule 731, which gives the prosecutor automatic access to the subpoena authority of the court. So as to insure that the witness has an ade-

quate opportunity to make an informed determination relating to exercise of his rights under subdivision (g), a written notification of those rights must be served along with the subpoena.

- 1 (c) When taken. No deposition may be taken under this Rule
- 2 after any person is arrested for, or any citation, summons, arrest

3 warrant, [indictment,] or information is issued for, commission
 4 of any offense which is a subject of the deposition or any related
 5 offense as defined under Rule 471(a). Upon motion of a de-
 6 fendant or witness and a showing that a scheduled deposition
 7 is prohibited by this subdivision, the court shall order that the
 8 deposition not be taken except in conformity with Rule 431.

Comment

Once prosecution has been initiated as to the subject of an investigation there is a defendant whose counsel is entitled to participate in the deposition procedure. Accordingly, once an arrest has been made, or a citation, summons, warrant, indictment, or information issued, the deposition procedure of Rule 431, *supra*, becomes applicable. This extends to initiation of prosecution for related offenses under Rule 471(a), *infra*—i. e., offenses “based on the same conduct or “aris[ing] from the same criminal episode.” Testimony concerning a related offense is certainly “relevant” to the defendant’s preparation on the already initiated prosecution (*cf.* Rule 421(a), *supra*), and the defendant should have the opportunity to participate in the deposition. (Of course, if the witness himself is the defendant on the related offense, then a Rule 431 deposition will not be available without the defendant-witness’ consent. See Rule 431(a)(1), *supra*.)

Admittedly, courts may have some difficulty in determining the relationship between the sub-

ject of the prosecutor’s examination and the offense for which an arrest has been made or a citation, summons, warrant, indictment, or information issued. But the issue is no more difficult than that currently faced in the context of an objection to a grand jury investigation on the ground that the grand jury subpoena power is being utilized “for the purpose of preparing an already pending indictment for trial.” See *United States v. Doe*, 455 F. 2d 1270 (1st Cir. 1972). Indeed the standard provided in this subdivision (c) offers more direction to the court (and more protection against misuse of the investigatory deposition process) than the approach of the federal courts in ruling on such objections. See *United States v. Doe*, *supra* (applying a “predominant purpose” test). It should be noted in this regard that the reference to Rule 471(a) should clearly indicate that the subject matter of the investigation must be defined in terms of the transaction and not just in terms of the individual about whom questions are asked.

1 (d) How taken. The deposition shall be taken in the manner
 2 provided in civil actions, except:

3 (1) It shall be recorded by the means the prosecuting at-
 4 torney designates; and

- 5 (2) Upon motion of the witness and a showing that the
6 taking of the deposition will unreasonably annoy, embarrass,
7 or oppress the witness, the court may order that the deposi-
8 tion not be taken or may limit the scope and manner of the
9 taking of the deposition.

Comment

This subdivision is based upon related provisions of Rule 431, *supra*. Clause (1) derives from Rule 431(d)(2). Since the prosecutor is the party seeking the deposition, he may designate the recording method.

Clause (2) is derived from Rule 431(a)(4), *supra*. It obviously will be difficult for the prospec-

tive witness to make the requisite showing in advance of the deposition, but certain situations may be anticipated that are likely to require court action under clause (2) (*e. g.*, where the witness claims that he is too ill to be deposed or that repetitive depositions have been scheduled so as to harass him).

- 1 **(e) Persons present.** No person may be present during the
2 taking of the deposition except:
- 3 (1) The prosecuting attorney;
- 4 (2) A stenographer or operator of a recording device;
- 5 (3) An interpreter, when needed;
- 6 (4) The witness under examination;
- 7 (5) The witness' lawyer;
- 8 (6) A public officer holding the witness in custody;
- 9 (7) A parent or guardian of a witness who is a minor, un-
10 less excluded by order of the court; and
- 11 (8) With the approval of the court, any person whose
12 presence is deemed appropriate to protect the physical or
13 mental health of any other person present.

Comment

This subdivision follows the common pattern of grand jury statutes in limiting the persons who may be present. In part, this limitation is designed to protect the secrecy of the proceeding, but it is also designed to keep the deposition from taking on the appearance of a public hearing. The prosecutor may not conduct the

investigatory deposition in the publicity-oriented fashion in which legislative hearings are sometimes conducted.

The list of persons allowed to be present is somewhat broader than that found in most grand jury statutes. Compare, *e. g.*, former Uniform Rule 10; F.R. Crim.P. 6(d); Alaska R.Crim.P.

6. These provisions do not include reference to custodial officers, parents, or persons appropriate to protect health. *But see* N.Y.Crim.P.Law § 190.25(3) (custodial officer). In the grand jury situation, there may be concern that such persons will influence the grand jury in its determination of probable cause. That concern does not exist in this setting. Neither is there as great concern that the presence of such persons will improperly influence the witness' testimony, since the witness will have the assistance of counsel. Compare *United States v. Carper*, 116 F.Supp. 817 (D.D.C.1953) (rejecting indictment because the presence of the deputy marshal holding the witness in custody could have intimidated the witness). However, such concern is not completely eliminated with respect to persons in the last two categories noted, and their presence is therefore specifically made subject to court control. *Cf. United States v. Borys*, 169 F.Supp. 366 (D. Alaska 1959) (indictment dismissed where parent present

during child's testimony on alleged sex offense).

The last category of persons noted in this subdivision is stated broadly, rather than by specific reference to physicians, since there may be situations where other persons may be appropriately present to protect the mental or physical health of the witness or others present (*e. g.*, a relative of an extremely nervous witness or a police officer assigned to protect a prosecutor who has been threatened by a witness). Because of the breadth of this category, and therefore its potential for abuse, court approval is required to gain the presence of such a person.

Admittedly, as the number of persons present increases, there may be somewhat greater difficulty in preserving secrecy. But the number authorized by this subdivision would not appear to be so substantial as to cause difficulties in this regard, and if the number is so great as to be oppressive to the witness, relief is available under subdivision (i) (6), *infra*.

(f) Secrecy.

(1) *Imposition of requirement.* Upon determination by the prosecuting attorney that secrecy is needed to obtain relevant information or to protect the interests of a witness or other person, or upon request of the witness, the prosecuting attorney shall direct all persons present during a deposition not to disclose the nature or purpose of the deposition or anything which transpires during the examination, except as permitted under paragraph (2). Neither the prosecuting attorney nor his agent may disclose, without the consent of the person subpoenaed, that a subpoena has issued, except as necessary to its issuance or service.

Comment

Subdivision (f) carries over to the investigatory deposition some aspects of the secrecy requirement traditionally applied to the grand jury. In the grand jury setting, secrecy is thought to be necessary for several reasons: (1) to protect the internal operations of the grand jury, (2) to prevent disclosure of a grand jury investigation to a person being investigated, who might then decide to flee, (3) to prevent disclosure to a person being investigated who might tamper with prospective witness, (4) to encourage full and open testimony by the witness, and (5) to protect the reputation of an innocent person who is the subject of an investigation and may never be charged with an offense. Only the first ground is purely a product of the grand jury setting; grounds (2)–(5) may be equally applicable to the investigatory deposition under the circumstances of a particular case.

Under paragraph (1), the determination whether such circumstances exist is left to the prosecutor and witness. The witness may determine for himself (1) whether the possible public examination by a prosecutor would be injurious to his position, or (2) even if the prosecutor clearly does not intend to make a public disclosure, whether the imposition of a legal requirement of secrecy will be helpful to the witness in avoiding pressure to disclose. Similarly, the prosecutor may determine that a secrecy requirement is necessary to keep the subject of the investigation

from learning of its scope, to encourage witnesses to speak freely, or to restrict possible pre-prosecution publicity that may create difficulties in providing a fair trial on any subsequent charges. The determination by either the prosecutor or the witness that secrecy is needed is binding on the other.

In some jurisdictions, no secrecy requirement is currently imposed upon the grand jury witness. See, *e. g.*, F.R.Crim.P. 6(e). In others, and in former Uniform Rule 11, the secrecy requirement is imposed upon all parties present. See, *e. g.*, La.Code Crim.P. art. 434. This subdivision follows the latter approach. When there is a need for secrecy—whether to protect the reputation of the potentially innocent subject of the investigation, or to facilitate the acquisition of further evidence without interference by the subject of the investigation—that need is undermined by disclosures by witnesses as well as other persons.

It should be noted, however, that the witness can only be precluded from disclosing his deposition as such; he is still free to discuss the subject matter discussed at the examination provided he makes no reference to the examination. Moreover, each party may seek court approved disclosure under paragraph (2) (v), *infra*.

The second sentence is to protect the individual against the misuse of the subpoena power to achieve publicity. See United

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States v. Dionisio, 410 U.S. 1, 43-44, 93 S.Ct. 764, 35 L.Ed.2d 67 (Marshall, J., dissenting). Similar provisions are found in various states. See, e. g., Mich.Comp. Laws § 767.4.

(2) *Scope.* Upon notification by the prosecuting attorney under paragraph (1), no person present during a deposition may disclose the nature or purpose of the deposition or anything which transpired during the examination prior to an arrest for, or the issuance of a citation, summons, arrest warrant, [indictment], or information for, the commission of an offense that was a subject of the examination or any related offense as defined under Rule 471(a), except disclosure may be made:

(i) To counsel for the witness not present during the examination, and to the staff of counsel for the witness;

(ii) To a prosecuting attorney not present during the examination or a [law enforcement officer], for use in the performance of his duties;

(iii) To the court in connection with a challenge to the deposition as provided in this Rule;

(iv) In connection with a judicial proceeding on a criminal charge that the witness committed perjury in his testimony taken under this Rule or other testimony relating to the same subject matter; and

(v) As directed by the court in the interest of justice.

A person to whom disclosure is made under subparagraphs (i) or (ii) may not make a further disclosure beyond that which a person present during the deposition could make under this paragraph.

Comment

The grounds for secrecy noted in the previous Comment are primarily applicable prior to the initiation of prosecution. Moreover, after charges are initiated, there is a defendant who has a need for examination of all depositions relating to his case, as reflected in Rule 421(a), *supra*, making investigatory depositions an appropriate subject of discovery. Accordingly, the duty of secrecy ter-

minates with the initiation of prosecution of an offense that is a subject of the investigation. A similar position is taken by several states with respect to grand jury proceedings. See, e. g., Alaska R.Crim.P. 6(j); *People v. Belanca*, 386 Mich. 708, 194 N.W.2d 863 (1972). Many other jurisdictions, though they have not reached the point of permitting full disclosure after indictment,

have recognized that the "traditional reasons for grand jury secrecy are largely inapplicable" after indictment and have liberalized disclosure after that point. See *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967); ABA Standards, Discovery and Procedure Before Trial 2.1 (iii) (Approved Draft, 1970) (providing discovery of "those portions of the grand jury minutes containing * * * relevant testimony of persons whom the prosecutor intends to call").

This paragraph recognizes five exceptions even with respect to disclosure prior to the initiation of prosecution on the subject of the investigation. These exceptions are analogous to those presented in the grand jury setting, although broader in some respects.

Most grand jury secrecy provisions contain an exception permitting disclosure to the "prosecuting attorney for use in the performance of his duties." See, *e. g.*, former Uniform Rule 11; 38 Ill.Stat. § 112-6(b). Clause (ii) extends this to prosecuting attorneys of other districts and to law enforcement officers (who are then prohibited from making further disclosure by the same limitations as are applied to persons present).

Under clause (i), disclosure to the witness' counsel is also permitted (as it is in the grand jury setting, see *e. g.*, La.Code Crim. P. art. 434). Further, just as the prosecutor is allowed to make further disclosure to other prosecutors and law enforcement offi-

cers, the witness' counsel is permitted to make disclosure to his staff (including, *e. g.*, private investigators).

Clauses (iii) and (iv) also authorize disclosure commonly permitted in the grand jury setting, although sometimes only on court approval. See, *e. g.*, former Uniform Rule 11 and 38 Ill.Stat. § 112-6(b) (authorizing disclosure "preliminary to or in connection with a judicial proceeding").

The final exception gives the court authority to prevent unnecessary imposition of secrecy by prosecutor or witness, and to grant appropriate relief where special justifications for disclosure may outweigh the justification for secrecy. Thus, the court may authorize disclosure to another government agency investigating the same matter. See *People v. Di Napoli*, 27 N.Y.2d 229, 316 N.Y.S.2d 545, 265 N.E.2d 449 (1970). Similarly, disclosure for the purpose of impeachment may be permitted where the witness testifies as to the same matter in a civil proceeding. Grand jury secrecy provisions in some states currently grant the court far ranging discretion to permit disclosure in areas like these. See, *e. g.*, N.Y.Crim.P.Law § 190.25 (4). Moreover, there should be greater room for flexibility with respect to investigatory depositions because one concern relating to disclosure of grand jury proceedings—possible interference with the operations of the grand jury as a determiner of probable cause—is not present in this setting.

1 (g) Notification of rights. Before examining a witness, the
2 prosecuting attorney shall inform him:

3 (1) Of his right to refuse to answer on the ground that
4 his testimony may tend to incriminate him;

5 (2) Of his right under subdivision (f); and

6 (3) Of his right to the assistance of a lawyer during the
7 examination, that upon request a lawyer will be provided
8 without cost to him, and that upon request the examination
9 will be delayed to afford him reasonable opportunity to ob-
10 tain and consult with a lawyer.

11 The notification of rights by the prosecuting attorney shall be
12 recorded as part of the deposition. If the witness proceeds with-
13 out a lawyer, his express waiver of the assistance of counsel shall
14 also be recorded.

Comment

There is a division of authority concerning the need for notifying a grand jury witness of his right against self-incrimination, at least where the witness is a prospective defendant. Compare *United States v. Scully*, 225 F.2d 113 (2d Cir. 1955), certiorari denied 76 S.Ct. 156, 350 U.S. 897, 100 L.Ed. 788, with *State v. Fary*, 19 N.J. 431, 117 A.2d 499 (1955). See also *State ex rel. Lowe v. Nelson*, 202 So.2d 232, opinion adopted 210 So.2d 197 (Fla. Dist. Ct. App. 1967) (dividing over the impact of *Miranda*). This subdivision (g) requires notification in all cases. No attempt is made to distinguish between witnesses in terms of the likelihood that they may become defendants. Any such line of distinction involves considerable difficulty in application. See *Birzon and Gerard, The Prospective Defendant Rule and the Privilege Against Self-Incrimination in New York*, 15 Buff.L.Rev. 595 (1966). Moreover, any witness may suddenly find himself in a position where

his answers may be incriminatory. Any question as to whether the witness' response reflects a knowing waiver of his privilege should be avoided by requiring notification in each case. Cf. N.Y.Crim. P.Law § 190.40 (granting immunity to all grand jury witnesses unless they execute written waivers). The same approach is taken with respect to waiver of objections that might be raised under subdivision (i), *infra*.

A similar rationale supports the witness' right to assistance of counsel. While counsel is not available before the grand jury, that restriction is based upon concerns (*e. g.*, possible attempts by counsel to influence the grand jury) that are not present in the deposition context. Indeed, most jurisdictions recognize the grand jury witness' need for the assistance of counsel by permitting the witness to leave the grand jury room when he desires to consult with counsel on legal matters. Compare ALI Model Code of Pre-

Arraignment Procedure § 340.3 (T. D. # 5, 1972) (recommending that counsel be permitted in the grand jury room). Moreover, the witness before the prosecutor on an investigatory deposition lacks the "protective shield" of the grand jurors that has been stressed as one of the factors justifying exclusion of counsel before the grand jury. See *Petition of Groban*, 352 U.S. 330, 341, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957) (Black, J., dissenting). See also *Gill v. State ex rel. Mobley*, 242 Ark. 797, 416 S.W.2d 269 (1967) (holding right to counsel applicable to examination before prosecutor).

Since counsel can provide critical assistance to the witness in the exercise of his legal rights, appointed counsel is provided. Arguably, this may be required constitutionally when an indigent individual is a target of the investigation. *Cf. State ex rel. Lowe v. Nelson*, *supra*. Subdivision (g) goes beyond that situa-

tion both because of the difficulties involved in applying the target standard and the possible need for assistance even when the witness is not the target. Where the witness is willing to give the prosecutor a voluntary statement, there often will be no need to utilize this Rule, and the issue of appointment of counsel will not arise. If, on the other hand, the witness refuses to discuss the case except pursuant to a subpoena, his very posture evidences a possible need for counsel, even though he may not be the target of the investigation.

In light of the fact that this procedure occurs at the investigatory stage, when the deponent is not charged and there may be no probable cause as to him, the state should bear the cost of counsel just as it bears the cost of other experts utilized at the investigatory stage, unless the deponent opts to retain a lawyer at his own expense.

- 1 (h) **Immunity.** A witness called to testify under this Rule
- 2 may be granted immunity under Rule 732.

Comment

Where the grand jury is used as an investigatory device, it is frequently utilized along with the grant of immunity. The same is

true of the prosecutor's investigatory subpoena. See, *e. g.*, La. Code Crim.P. art 439.1.

- 1 (i) **Refusal to testify.** A witness may refuse to answer a
- 2 question if:
- 3 (1) He has a privilege not to testify;
- 4 (2) He has not had an adequate opportunity to consult
- 5 with a lawyer;
- 6 (3) The question is based upon information derived from
- 7 a violation of a constitutional right of the witness or any
- 8 other right requiring exclusion of evidence obtained from
- 9 the violation thereof;

(4) The question is not relevant to the investigation of a possible commission of any criminal offense within the jurisdiction of the prosecuting attorney;

(5) The question relates to a matter that is not a proper subject of investigation under subdivision (c); or

(6) The taking of the deposition unreasonably annoys, embarrasses, or oppresses the witness.

Comment

This provision is designed to specify grounds upon which a witness may refuse to answer a question. In the area of grand jury examination, there is considerable division as to the permissible grounds for objection.

The first ground—objection based upon a testimonial privilege (*e. g.*, self incrimination, marital communications)—is well recognized. Whether the privilege is applicable would depend upon state law (or federal constitutional law where the privilege against self-incrimination is involved).

The second ground is a byproduct of the right to counsel.

The third ground is an extension of the position taken by Congress with respect to illegal wiretaps. See *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Clause (3) would also apply to examinations based upon information obtained via other constitutional violations requiring application of the exclusionary rule. Support for this position is found in the application of the “fruit of the poison tree” doctrine to other aspects of the criminal process. See generally *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In *United*

States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), a divided court refused to extend *Silverthorne* to permit a grand jury witness to object to examination based on information obtained from an unconstitutional search. *Calandra* was based in part upon the “potential injury to the historic role and functions of the grand jury.” The Court was particularly concerned that recognition of objections of the type raised by the witness there would result in “‘protracted interruptions of grand jury proceedings’ * * *, effectively transforming them into preliminary trials on the merits.” While the same concern is applicable to the prosecutor’s investigatory deposition it is not as significant in this setting. The prosecutor’s investigative deposition process is not limited by a specific term or other cumbersome aspect of the grand jury investigative process. Also, as noted in discussion of clauses (4) and (5), the prosecutor acting alone is not appropriately granted quite the same, also unlimited, scope of investigation as was recognized in *Calandra* as traditional for the grand jury. On much the same reasoning, clause (3) would also recognize objections based on information derived from violations of nonconstitutional rights

that are enforced by the exclusionary rule. See Rule 46(a)(2), *infra*.

The fourth ground of objection—relevancy—is not recognized with respect to grand jury proceedings in most jurisdictions. Federal courts, for example, have held that the witness may not object on the ground that (1) the subject of investigation cannot be the basis for a criminal prosecution because not within the reach of Congress' constitutional authority, *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L. Ed. 979 (1919), (2) the subject of investigation consisted of criminal activities in another district, and therefore not within the jurisdiction of the grand jury, *United States v. Girgenti*, 197 F.2d 218 (3d Cir. 1952). On the other hand, several states do recognize relevancy objections, although there is a presumption of regularity that the witness must overcome. See, *e. g.*, *People v. Polk*, 21 Ill.2d 594, 174 N.E.2d 393 (1961). The refusal to recognize a relevancy objection in the grand jury setting has rested, in part, upon the view that the grand jury, because of its composition, will serve to bar prosecutorial misuse of its investigatory authority. That protection is not available in the investigatory deposition procedure. Rejection of a relevancy objection has also been justified on the ground that the determination of relevancy places too great a burden on the grand jury—*i. e.*, that it cannot be expected to know at the outset the eventual outcome of its investigation. But the relevancy objection recognized in clause (4) imposes

no such burden. The objecting witness must, in effect, show that the subject of investigation could not relate to any possible offense. There is no requirement that the prosecution establish probable cause that a particular offense was committed. A similar approach taken in the grand jury context apparently has not caused any great difficulties in those states that recognize relevancy objections.

Clause (5) is based upon subdivision (c), *supra*, and bars questions concerning pending prosecutions. The prosecutor may obtain such information by utilizing the deposition procedure of Rule 25, *supra*.

Clause (6) restates the objection recognized in subdivision (d) (3) as an appropriate ground for challenging the entire deposition process. The objection will largely overlap with the relevancy objection of clause (4), but there may be instances where a potentially relevant examination should be restricted. Thus, in *Branzburg v. Hayes*, 408 U.S. 665, 707-08, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court, while upholding the grand jury's authority to question a newsman concerning alleged offenses, stated:

[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution * * *. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt

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a reporter's relationship with his news sources would have justification. Grand juries are

subject to judicial control and subpoenas to motions to quash.

1 (j) **Judicial order.** If a witness refuses to answer upon a
2 a ground provided in subdivision (i), the court, upon motion of
3 the prosecuting attorney, shall hold a hearing to determine
4 whether that refusal is justified under subdivision (i). To pre-
5 serve the secrecy of the examination the court may exclude the
6 public from the hearing. If the court finds that subdivision (i)
7 is inapplicable, the witness shall be required to answer. A wit-
8 ness may not be held in contempt for refusal to answer questions
9 in reliance upon subdivision (i) unless first directed to answer
10 by the court. If the court finds that the refusal to answer was
11 justified under subdivision (i), it may limit the future scope
12 and manner of the taking of the deposition, or if the refusal was
13 justified under subdivision (i)(4), (5), or (6), order that the
14 deposition be terminated.

Comment

Rulings on objections recognized by subdivision (i), *supra*, will be made by the court pursuant to this subdivision (j). If the witness is mistaken as to the legal validity of his objection, he should not be held in contempt, but should first be given the opportunity to respond to the question. See Commentary to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 12.8 (1973).

To preserve the secrecy of the deposition testimony, the court may exclude the public. Cf. Mich. Comp.Laws § 767.19(f). Thus, the witness will not attempt to call

public attention to the subject of the investigation by objecting to a question primarily to obtain a public hearing on the objection that may be attended by the press. Neither will the prosecutor attempt to achieve the same objective by challenging a witness' objection he otherwise would accept.

If the court sustains a witness' objection, its authority under this subdivision is sufficiently broad that it may appropriately prohibit future questions along the same line or even terminate the deposition when the entire examination relates to an improper subject.

Rule 433. [Physical or Mental Examination of Prospective Witness.]

1 (a) **Order for examination.** Upon motion of a party, notice
2 to the person to be examined, and opportunity for him to be
3 heard, the court may order any person other than the defendant
4 to submit to a physical or mental examination by a physician if
5 it appears:

6 (1) A party other than the movant intends to call the per-
7 son as a witness;

- 8 (2) The person's testimony will be essential to the case
 9 of the party intending to call him as a witness; and
 10 (3) There is probable cause to believe that the examina-
 11 tion would show the person's testimony would not be credi-
 12 ble.
 13 The order shall specify the time, place, manner, conditions, and
 14 scope of the examination and by whom it may be made.

Comment

This is similar to F.R.Civ.P. 35(a) except that the latter:

(1) provides only for ordering an examination of "a party" and for ordering a party to produce for examination "a person in the custody or under the legal control of a party,"

(2) does not specify the proposed examinee's opportunity to be heard, and

(3) instead of requirements like clauses (1) through (3), authorizes an order when the proposed examinee's "mental or physical condition (including the blood group) * * * is in controversy * * * for good cause shown."

In some situations a party should have a right to an examination of another party's prospective witness as to such matters as eyesight, hearing, or mental condition, which right should be directly enforceable against the prospective witness. Ability to

comment on a witness' refusal to be examined will often be an inadequate substitute for an examination. It seems inappropriate to have the order for examination enforceable only against the party intending to call the person (so that if he refuses to be examined the only sanction would be exclusion of part or all of his testimony), because a party's right to have a person testify should not be defeasible by the person's refusal to be examined.

The conditions included in clauses (2) and (3) insure that the prospective witness' privacy will be invaded only where it appears that the examination is essential to insure a fair trial. It does not seem justifiable to compel him to be examined if his testimony will be cumulative or if the movant fails to establish probable cause to believe that the examination will show his testimony would not be credible.

- 1 **(b) Report of examining physician.** If requested by any party
 2 or the person examined, the party causing the examination to
 3 be made shall deliver to him a copy of any written report of the
 4 examining physician setting out his findings, including results
 5 of all tests made, diagnoses, and conclusions.

Comment

This derives from F.R.Civ.P. 35(b)(1). Nothing herein precludes discovery of a report of an

examining physician or the taking of the physician's deposition.

Rule 434. [Obtaining Nontestimonial Evidence from Defendant upon Prosecution Motion.]

1 (a) **Authority.** Upon motion of the prosecuting attorney, the
2 court by order may direct a defendant to participate in a proce-
3 dure to obtain nontestimonial evidence under this Rule, if the
4 court finds probable cause to believe:

5 (1) That the evidence sought may be of material aid in
6 determining whether the defendant committed an offense
7 charged in the information [or indictment];

8 (2) That the evidence sought cannot practicably be ob-
9 tained from other sources; and

10 (3) If the prosecution was commenced by citation, that
11 the offense charged has been committed and the defendant
12 committed it.

Comment

Rule 434 generally

This Rule relates to the acquisition of nontestimonial evidence from a "defendant" (*i. e.*, a person against whom an information or indictment has been filed). The term "nontestimonial evidence" refers to evidence that may be obtained from the person without violating the privilege against self-incrimination because the evidence is not testimonial in character. See *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Under current practice in most jurisdictions, the police will extend the detention of an arrested person prior to his initial appearance before a magistrate so that they can obtain nontestimonial evidence from him. Often, the first appearance is delayed for this reason even when there is no immediate need to obtain such evidence (*i. e.*, the evidence is not likely to be altered, lost, or dissipated.)

One justification offered for such delay is that there is no statutory or rule authority to require a defendant to participate in a nontestimonial evidence procedure once he has been released from custody on bail following the first appearance. Rule 434 provides for such authority upon issuance of a court order. It is similar in function to ABA Standards, Discovery and Procedure Before Trial 3.1 (Approved Draft, 1970), which grants the prosecution discovery of evidence from the "person of the accused." That provision has been adopted in several states. See, *e. g.*, Alaska R. Crim.P. 16(c)(1); Fla.R.Crim.P. 3.220(b)(1). *Cf. Adams v. United States*, 399 F.2d 574, 130 U.S.App. D.C. 203 (D.C.Cir.1968).¹

Rule 434 is supplemented by Rules 211(b) and 311(2) which limit the authority of the police to further detain a person for the purpose of obtaining nontestimonial evidence from him. Rule 211 (b) requires that a detained per-

son who falls within the category of persons who must be released upon issuance of a citation should be detained only so long as is necessary to make that determination and to obtain nontestimonial evidence that the officer reasonably believes may be altered, dissipated, or lost if it is not then obtained. This limitation upon detention is based upon two premises: (1) The detention of the individual should not be extended where such extension is not reasonably necessary for effective investigation of the offense involved—if the evidence can be obtained subsequently with no loss as to reliability, the convenience of the law enforcement officer does not outweigh the restriction upon the individual's liberty; (2) Some nontestimonial evidence procedures involve "searches" under the Fourth Amendment, and others, while not in that category, nevertheless may involve a significant invasion of privacy (often depending upon the manner in which they are administered)—accordingly, if reasonably practicable, judicial authorization should be obtained before such procedures are undertaken. *Cf. Schmerber v. California, supra*; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Rule 311(2) imposes a limit on detention similar to that imposed by Rule 211(b), and is based upon similar premises. Rule 311(2) provides that an arrested person may not be delayed in his presentation before a magistrate for the purpose of obtaining nontestimonial evidence except where it is reasonably believed that the evidence will be altered, dissipated or

lost. The first appearance is too important a phase in the criminal process to sanction its delay for the convenience of the officer who desires to obtain evidence that will as readily be available after the first appearance. *Cf. Adams v. United States, supra* (finding that F.R.Crim.P. 5(a) was violated by significantly delaying the presentation of the defendant before a magistrate so that the defendant could be placed in lineups relating to the investigation of other offenses). The adoption of a limitation upon nontestimonial evidence procedures in Rule 311(2) (as well as Rule 211(b)) also avoids offering any "incentive" for using an arrest procedure where release upon issuance of a citation is appropriate.²

Because of the special nature of the procedures involved in obtaining nontestimonial evidence, Rule 434 does not provide for "automatic" disclosure upon request, as is done in other areas of prosecutorial discovery. Compare Rule 423, *supra*. Rather, a court order is required, and such order is issued only after a hearing on a motion. See also ABA Standard 3.1. In general, the procedure is viewed as analogous to the issuance of a search warrant, except that here, since there is no concern that the evidence will be altered, dissipated, or lost, and the defendant is already a party to the proceedings, there is no reason to have ex parte consideration of the requested order. (Where there is concern that the evidence will be altered, dissipated, or lost, an ex parte emergency order may be issued under subdivision (b), *infra*.) Similarly, the procedure de-

parts from search warrant procedure by requiring that the prosecuting attorney, rather than a police officer, initiate the request. This follows from the motion procedure. It also is appropriate since the prosecution has already filed the information and therefore should be familiar with the case.

Rule 434 should not impose any substantial burden upon the court. Many of the more common nontestimonial evidence procedures will fall within Rules 211(b) and 311 (2) since the evidence sought may readily be altered or lost (which includes destruction or alteration by the defendant) or will naturally dissipate (which includes loss of reliability). Rule 211(b) or 311 (2) would encompass, for example, alcohol or drug tests, removal of most foreign substances from the surface of the body (*e. g.*, material under the fingernails), prompt on-the-scene viewing of the defendant's person by witnesses (see, *e. g.*, *Russell v. United States*, 408 F. 2d 1280, 133 U.S.App.D.C. 77 (D. C.Cir.1969)), and even appearance in lineups when the offense was recently committed, the witness' recollection is fresh, and the reliability of the identification process will accordingly be dissipated by delay in holding the lineup.

Subdivision (a)

This subdivision sets forth the standard for issuance of the Rule 434 order. That standard is basically the same probable cause standard utilized in a search warrant application. It may well be that such a high standard is not necessary in light of statements in the various opinions in *United*

States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), and *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), both discussed in the Comment to Rule 436, *infra*. However, neither of those decisions dealt with such procedures as the removal of blood or the taking of x-rays. Compare *Schmerber v. California*, *supra*, (treating the withdrawal of blood for the purpose of making a chemical analysis as a full-fledged search and seizure under the Fourth Amendment). Moreover, probable cause does not appear to be too difficult a standard to meet in this situation. The subject's very status as a defendant is based upon the determination that there is probable cause to believe he committed the offense in question.³ The primary issue therefore is only whether relevant evidence may be obtained from him, and this requirement is readily met if the prosecutor has any basis for tying the particular evidence sought to the case—*e. g.*, there is a witness who may be able to identify the offender, or there are certain types of prints found at the scene that may match those of the offender.⁴

Subdivision (a)(2) requires that the court also find probable cause to believe that the evidence sought cannot practicably be obtained from other sources. Thus, the defendant should not be required to furnish fingerprints if they are already available from a convenient law enforcement agency. Similarly, blood samples should not be required if equally appropriate samples are available from a local hospital. Provisions

similar to clause (2) are also contained in those state provisions authorizing suspect identification orders that are cited in footnote 1, *supra*.

¹ Several jurisdictions have also adopted provisions authorizing court orders directing suspects to participate in nontestimonial identification procedures. See, e. g., Idaho Code § 19-625; Utah Code Ann. § 77-13-37. These provisions are designed to reach persons who have not been charged with the commission of the offense being investigated, (see also Rule 436, *infra*), but presumably also could be applied to defendants. See also ALI Model Code of Pre-Arrest Procedure § 170.1-7 (T.D. # 6, 1974); Proposed Amendment to F.R.Crim.P. 41.1 (Preliminary Draft, April 1971).

² It should be noted that both Rule 211(b) and 311(2) authorize delay for the purpose of obtaining "relevant" nontestimonial evidence. This requires that the evidence relate to the offense which served as the basis for the citation or arrest. Where police desire to obtain evidence relating to another offense as to which they do not have probable cause, Rule 437, *infra*, must be employed notwithstanding that the person is in custody. See United States v. Allen, 408 F.2d 1287, 133 U.S.App.D.C. 84 (D.C.Cir. 1969).

³ That determination will already have been made by the court where the prosecution is initiated by the issuance of a summons or arrest warrant, or by an arrest without a warrant followed by an initial appearance under Rule 311, *supra*. Where, however, the prosecution is initiated by the issuance of a citation, the court would not have made a probable cause determination. Accordingly, subdivision (a)(3) requires that such a determination be made at this point.

⁴ The standard of clause (2) uses the term "may be material" rather than "will be material" so as to avoid any suggestion that the prosecuting attorney must show that the evidence he desires to match against that taken from the defendant is more probable than not capable of being used for such purposes. Cf. ALI Model Code of Pre-Arrest Procedure, p. 163 (Official Draft # 1, 1972) (also rejecting a more-probable-than-not standard). Similar phrasing is used in some search warrant provisions and is not viewed as diluting the probable cause standard. See, e. g., N.Y.Crim.P.Law § 690.40(2).

- 1 (b) **Emergency procedure.** Upon application of the prosecut-
- 2 ing attorney, the court by order may direct a [law enforcement
- 3 officer] to bring the defendant forthwith before the court for an
- 4 immediate hearing on a motion made under this Rule, if affidavit
- 5 or testimony shows probable cause to believe that the evidence
- 6 sought will be altered, dissipated, or lost if not promptly obtained.
- 7 Upon presentation of the defendant, the court shall inform him of
- 8 his rights under this Rule and afford him reasonable opportunity
- 9 to consult with a lawyer before hearing the motion.

Comment

This subdivision provides for an emergency procedure under which a defendant would be taken into custody and brought directly before a judge who would hold a prompt hearing¹ as to the issuance of a nontestimonial evidence order and then if the order is issued, direct the defendant to immediately participate in the authorized procedure. A similar emergency provision is included

in Proposed Amendment to F.R. Crim.P. 41.1(d) (Preliminary Draft, April 1971). See also ALI Model Code of Pre-Arrestment Procedure § 170.4(2) (T.D. # 6, 1974). The proposed federal provision, like the emergency provisions in Rules 436 and 437, *infra*, makes reference to the possible flight of the subject as well as the loss of evidence. Such a provision is not included here because the subject is a defendant and the possibility of flight has already been considered in allowing him pretrial release.

Where there is probable cause that the evidence will be altered, lost or dissipated, the nontestimonial evidence ordinarily will have been obtained pursuant to Rule 211(b), or 311, *supra*. There may

be situations, however, when the probability of the loss of evidence arises after the defendant has been released. For example, the prosecuting attorney may discover an additional witness who is extremely ill, thus requiring a prompt identification procedure. Notwithstanding the need for prompt action, the defendant must be granted the assistance of counsel. Indeed, in emergency situations, assistance of counsel is especially important since the prosecuting attorney frequently may desire that the procedure be conducted in an unusual manner (*e. g.*, the prosecutor may request that a lineup rather than a lineup be used). If the defendant cannot obtain his own counsel on short notice, special counsel may be appointed to assist him.

¹ Because of the provision for an "immediate hearing," the two-day notice provision of Rule 752 would not be applicable.

(c) Scope. The order may direct the defendant to participate in one or more of the following procedures conducted in a reasonable manner:

(1) Appearing, moving, or speaking, for identification in a lineup, but if a lineup is not practicable, then in some other reasonable procedure;

(2) Trying on clothing or other articles;

(3) Providing handwriting and voice exemplars;

(4) Submitting to the taking of photographs;

(5) Submitting to the taking of fingerprints, palm prints, footprints, and other body impressions;

(6) Submitting to the taking of specimens of saliva, breath, hair, and nails;

(7) Submitting to body measurements or other reasonable body surface examinations;

(8) Submitting to the removal of foreign substances from the surface of the body, if the removal does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual;

- 20 (9) Submitting to the taking of specimens of blood and
21 urine, if the taking does not involve an unreasonable intrusion
22 of the body or an unreasonable affront to the dignity
23 of the individual; and
24 (10) Submitting to physical examination, including x-
25 rays, under medical supervision.

Comment

This subdivision lists those non-testimonial evidence procedures in which the court may order the defendant to participate. The procedures listed are not confined to identification procedures. Several may be utilized to obtain evidence to negate a potential defense as well as to establish that defendant was a participant in the offense. Thus, a physical examination may reveal the presence or absence of bruises that may be relevant to a potential claim of self-defense.

The subdivision lists those commonly-utilized procedures that clearly may be performed without an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual. See *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957). The type of participation required of the defendant is basically the same as that required under ABA Standards, Discovery and Procedure Before Trial 3.1 (Approved Draft, 1970) and Proposed Amendment to F.R.Crim.P. 41.1 (Preliminary Draft, April 1971). The list in ALI Model Code of Pre-Arrestment Procedure § 170.1 (T.D. #6, 1974) is also similar, except that it is limited to identification procedures and does not include physical examinations involving more than a body surface examination (*e. g.*, x-rays). Because there may be

considerable variation in the methods utilized to obtain different types of evidence, this subdivision, like the proposals just mentioned and most state provisions on the subject, does not include an "open-ended provision." Standards like unreasonable intrusion and unreasonable affront to the dignity of the individual should not be relied upon as the only safeguards in the individual case. There should be the additional safeguard that the body adopting the Rules has examined the particular procedure and recognized that it will ordinarily be performed in a manner that will not violate those standards.¹

Clause (1) expresses a preference for lineups over other identification procedures (which are permitted only if the lineup is not practicable). This provision does not prohibit prompt confrontations with a witness or victim. Such "showups" arguably offer certain advantages because of the freshness of the witness' recollection. Rule 434, however, applies to procedures administered at a considerably later time. At this point, the lineup is clearly to be preferred if it is practicable. See Project on Law Enforcement Policy and Rulemaking, Model Rules for Law Enforcement: Eyewitness Identification (1972). Where the lineup is not practicable—*e. g.*, where the defendant is in a hos-

pital—a showup may be appropriate. See, *e. g.*, *Jackson v. United States*, 412 F.2d 149, 134 U.S. App.D.C. 18 (D.C.Cir. 1969).

¹ It should be noted, however, that in some jurisdictions, search provisions may be viewed as sufficiently broad to authorize the removal of items not encompassed in Rule 434. See, *e. g.*, *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972) (requiring defendant to submit to an operation for removal of a bullet does not constitute an unreasonable search where no danger is involved); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966) (border search did not violate Fourth Amendment where emetic was used to induce vomiting for the purpose of recovering swallowed contraband). But see *Adams v. State*, 299 N.E.2d 834 (Ind.1973).

- 1 **(d) Contents of order.** The order shall specify with particu-
- 2 larity the authorized procedure, the scope of the defendant's par-
- 3 ticipation, the time, duration, place, and other conditions of the
- 4 procedure, and who may conduct it. It shall inform the defend-
- 5 ant that (1) he may not be subjected to investigative interroga-
- 6 tion while participating in or present for the procedure, and (2)
- 7 he may be held in contempt of court if he fails to appear and
- 8 participate in the procedure as directed. It may also direct the
- 9 defendant not to alter substantially any identifying physical
- 10 characteristics to be examined or destroy any evidence sought.

Comment

These Rules do not prescribe general standards for conducting identification procedures (*e. g.*, number of persons in a lineup). Compare ALI Model Code of Pre-Arrest Procedure, Article 160 (T.D. #6, 1974); Project on Law Enforcement Policy and Rulemaking, Model Rules for Law Enforcement: Eyewitness Identification (1972). It is anticipated that local departments may adopt such rules. When this is done, the description of the authorized procedure in the court's order may be comparatively brief. If appropriate local rules have not been adopted, the court may find it desirable to impose certain conditions on the conduct of the procedure (*e. g.*, that the lineup be photographed, statements made by witnesses recorded, etc.) Similarly, the court either may designate a particular person who shall conduct the procedure or may sim-

ply refer to an eligible group of persons by reference to their position (*e. g.*, "any employee of the state crime laboratory"). The Rule does not establish a particular time limit for all procedures, nor require that procedures generally be conducted during the day. Compare ALI § 170.7(2), (3). These are matters that can appropriately be resolved in each case.

As with other court orders, the failure to comply may constitute contempt. Contempt is the only sanction for disobedience available under the Rule—*i. e.*, the individual may not be physically forced to participate where his cooperation is needed (*e. g.*, to take a blood sample). See also ALI at p. 109. Notification of the potential contempt sanction is included in the order since nontestimonial evidence orders are rather unique at the present time. See also Pro-

posed Amendment to F.R.Crim.P. 41.1(h)(7) (Preliminary Draft, April 1971).

The provision for including a warning against altering physical characteristics or destroying evidence sought is primarily applicable to participation in lineups or

requests for specimens of a particular item (*e. g.*, pubic hair) that can be removed from the body. See also ALI § 170.3(2)(f). Of course, where there is a significant threat in this regard, the emergency procedure of subdivision (b), *supra*, may be employed.

- 1 (e) **Service.** The order shall be served by delivering a copy
- 2 of the order to the defendant personally.

Comment

Personal service is required so as to assure the availability of the contempt sanction where the individual fails to comply without adequate excuse.

- 1 (f) **Implementation of order.**

- 2 (1) While participating in or present for an authorized
- 3 procedure, the defendant may be accompanied by a lawyer
- 4 and by an observer of his choice. The presence of other
- 5 persons at the procedure may be limited as the court deems
- 6 appropriate under the circumstances.

- 7 (2) The procedure shall be conducted with dispatch. If
- 8 the taking of a specimen or the removal of a foreign sub-
- 9 stance involves an intrusion of the body, medical or other
- 10 qualified supervision is required. Upon timely request of
- 11 the defendant and approval by the court, the taking of a
- 12 specimen or removal of a foreign substance shall be super-
- 13 vised by a qualified physician designated by the defendant.

- 14 (3) The defendant may not be subjected to investigative
- 15 interrogation while participating in or present for the pro-
- 16 cedure. No statement of the defendant may be admitted in
- 17 evidence against him if made in the absence of counsel and
- 18 while participating in or present for the procedure.

- 19 (4) Any evidence obtained from the defendant may be
- 20 used only with respect to the offense specified in establish-
- 21 ing probable cause under subdivision (a) or a related
- 22 offense as defined in Rule 471.

Comment

Paragraph (1) permits the defendant to be accompanied by his lawyer. No reference is made to the appointment of a lawyer to assist an indigent defendant, since appointment will already have

been made under Rule 321(b), *supra*. Under *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972), the defendant would have a constitutional right to have the assistance of counsel at a lineup, since an information has already been filed. The presence of counsel as an observer at a procedure under this Rule serves the interest of both prosecution and defendant in establishing the fairness of the procedure. Counsel's presence may be particularly valuable in determining whether to challenge the reliability of the procedure. Finally, while decisions like *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed.2d 1178 (1967), establish that the defendant is not entitled to appointment of counsel when such evidence as a handwriting exemplar is to be furnished, it is not equally clear that police could deny access to counsel if he desired to be present. See ALI Model Code of Pre-Arraignment Procedure § 160.3 (T.D. #6, 1974) (prohibiting denial of access except where counseling disrupts the procedure). If the defendant has a right to have counsel present, then there is no reason why he should not be so informed.

In some instances, counsel may desire to have present an expert, or the defendant may simply desire to have a relative present. Since the Rule 434 procedure offers ample opportunity to arrange for the presence of such persons, and the presence of one additional person should not interfere with the administration of the authorized procedure, paragraph (1) also provides for the presence of an "observer." The court may pro-

hibit the presence of other persons, however, when appropriate.

Paragraph (2)'s provision for medical or other qualified supervision for removal of a specimen or foreign substance from the body is in accord with Proposed Amendment to F.R.Crim.P. 41.1 (i) (Preliminary Draft, April, 1971). To make clear that the supervision need not be by a physician, the reference is made to "other qualified" supervision, which could encompass, for example, a nurse especially trained to take blood samples. The cost of the supervision would be borne by the prosecution just as it would bear the cost of other experts it may use in the discovery process. So as to avoid concerns relating to the nature of the medical supervision or the particular medical problems of the defendant, paragraph (2) also permits the defendant to select his own physician to provide the medical supervision. The requirement of court approval insures that the defendant will not be able to unduly delay the procedure by selecting a physician who is not readily available.

Paragraph (3)'s prohibition against investigative interrogation is in accord with ALI § 170.7 (4). Proposed Federal Rule 41.1 (h)(5) requires that the person be advised that he is under no duty to submit to interrogation, but does not bar interrogation. The prohibition against interrogation is designed to insure that the Rule 434 proceeding is not misused as an opportunity to obtain inculpatory statements from the defendant. Because it is not always clear what constitutes interroga-

tion, see, *e. g.*, *Combs v. Commonwealth*, 438 S.W.2d 82 (Ky. 1969) (reading of ballistics report to defendant did not constitute interrogation), all statements made in the absence of counsel are subject to suppression. This prohibition, of course, only extends to use of the substance of statement. It does not exclude use of the voiceprint against the defendant. The scope of the prohibition, in terms of the proceedings affected and the limits on use of the evidence, would be commensurate with the suppression remedy under Rule 461, *infra*.

Paragraph (4) is designed to bar use of nontestimonial evidence obtained in connection with one

offense in investigating other offenses as to which probable cause does not exist. This prohibition applies only to the evidence furnished by the defendant himself. If a witness at a lineup happens to recognize the defendant as a person who robbed the witness on a previous occasion, that identification would not be excluded (assuming the lineup had not been purposefully arranged to obtain identification relating to the earlier robbery).

This Rule does not specify that the results of the procedure be made available to the defendant, since such results will automatically be made available under Rule 421, *supra*.

Rule 435. [Obtaining Nontestimonial Evidence from Accused Person upon His Motion.]

- 1 (a) **Authority.** Upon motion of an accused person who has
- 2 been arrested, cited, or charged in an information [or indictment], the court by order may direct the prosecuting attorney to
- 3 provide one or more of the procedures specified in Rule 434(c)
- 4 for participation therein by the accused person, if the court finds
- 5 that the evidence sought could contribute to an adequate de-
- 6 fense.
- 7

Comment

Rule 435 generally

This Rule applies to defendants who themselves desire to participate in a nontestimonial evidence procedure conducted by the prosecution. Similar provisions are contained in ALI Model Code of Pre-Arrest Procedure § 170.2(8) (T.D. #6, 1974) and Proposed Amendment to F.R.Crim.P. 41.1(k) (Preliminary Draft, April 1971). The defendant who is convinced that nontestimonial evidence would "clear" him may

desire to use this procedure, although most of procedures involved could be conducted by defendant without use of this Rule. Thus, if the defendant desires to match his own blood with that found at the scene, he may do this pursuant to his right under Rule 421, *supra*, to make reasonable tests upon evidence within the prosecutor's possession. Similarly, if he desires to test a witness' testimony on the issue of identification by asking the witness to

make an identification from a group of photographs, this also can be done by deposition. Indeed, the deposition procedure might even be used to present a lineup provided other persons were found who were willing to participate. There may be situations, however, in which the defendant, to avoid any controversy as to the method used in obtaining the evidence, would prefer that it be done at the prosecutor's direction. There may also be situations in which the evidence must be obtained promptly after arrest and before the deposition procedure would become available.

Subdivision (a)

Subdivision (a) of this Rule largely parallels that of Rule 434, *supra*. Reference is made to the "accused person" rather than "the defendant" because there may be need to obtain nontestimonial evidence before the information is filed. In particular, where the

prosecution was initiated by citation, the information may not be filed until several days after its issuance. See Rules 222(a), 231(f), *supra*. Indeed, even when the person is arrested without a warrant, the information may not be filed at the time of the first appearance. See Rule 231(f)(3), *supra*.

The standard for issuance of the order also differs from that utilized in Rule 434(a). The order must be issued if the court finds that the evidence sought could contribute to an adequate defense. *Cf.* Rule 731(b), *infra*. This standard should require less of a detailed factual showing than the Rule 434(a) standard, and therefore should tend to minimize the possibility that the defendant will be required to offer potentially incriminating evidence in order to utilize this procedure. See also ALI Model Code of Pre-Arraignment Procedure, p. 104 (T.D. # 6, 1974).

- 1 (b) **Contents of order.** The order shall specify with particu-
- 2 larity the authorized procedure, the scope of the accused person's
- 3 permitted participation, the time, duration, place, and other con-
- 4 ditions of the procedure, and who may conduct the procedure.

Comment

This varies somewhat from Rule 434(d), *supra*, since it is the accused person himself who is requesting the order. However, the basic safeguards in administration—prohibition of interrogation, presence of lawyer and observer, and prohibition against use of the evidence in investigating unrelated cases—remain the same. No provision is made for appointment

of counsel to assist the indigent since the court may make such appointment under Rule 321(b), *supra*. No provision is made for an emergency provision because the applicant himself is the subject of the order, and the court has authority to grant a prompt hearing on his motion under Rule 752(a), *infra*.

- 1 (c) **Implementation of order.** Rule 434(f)(1) through (3)
- 2 applies to procedures ordered under subdivision (a).

Comment

See Rule 434(f) and Comment, *supra*. Since the accused himself initiates the procedure, there is no reason to impose the limitation of Rule 434(f)(4), which is designed to preclude prosecutorial misuse of the Rule 434 procedure.

Rule 436. [Investigatory Nontestimonial Evidence Order.]

1 (a) Authority. Upon application of the prosecuting attorney,
2 the court by order may direct any person to participate in one or
3 more of the procedures specified in Rule 434(c)(1) through (8),
4 if affidavit or testimony shows probable cause to believe that:

5 (1) An offense has been committed by one or more of
6 several persons comprising a narrow focal group that in-
7 cludes the subject person;

8 (2) The evidence sought may be of material aid in iden-
9 tifying who committed the offense; and

10 (3) The evidence sought cannot practicably be obtained
11 from other sources.

Comment

Rule 436 generally

This Rule permits the issuance of an order directing the person to participate in a nontestimonial evidence procedure on a showing of less than probable cause. Thus, in a situation in which the police have probable cause to believe that the offense was committed by a person of a particular description, and based upon access to the scene of the crime, etc., only several people meeting that description may have committed the crime, an order may be obtained directing those persons to appear in a lineup or furnish other nontestimonial evidence which will assist in determining which of them actually committed the offense. Similar provisions have been adopted in some jurisdictions. See, *e. g.*, Ariz.Rev.Stat. § 13-1424; Idaho Code § 19-625; Utah Code Ann. § 77-13-37 (limited to lineups). Proposals for similar

provisions are advanced in ALI Model Code of Pre-Arrest Procedure, Article 170 (T.D. # 6, 1974) and Proposed Amendment to F.R.Crim.P. 41.1 (Preliminary Draft, April 1971). In the absence of such provisions, the police may rely only upon rather haphazard procedures that do not require the suspect's participation (*e. g.*, transporting the witness to various locations where he might obtain a glimpse of the several suspects). It has also been suggested that police, lacking a procedure like that in this Rule, may arrest suspects in cases of doubtful probable cause, may engage in "subterfuge" arrests for other offenses, and may use various deceptive devices to obtain nontestimonial evidence from a suspect. See ALI Code, *supra*, at 246. See also *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). The availability of

a Rule 436 procedure may encourage police to delay making an arrest, even where probable cause exists, until identification evidence is obtained. If the evidence obtained indicates that the suspect is innocent, an unnecessary arrest will have been avoided.

Support for the constitutionality of this Rule is found in *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In *Davis*, the Court ruled inadmissible finger and palm prints obtained from the defendant following an arrest and significant detention not supported by probable cause. The Court noted, however, that it was "arguable * * * that because of the unique nature of the fingerprinting process, * * * detentions [for the limited purpose of obtaining prints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id.* at 727. The Court noted that "fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions." *Ibid.* It also noted that the "limited detention" for fingerprinting "need not come unexpectedly or at an inconvenient time." *Ibid.* For the "same reason," however, "the general requirement that the authorization of a judicial officer be obtained

in advance of detention would seem not to admit of any exception in the fingerprinting context." *Id.* at 728.

Camara and *Terry*, though dealing with other procedures presenting Fourth Amendment issues (administrative searches and on-the-street frisks), recognized that where the invasion of privacy was not as great as that involved in the traditional search, a lesser standard of probability than the traditional probable cause standard would be satisfactory. Relying on *Terry* and *Davis*, the Court of Appeals for the District of Columbia has recognized judicial authority to order a suspect to participate in a "court-ordered line-up predicated on reasonable grounds short of a basis for final arrest." See *Wise v. Murphy*, 275 A.2d 205 (D.C.Ct.App.1971). See also *United States v. Greene*, 429 F.2d 193 (D.C.Cir. 1970).

Dionisio may provide even more extensive authority for nontestimonial evidence orders based upon a standard of less than probable cause. In that case, the Court upheld a grand jury subpoena directing approximately 20 persons to provide voice examples for comparison with recorded conversations that had been received in evidence by the grand jury. The Court of Appeals had held that the Fourth Amendment required that the subpoenas be supported by a preliminary showing of "reasonableness," which was described as something less than probable cause. While the three dissenting justices apparently shared that view, the majority held that there was no need for a preliminary showing either of a reasonable

basis for issuance of the subpoena or of the traditional probable cause. The majority noted initially that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense." "The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative 'stop' * * * [in that] 'the latter is abrupt, is effected with force or the threat of it * * * and, in the case of an arrest, results in a record involving social stigma.'" *Id.* at 9, 10. The Court also rejected the contention that the taking of the voice exemplars, aside from the detention pursuant to a subpoena, itself constituted a violation of the Fourth Amendment. It noted that, under the standard of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed.2d 576 (1967), the individual had no reasonable expectation of privacy with respect to the sound of his voice, since his voice was a characteristic that he "knowingly exposes to the public." *Id.* at 14.

Various aspects of this Rule reflect a design to stay well within the perimeters suggested by *Davis* and *Dionisio*. First, aside from the emergency procedure (subdivision (d), *infra*), which does require a showing of probable cause as to flight or loss of evidence, there is no abrupt taking of the person into custody. The individual receives an order directing him to appear at some future time. The order may be challenged or modified and assistance of counsel is provided for that purpose. The issuance of the order may not be publicized except with the subject's approval.

Second, the procedures included under this Rule relate either to evidence of characteristics that are open to the public or evidence, like fingerprints, that is easily obtained with a minimum of inconvenience. Thus, unlike the ALI, Arizona, and Idaho codes cited *supra*, this Rule does not extend to the withdrawal of blood or urine. See *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (applying traditional Fourth Amendment standards to the withdrawal of blood.)¹ Compare Rule 434(c) (9), *supra*. Neither does this Rule extend to physical examinations beyond body surface examinations. Compare Proposed Amendment to F.R.Crim.P. 41.1 (k) (3) (Preliminary Draft, April 1971); Rule 434(c) (10), *supra*.

The *Davis* opinion, in its discussion of fingerprints, noted that there was inherent protection against potential harassment through repeated requests for participation since fingerprints need be taken no more than once. The same permanency is not attributable to all evidence obtainable under this Rule, and, where the subject is not subsequently charged, the evidence may be destroyed under subdivision (h), *infra*. However, clause (3) of subdivision (a) offers protection against harassment by requiring a showing that the evidence cannot otherwise be obtained. This provision is supplemented by the subject's right to receive the result of any testing, and his right to return of the evidence taken if he is not subsequently charged. See subdivision (h), *infra*. Similarly, any potential misuse of the

procedure as an interrogation proceeding is barred both by the prohibition against interrogation and the required exclusion of all statements made in the absence of counsel. Further, any incentive to use the Rule to acquire evidence for use in connection with the investigation of other crimes or to merely add to the store of investigatory data is undercut by the prohibition against such use in subdivision (f)(4), *infra*, and the requirement of destruction under subdivision (h), *infra*.

Another factor emphasized in *Davis*,—the reliability of the procedure involved—is enhanced by the court's authority to set conditions under subdivision (b), *infra*. Also, the subject's right to have both counsel and an observer present should serve both to insure fairness in procedure and to provide an adequate observation point from which the subject may contest the reliability of the procedure in any subsequent proceeding. The Rule thus provides for the automatic appointment of counsel upon request of the subject person.

Finally, the standard for issuance of the order easily meets the "reasonable suspicion" standard of *Terry* which is used in other provisions of this type. See Idaho Code § 19-625(1)(B) ("reasonable grounds exist, which may or may not amount to probable cause"); Utah Code Ann. § 77-13-37(1), ("probable cause to believe that a crime has been committed and reason to believe that the suspect committed it"); Proposed Amendment to F.R.Crim.

P. 41.1(c)(2) (Preliminary Draft, April 1971) ("reasonable grounds, not amounting to probable cause to arrest, to suspect that the person * * * committed the offense"); ALI Model Code of Pre-Arraignment Procedure § 170.2 (6)(b) (T.D. #6, 1974) ("reasonable grounds to suspect that the person * * * may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures"). While the standard of subdivision (a) is stated in a somewhat different fashion, it clearly does not fall short of a "reasonable suspicion" standard and presumably might be viewed as requiring a higher probability than some interpretations of "reasonable suspicion." It requires probable cause that an offense has been committed and that one or more of a limited group of persons committed the offense. It is only with regard to the size of the group that it departs from the traditional probable cause standard. The group must be limited, but it may contain several persons. The maximum size is not specified. Indeed, the permissible size may vary with the nature of the procedure requested, depending upon the degree of imposition involved in administering the procedure. It is not necessary, of course, that the exact size of the group be specified in the application, but the court should be assured that only a limited number of persons possess the crucial characteristics, so the probability as to the individual is not so remote as to make the imposition "unreasonable."

The "group probable cause" standard of this Rule is also bolstered in two other respects. First, in addition to judicial review, there must be prosecutorial review because the application must be presented by the prosecuting attorney rather than a law enforcement officer. See also ALI § 170.2. Second, by requiring that the order be served within a specified period, the court can assure that the "probable cause" showing does not become stale. The standard is not further limited by restricting the order to investigation of "serious offenses." Compare ALI § 170.1; Proposed Federal Rule 41.1. There may be some misdemeanors as to which nontestimonial evidence procedures would be crucial in identifying the offender and the particular offense may have significance far beyond its misdemeanor designation.

Subdivision (a)

Unlike Rules 434 and 435, *supra*, subdivision (a) authorizes the court to issue a nontestimonial evidence order upon ex parte consideration of the prosecuting attorney's application, rather than after a hearing on a motion. The subject of the Rule 436 order, unlike the subject of a Rule 434 or 435 order, is not already a participant in a criminal proceeding. He should not be required to even appear before the court to contest the prosecuting attorney's request until the court has determined, on the basis of the prosecuting attorney's evidence, that there is a factual basis for

issuance of the order. Moreover, the prosecutor should not be required to inform a person that he is a suspect until the court finds a sufficient basis for issuance of the order. The issuance of nontestimonial evidence orders upon ex parte consideration is common to the several state provisions and the ALI and Federal Rule proposals that are cited *supra*. It should be emphasized that after the order is issued, the subject is entitled to a hearing upon a motion to have the order vacated or modified under subdivision (e), *infra*. So as to insure that the subject has ample opportunity to utilize such motions the Rule provides in subdivision (b), *infra*, for the automatic appointment of counsel upon request without cost to the subject person. With these safeguards, it does not seem necessary to require an adversary hearing prior to the execution of the order in every case. In many instances, the subject person may not desire to contest the order.

The standard for issuance of the order is discussed in the introductory portion of this Comment, *supra*. The factual showing necessary to meet the standard may be made by "affidavit or testimony." Cf. Rule 221(b), *supra* (governing issuance of arrest warrants). If an affidavit is used, it must contain the same degree of specificity as an affidavit used to support a search or arrest warrant. Conclusory statements would not be satisfactory. Cf. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Also, the court may

examine the affiant under oath taken would be recorded under if it so desires. Any testimony Rule 754, *infra*.

¹In *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), the Court noted that the taking of scrapings of fingernails "went beyond 'mere physical characteristics * * * constantly exposed to the public' [citing *Davis* and *Dionisio*], and constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." The Court concluded, however, that this search was acceptable under the Fourth Amendment, notwithstanding the absence of a warrant, in light of the presence of probable cause and the destructibility of the evidence. While characterizing the procedure in *Cupp* as a search, the Court also noted that it constituted a "limited intrusion." Cf. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Schmerber*, on the other hand, the Court noted that what was involved was a search "involving intrusions beyond the body's surface." *Id.* at 769. It suggested that the "interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion * * * in the absence of a clear indication that in fact * * * evidence will be found." *Id.* at 769-70. The Court also stressed the reasonable manner in which the evidence was obtained, and noted the petitioner "is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing such as a 'breathalyzer' test." *Id.* at 771. Thus, while both *Cupp* and *Schmerber* dealt with activities viewed as "searches," the analysis of *Schmerber* suggests that the drawing of blood presents more significant Fourth Amendment concerns than does the scraping of fingernails. Accordingly, paragraph (8) of the Rule 434(c) procedures has been incorporated in Rule 437, while paragraph (9) has not been included.

(b) **Contents of order.** The order shall specify with particularity the authorized procedure, the scope of the subject person's participation, the time, duration, place, and other conditions of the procedure, who may conduct the procedure, and the time within which the order must be served. It shall also inform the subject person:

(1) Of the grounds upon which the order was issued;

(2) That he may not be subjected to investigative interrogation while participating in or present for the procedure;

(3) That he may be accompanied by a lawyer during the procedure and that upon request a lawyer will be provided without cost to him;

(4) That he may request that the court make a reasonable modification of the order with respect to time, place, or manner of conducting the procedure, including where practicable a modification to have the procedure conducted at his place of residence;

(5) That he may challenge the order as provided in subdivision (e);

(6) The manner in which he may request the assistance of counsel, request modification of the order, or challenge the order; and

- 23 (7) That he may be held in contempt of court if he fails
24 to appear and participate in the procedure as directed.
25 The order may also direct the subject person not to alter substan-
26 tially any identifying physical characteristic to be examined or
27 destroy any evidence sought.

Comment

The contents of a Rule 436 order are similar to those of a Rule 434 order, except that the subject is given additional information. He is informed of the grounds upon which the order was issued to assist him in determining whether to challenge the order. Cf. ALI Model Code of Pre-Arrest Procedure § 170.3(2) (T.D. # 6, 1974); Proposed Amendment to F.R.Crim.P. 41.1 (h)(4) (Preliminary Draft, April 1971). Notification concerning his right to the assistance of counsel, to request modification of the order, to challenge the order, and the procedure to be utilized in exercising these rights is also included. Notification of these matters is necessary since it cannot be assumed that the subject will have available the assistance of counsel when he receives the order. See also ALI § 170.3(2). Cf. Proposed Federal Rule 41.1 (h)(6) (providing notice only as to the right to request modification). The order need not include a reference to the subject's right to utilize the services of his own doctor under subdivision (f)(2), *infra*, nor his right to have an observer present under sub-

division (f)(1), *infra*. The former right is likely to have limited application and is not as significant as the others noted. Notification of the right to have an observer other than counsel present might tend to depreciate the importance of obtaining the assistance of counsel.

The notification of the right to counsel must clearly indicate that counsel will be provided without cost to the subject person. In light of the nature of the procedures involved and the absence of a probable cause showing as to the individual, the prosecution should bear the cost of counsel just as it bears the cost of other experts utilized in obtaining and comparing nontestimonial evidence. The need for the assistance of counsel is discussed in the Comment to Rule 434(f), *supra*. See also Idaho Code § 19-625(h) and Utah Code Ann. § 77-13-38, providing for the appointment of counsel to assist the indigent (although the Utah provision applies only to lineups).

Clause (7) corresponds to the notification provision of Rule 434 (d), *supra*.

- 1 (c) Service. The order shall be served by delivering a copy
2 of the order personally to the subject person within the time pe-
3 riod specified in the order. Except as provided in subdivision
4 (d), the order shall be served at least [two] business days before
5 the date of the subject person's required participation.

Comment

Service is made in the same manner as under Rule 434. A time limit is placed upon service so as to avoid such delay as will permit the showing of probable cause to become stale. The Rule does not set any specific time limitation, but leaves the time limit to be specified by the court as appropriate under the circumstances. Specific deadlines are set in several comparable provisions. See, *e. g.*, ALI Model Code of Pre-Arrest Procedure § 170.5(2) (T.D. #6, 1974) (five days, with possible extension for an additional five days for service, with procedure executed within 15 days); Ariz.Rev.Stat. Ann. § 13-1424(8) (15 days for execution); Idaho Code § 19-625(2)(j) (ten days for execution). These specific deadline provisions appar-

ently were based upon similar requirements found in search warrant provisions, but there the place to be searched is usually immobile, and can readily be found within the period specified in the provision. In the area of non-testimonial evidence orders, the court needs more flexibility. If the court sets too distant a period for service and execution, the subject may always challenge the order if the factual showing has become stale. This opportunity to challenge before execution is not available in the case of a search warrant.

This subdivision assures the subject of at least two business days during which he can arrange for counsel and challenge the order. See also ALI § 170.7.

1 (d) **Emergency procedure.** Upon application of the prosecut-
2 ing attorney, the court by order may direct a [law enforcement
3 officer] to bring forthwith before the court a person against
4 whom an order under subdivision (a) has issued, if affidavit or
5 testimony shows probable cause to believe:

- 6 (1) The subject person will flee upon service of the order;
7 or
8 (2) The evidence sought will be altered, dissipated, or
9 lost if not promptly obtained.

10 Upon presentation of the subject person, the court shall read the
11 nontestimonial evidence order to him and afford him reasonable
12 opportunity to consult with a lawyer and to seek modification or
13 vacation of the order under subdivision (e). The court may then
14 direct the subject person to participate immediately in the au-
15 thorized procedure.

Comment

This provision is similar to Rule 434(b), *supra*. Before the order is issued under this provision, however, the court must make two determinations. First, it must

decide to issue the nontestimonial evidence order pursuant to subdivision (a), and then it must find probable cause to believe either that the subject person otherwise

would flee upon service of the order or that the evidence sought would be altered, dissipated, or lost unless promptly obtained. See also Comment to Rule 434(b), *supra*. Upon being taken into custody pursuant to the emergency order, the subject person must be brought directly before the court and given the opportunity, with the assistance of counsel, to challenge the nontestimonial evidence order. A similar "emergency custody procedure" is authorized in Proposed Amendment to F.R. Crim.P. 41.1(f) (Preliminary Draft, April 1971). See also ALI Model Code of Pre-Arraignment Procedure § 170.4(2) (T.D. #6, 1974). Compare Ariz.Rev.Stat. Ann. § 13-1424 and Idaho Code § 19-625 (authorizing peace officer to take subject into custody following issuance of order in all cases).

The Rule makes no provision for taking a person into custody without court order even when the officer had no prior opportunity to

obtain an order—*e. g.*, where he comes upon several persons who fit within an appropriate "narrow focal group" at the scene of the crime. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), provides sufficient supplemental authority, however, to make effectively prompt use of the emergency provision in such cases. Thus, where the officer is concerned that the suspects may destroy the evidence sought if allowed to leave, but lacks probable cause to arrest them, he may, under *Terry*, detain them for a brief period while the prosecutor, relying upon information furnished by the officer, obtains an emergency order under this subdivision. This procedure would, of course, require the prompt availability of both prosecutor and court, but a procedure requiring similar availability has been effectively employed in the search warrant area. See *Miller, Telephonic Search Warrants*, 9 *The Prosecutor* 385 (1974).

- 1 **(e) Modification and challenge.** Upon a showing that com-
- 2 pliance with the order will unreasonably embarrass or incon-
- 3 venience the subject person, the court shall change the time,
- 4 place, or manner of conducting the procedure or vacate the order.
- 5 Upon a showing that the order was improperly issued or that
- 6 there are no longer sufficient grounds for issuance of the order,
- 7 the court shall vacate it.

Comment

Similar provisions providing opportunity to seek modification of the order are in Proposed Amendment to F.R.Crim.P. 41.1(e) (Preliminary Draft, April 1971) and ALI Model Code of Pre-Arraignment Procedure § 170.4 (T.D. #6, 1974). The court would have

inherent authority to modify its order in any event, but this provision provides emphasis to the subject's right to request modification. *Cf.* Rules 431(a)(4), 432(d)(2), *supra*.

A similar provision for challenging the issuance of the order

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is proposed in ALI § 170.6. The challenge is not limited to the information available to the court at the time the order was issued. The subject may introduce evidence contradicting prosecution evidence offered under subdivision (a) *supra*, or may show that changed circumstances indicate the order no longer is justified.

(f) Implementation of order.

(1) While participating in or present for an authorized procedure, the subject person may be accompanied by a lawyer and by an observer of his choice. The presence of other persons at the procedure may be limited as the court deems appropriate under the circumstances.

(2) The procedure shall be conducted with dispatch. If the removal of a foreign substance involves an intrusion of the body, medical or other qualified supervision is required. Upon timely request and approval by the court, the removal of a foreign substance shall be supervised by a qualified physician designated by the subject person.

(3) The subject person may not be subjected to investigative interrogation while participating in or present for the procedure. No statement of the subject person may be admitted in evidence against him if made in the absence of counsel and while participating in or present for the procedure.

(4) Any evidence obtained from the subject person may be used only with respect to the offense specified in establishing probable cause under subdivision (a)(3) or a related offense as defined in Rule 471.

(5) Before completion of the procedure, neither the prosecuting attorney nor his agent may disclose, without the consent of the subject person, that an order has been issued, except as is necessary to its issuance or service. Upon application of the subject person, the court may restrict disclosure of the results of any testing or comparison utilizing evidence obtained in the authorized procedure before the introduction of the results in a judicial proceeding, except that disclosure may be made:

(i) To a prosecuting attorney or a [law enforcement officer] for use in the performance of his duties; and

(ii) In connection with a judicial proceeding.

Comment

Paragraphs (1) through (4) largely follow Rule 434(f), *supra*. Paragraph (5) is designed to protect the potentially innocent sub-

ject from the harm that may flow from publicizing his status as a suspect. It prohibits prosecution disclosure prior to the completion of the procedure, when the results will be available. Similar protection is afforded the witness in an investigatory deposition. See Rule 432(f), *supra*. Cf. ALI

Model Code of Pre-Arraignment Procedure § 170.2(7) (T.D. #6, 1974). So as to provide further protection, the court may direct that the order not be filed with the clerk until after the procedure is completed. See Comment to Rule 752(d), *infra*.

- 1 (g) **Reports.** The subject person shall be furnished with a
- 2 written report of the result of any testing or comparison utilizing
- 3 evidence obtained in the authorized procedure. If the evidence
- 4 is subjected to any scientific test or comparison, a copy of any
- 5 report prepared by the person conducting the test shall be avail-
- 6 able, upon request, to the subject person. Disclosure of the re-
- 7 sult and report shall be made promptly after they become avail-
- 8 able unless the court directs that disclosure be delayed.

Comment

The innocent person subjected to participation in a nontestimonial evidence procedure should be informed of the outcome of that procedure promptly after the result of any testing or comparison becomes available. Similarly, any scientific reports should be made available upon request. Where the result points to the guilt of the subject, the reporting requirement merely serves to advance discovery that will eventually be given to the subject as a defendant. If the result and report are available before prosecution has been instituted, the court may direct that disclosure be delayed if there is cause to believe that the subject is likely to flee once he learns of the results.

In light of the reporting requirements, the Rule does not contain a provision requiring that a return be filed setting forth the type of evidence taken under the order. Compare Proposed Amendment to F.R.Crim.P. 41.1(j) (Preliminary Draft, April 1971); Idaho Code § 19-625 (requiring that a copy of the return be given to the subject). See also ALI Model Code of Pre-Arraignment Procedure §§ 130.4(4), 160.4(6), 170.8 (2) (T.D. #6, 1974) (specifying that a record sufficient to disclose any matter relevant to accuracy be kept and reasonable access thereto be allowed to the suspect or his counsel).

- 1 (h) **Disposition of evidence.** Unless the court authorizes fur-
- 2 ther retention, nontestimonial evidence obtained from a subject
- 3 person under this Rule and all copies thereof shall be promptly
- 4 destroyed, or, upon request, returned to the subject person, if an
- 5 information [or indictment] charging him with an offense re-
- 6 lating to that evidence is not filed within [45 days] after the
- 7 evidence was obtained. Upon motion of the prosecuting attor-

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8 ney, the court may authorize further retention of nontestimonial
9 evidence as reasonably necessary to facilitate a continuing inves-
10 tigation or prosecution.

Comment

Similar provision for destruction of records is proposed in ALI Model Code of Pre-Arrestment Procedure § 170.8(4) (T.D. #6, 1974) and Proposed Amendment to F.R.Crim.P. 41.1(j) (Preliminary Draft, April 1971) (requiring destruction only upon request of the subject person). *See also* *Wise v. Murphy*, 275 A.2d 205 (D.C.Ct.App.1971) (noting the significance of such protection in sustaining a Rule 436-type order).¹

The destruction provision insures that the Rule 436 procedure will not be misused to collect nontestimonial evidence for future use. In this regard, it supplements subdivision (f)(4), *supra*. If the subject person desires to retain the evidence in the event that circumstances should change and an information is filed or another Rule 436 order is issued, he may obtain the evidence upon request.

¹ The *Wise* decision also emphasized the need for prompt appellate review of such orders. These Rules, however, do not treat the topic of appellate review.

Rule 437. [Obtaining Nontestimonial Evidence from Third-Person upon Accused Person's Motion.]

1 (a) Authority. Upon motion of an accused person who has
2 been arrested, cited, or charged in an information [or indictment],
3 and after notice to the person who is to be the subject of
4 the order and opportunity for him to be heard, the court by order
5 may direct any person to participate in one or more of the procedures
6 specified in Rule 434(c) (1) through (8), if it finds probable
7 cause to believe that:

8 (1) The offense for which the accused person was arrested,
9 cited, or charged was committed by one or more of several
10 persons comprising a narrow focal group that includes
11 the subject person;

12 (2) The evidence sought could contribute to an adequate
13 defense of the accused person; and

14 (3) The evidence sought cannot practicably be obtained
15 from other sources.

16 The court may direct any person, including the prosecuting attorney,
17 to provide the authorized procedure.

Comment

Rule 437 generally

prosecution's authority to obtain

This provision provides the defendant with a counterpart to the

a nontestimonial evidence order on less than traditional probable

cause under Rule 436, *supra*. A similar proposal is advanced in ALI Model Code of Pre-Arrest Procedure, Article 170 (T.D. #6, 1974). This Rule will be used by defendants in situations in which they believe that they can establish that another person either committed the offense in question or is at least as likely a suspect as the defendant. It might be useful particularly where a group of several persons were present at the time of the offense, and the defendant claims that the victim erroneously identified him rather than another person present. In most such situations, the prosecuting attorney may be willing to include the other parties in any identification procedure so as to be certain that he has charged the correct person. But the defendant's right to establish his innocence cannot depend upon the prosecutor's discretion. Just as the defendant may use depositions to obtain testimony that shifts the suspicion to other persons, he should also be able to obtain nontestimonial evidence for that purpose. Here, however, because of the nature of the participation required of the subject person, a showing of probability that the evidence will be helpful must first be made. Cf. Rule 433, *supra*.

Subdivision (a)

A motion under this Rule, like a Rule 435 motion, is available to a person who has received a citation or has been arrested without a warrant, even though an information has not yet been filed. The procedure under this Rule must be available at this point to cover situations in which

prompt action is necessary to avoid loss of nontestimonial evidence. See also Comment to Rule 435, *supra*. Since the procedure is requested by motion, the prosecuting attorney must be served and given an opportunity to be heard. See Rule 752(a), *infra*. Rule 752(a) provides for two days' notice "unless the court otherwise directs." Dispensing with the two-day requirement would often be appropriate for motion under Rule 437.

Both the procedures permitted to be ordered and the standards for issuance of the order follow Rule 436(a), *supra*, and are discussed at length in the Comment to that Rule. The manner in which the requisite showing must be made does depart, however, from Rule 436(a) in one important aspect. While the Rule 436 order may be issued upon an ex parte application of the prosecuting attorney, the instant subdivision requires an initial hearing on the defendant's motion. The ex parte procedure is not necessary under this Rule because there is no special need to avoid disclosure to the subject of his possible suspect status (as viewed by the defendant) prior to the issuance of the order. Also there may be less concern under this Rule of forcing the potential subject to defend against a frivolous motion since the prosecutor, who already is a party to the criminal proceeding, may often reflect the subject person's interests by opposing the motion. Compare, in this regard, the Comment to Rule 436(a), *supra*.

The defendant may frequently request that the procedure or-

dered under this Rule be provided by the prosecutor to avoid dispute concerning the administration of the procedure. However, there may be situations in which it would be appropriate to have

another governmental agency, or even the defendant's own experts, conduct the procedure. Accordingly the court is granted discretion to direct that any person provide the procedure.

- 1 (b) **Notice to subject person.** The notice to the subject person
- 2 shall inform him that he may be represented by a lawyer at the
- 3 hearing and that upon request the court may provide a lawyer
- 4 without cost to him.

Comment

The subject person may be represented by counsel at the hearing, but the appointment of counsel to assist the indigent at this stage is discretionary. As with Rule 436, *supra*, the underlying premise of this Rule is that a subject who is to be required to participate in a nontestimonial evidence procedure should have the assistance of counsel to challenge the order. In the proceeding under this Rule, however, unlike the Rule 436 proceeding, the subject may not stand alone in his ob-

jection to the requested order. The prosecuting attorney is a party to the proceeding and his opposition to the defendant's motion may adequately represent the interests of the prospective subject. Accordingly, appointment of counsel is not automatic¹ required under this Rule. Of course, if the order is issued, the subject is then automatically entitled to the assistance of counsel. Appointment of counsel, as under Rule 436, is made without cost to the subject person.

- 1 (c) **Emergency procedure.** Upon application of the accused
- 2 person, notice to the prosecuting attorney, and opportunity for
- 3 the prosecuting attorney to be heard, the court by order may di-
- 4 rect a [law enforcement officer] to bring the subject person
- 5 forth with before the court for an immediate hearing if affidavit
- 6 or testimony shows a reasonable likelihood that an order directing
- 7 the subject person to participate in an authorized procedure will
- 8 be issued under subdivision (a) and probable cause to believe
- 9 that:

- 10 (1) The subject person will flee upon service of notice of
- 11 a hearing to be held under subdivision (a); or

- 12 (2) The evidence sought will be altered, dissipated, or lost
- 13 if not promptly obtained.

- 14 Upon presentation of the subject person, the court shall inform
- 15 him of his rights under this Rule and afford him reasonable op-
- 16 portunity to consult with a lawyer before hearing the motion.

Comment

This provision follows Rule 436 (d), *supra*, except for the imposition of one additional requirement. Under Rule 436(d), the emergency order is issued only after the court has also issued the nontestimonial evidence order, *i. e.*, it has determined, based upon the prosecutor's initial presentation, that there is a basis for ordering the subject to participate in the requested nontestimonial evidence procedure. Under this Rule, however, the hearing on the issuance of the order occurs after the subject is taken into custody and brought before the court. Accordingly, this subdivision requires an additional finding—that there is a reasonable likelihood that an order will be issued under subdivision (a), *supra*. This would require the defendant to make a preliminary showing that he can establish probable cause as required by subdivision (a).

This showing insures that the subject will not be taken into custody in a situation where the evidence sought is likely to be lost if not promptly obtained, but the defendant is not likely to establish that the subject is one of a limited group as to whom probable cause exists. A similar initial showing is not required in Rule 434(b), *supra*, but there the subject has been charged with the crime.

This subdivision also requires that advance notice and opportunity to be heard be given to the prosecuting attorney. This requirement should not cause undue delay as the prosecuting attorney will usually be as readily available as the judge. The prosecuting attorney may have relevant information that is not known to the accused person. His participation offers further protection against misuse of the emergency procedure.

- 1 **(d) Contents of order.** The order shall specify with particu-
- 2 larity the authorized procedure, the scope of the subject person's
- 3 participation, the time, duration, place, and other conditions of
- 4 the procedure, and who may conduct the procedure. It shall also
- 5 inform the subject person that:
- 6 (1) He may not be subjected to investigative interroga-
- 7 tion while participating in or present for the procedure;
- 8 (2) He may be accompanied by a lawyer during the pro-
- 9 cedure and that upon request a lawyer will be provided with-
- 10 out cost to him; and
- 11 (3) He may be held in contempt of court if he fails to ap-
- 12 pear and participate in the procedure as directed.
- 13 The order also may direct the subject person not to alter substan-
- 14 tially any identifying physical characteristic to be examined or
- 15 destroy any evidence sought.

Comment

This is patterned after Rule 436(b), *supra*.

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- 1 (e) **Service.** The order shall be served by delivering a copy of
2 the order personally to the subject person.

Comment

This follows the service provisions of Rules 434, 435 and 436, *supra*.

- 1 (f) **Implementation of order.**

2 (1) While participating in or present for an authorized
3 procedure, the subject person may be accompanied by a
4 lawyer and by an observer of his choice. The accused person
5 may be present, but if he is in custody, he may be present
6 only with leave of court. The prosecuting attorney and
7 an expert of his choice, and a lawyer for the accused person
8 and an expert of the accused person's choice, also may be
9 present. The presence of other persons at the procedure
10 may be limited as the court deems appropriate under the circumstances.
11

12 (2) The procedure shall be conducted with dispatch. If
13 the removal of a foreign substance involves an intrusion of
14 the body, medical or other qualified supervision is required.
15 Upon timely request of the subject person and approval by
16 the court, the removal of a foreign substance shall be supervised
17 by a qualified physician designated by the subject person.
18

19 (3) The subject person may not be subjected to investigative
20 interrogation while participating in or present for the
21 procedure.

22 (4) A statement of the subject person made while he is
23 participating in or present for the procedure may not be
24 admitted in evidence against him if the statement was made
25 (i) in the absence of counsel and (ii) in response to investigative
26 interrogation by the prosecuting attorney or his
27 agent.

28 (5) Any evidence obtained from the subject person may be
29 used only with respect to the offense specified in establishing
30 probable cause under subdivision (a) (1) or a related offense
31 as defined in Rule 471.

32 (6) Before completion of the procedure, neither the prosecuting
33 attorney, the accused person, nor their agents may disclose, without the consent of the subject person, that a
34 motion has been made or an order issued under this Rule,
35 except as necessary to the presentation of the motion or
36

the issuance or service of the order. Upon application of the subject person, the court may restrict disclosure of the results of any testing or comparison utilizing evidence obtained in the authorized procedure before the introduction of the results in a judicial proceeding, but disclosure may be made:

(i) To the accused person, his lawyer, and the lawyer's staff;

(ii) To a prosecuting attorney or a [law enforcement officer] for use in the performance of his duties; and

(iii) In connection with a judicial proceeding.

Comment

Paragraph (1) follows the policy of Rules 434(f), 435(c), and 436(f), *supra*, in permitting the attendance of those persons necessary to assure fairness, while authorizing the court to require the exclusion of other persons. Here, more persons are involved, since the prosecutor, as well as the subject and the defendant, must be represented. The limited right of the defendant in custody to be present parallels Rule 431(f)(1), *supra*, governing the defendant's presence at discovery depositions. The authority of the prosecuting attorney and defense counsel to have other persons attend is limited to experts. Unlike the subject person, the defendant and prosecution have no need for the reassurance provided by a general observer. See Comment to Rule 434(f), *supra*.

Paragraph (2) parallels Rule 436(f)(2), *supra*.

Paragraph (3) follows Rules 434(f)(3), 435(c), and 436(f)(3) in prohibiting investigative in-

terrogation while the subject is participating in or present for the procedure.

Paragraph (4) differs from Rules 434(f)(3), 435(c), and 436(f)(3) in that it does not exclude all statements of the subject made in the absence of his counsel. The prosecuting attorney's use of evidence should not be subject to the actions of defense counsel who may seek to obtain admissions from the subject at the proceeding. The subject should realize that any self-incriminatory statement made by him in an effort to remove suspicion from the defendant may also be used against him. The prosecuting attorney is only barred from use of statements made by the subject in the absence of counsel and in response to interrogation by the prosecuting attorney himself or his agent. If the prosecuting attorney desires to interrogate the subject, he must use a deposition procedure.

Paragraphs (5) and (6) parallel Rule 436(f)(4) and (5), *supra*.

(g) **Reports.** The subject person shall be furnished with a written report of the result of any testing or comparison utilizing evidence obtained in the authorized procedure. If the evidence

4 is subjected to any scientific test or comparison, a copy of any
5 report prepared by the person conducting the test shall be avail-
6 able, upon request, to the subject person, prosecuting attorney,
7 and the accused person. Disclosure of the result and report to the
8 subject person shall be made promptly after they become avail-
9 able unless the court directs that the disclosure be delayed.

Comment

This provision parallels Rule 436(g), *supra*, which is discussed in the Comment to that Rule. Since the procedure may be provided by the defendant's experts or another agency (see Comment to subdivision (a) of this Rule, *supra*), provision is made for furnishing any reports to the prosecuting attorney as well as to the subject and the defendant. As with the deposition procedure, where the authority of the court is used by the defendant to obtain discovery from a third person, the evidence obtained from that person is made available to the prosecution even though similar evidence would not be discoverable under Rule 423, *supra*.

1 (h) **Disposition of evidence.** Unless the court authorizes fur-
2 ther retention, nontestimonial evidence obtained from a subject
3 person under this Rule and all copies thereof shall be promptly
4 destroyed, or, upon request, returned to the subject person, if an
5 information [or indictment] charging him with an offense relat-
6 ing to that evidence is not filed within [45 days] after the evi-
7 dence was obtained. Upon motion of a party, the court may au-
8 thorize further retention of nontestimonial evidence as reasonably
9 necessary to facilitate a continuing investigation, prosecution, or
10 defense.

Comment

This parallels Rule 436(h), *supra*, which is discussed in the Comment to that Rule.

Rule 438. [Comparing Nontestimonial Evidence.]

1 (a) **Authority.** Upon motion of the defendant, the court by
2 order may direct a prosecuting attorney to have a scientific com-
3 parison made between a specified sample or specimen of nontesti-
4 monial evidence in the prosecuting attorney's possession or con-
5 trol and other nontestimonial evidence of a similar character in
6 the prosecuting attorney's possession or control, if the court finds
7 that the result of the comparison could contribute to an adequate
8 defense.

Comment

This provision serves to supplement Rules 435 and 436, but extends to evidence beyond that obtained under those Rules. Where

the prosecuting attorney is aware that a comparison of evidence may produce exculpatory results, he presumably has an obligation to conduct such a comparison under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The prosecuting attorney may not always agree with defendant, however, as to the likelihood that the results could be exculpatory. In such a situation, the defendant could always have his own expert conduct tests under Rule 421, *supra*. However, so as to avoid controversy as to the method of comparison, the defendant may appropriately prefer that the comparison be provided by the prosecuting attorney. Cf. Rule 435, *supra*. The standard for issuance of the comparison order is similar to that of Rule 435. The order may extend to any evidence within the prosecut-

ing attorney's control. It does not extend to evidence in the defendant's possession unless that evidence has been given to (and accepted by) the prosecuting attorney. The defendant can insure that evidence obtained under Rule 437, *supra*, is within the prosecutor's control. (and therefore subject to a comparison order) by requesting that the Rule 437 procedure be provided by the prosecuting attorney. The Rule will extend to nontestimonial evidence obtained by the prosecution under Rules 211(b), 311(2), 434, and 436, *supra*, and through various investigatory activities (*e. g.*, physical searches and electronic surveillance). There is no provision respecting the disclosure of the results to the defendant since disclosure will be required under Rule 421, *supra*.

- 1 (b) **Contents of order.** The order shall specify the compari-
- 2 son authorized, who may make it, and appropriate conditions un-
- 3 der which it is to be made.

Comment

This is patterned after Rules 434(d) and 435(b), *supra*.

PART 4

DISPOSITION WITHOUT TRIAL

Rule 441. [Discussion Regarding Disposition of Case.]

- 1 (a) **Meeting.** The parties may meet to discuss the possibility
- 2 of pretrial diversion under Rule 442 or of a plea agreement under
- 3 Rule 443. The court may not participate in the discussions.

Comment

Pretrial diversion and plea discussions generally plea discussions. *Accord*, ALI Model Code of Pre-Arraignment Procedure § 320.1 (T.D. # 5, 1972). This is done to further

This Rule provides for pretrial diversion discussions as well as

"the goal of encouraging early and informed disposition of as many cases as possible" and to create a "framework to encourage and guide the exercise of prosecutorial discretion in determining * * * whether to decline prosecution unconditionally, or on condition that the defendant abstain from any further illegal acts or that he participates in some rehabilitation program; and whether to agree to sentencing concessions in connection with a plea." See *id.*, Commentary.

In providing for pretrial diversion discussions, this Rule implements Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 2.1 (1973), which states that, "In appropriate cases offenders should be diverted into noncriminal programs before formal trial or conviction," ABA Standards, The Prosecution Function 3.8 (Approved Draft, 1971) which calls upon the prosecutor to "explore the availability of non-criminal disposition including programs of rehabilitation, formal or informal," and ABA Standards, the Defense Function 6.1(a) (Approved Draft, 1971), which calls upon the defense lawyer to "explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies." See Pa.R.Crim.P. 175 through 185. Cf. Calif.Penal Code §§ 1000 through 1000.4 (certain drug offenders). As stated in the Commentary to the Prosecution Function Standard:

The President's Crime Commission has recommended that

prosecutors undertake "[e]arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required." President's Crime Comm'n Report 134. While the appellation "early diversion" is new, the underlying concept is not. It has long been the practice among experienced prosecutors to defer prosecution upon certain conditions, such as a firm arrangement for the offender to seek psychiatric or other similar assistance where his disturbed mental condition may have contributed to his behavior. A technique of long standing, indeed one going back to the early history of our country, is found in decisions of prosecutors not to prosecute an offender who has agreed to enter the military service or who has obtained new employment or in some other manner has embarked on what can broadly be considered to be a rehabilitative program.

See generally Nat'l Advisory Comm'n, Courts Chapter 2, Corrections Standard 3.1.

This subdivision recognizes the legitimacy of plea discussions. See Commentary to ABA Standards, Pleas of Guilty 1.8, 3.1(a); Commentary to ALI 350.3; Advisory Committee Note to the recent amendment to F.R.Crim.P. 11(e); *Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257, 260-61, 30 L.Ed.2d 427 (1971); Erickson, *The Finality of a Plea of Guilty*, 48 Notre Dame Law. 835,

839-41 (1973). *But see* Nat'l Advisory Comm'n, Courts, pages 37-45.

Pretrial diversion discussions and plea discussions are treated together in this Rule because in many cases both matters will be discussed at the same time and because it seems that the same provisions regarding court nonparticipation, deferring proceedings, aid of court in developing facts, and inadmissibility of statements and agreements should apply to each type of discussion. However, the agreements which may result from the discussions are treated separately—Rule 442, *infra*, treats pretrial diversion agreements and Rule 443, *infra*, plea agreements.

Meeting

Subdivision (a) provides that the parties "may" meet and discuss the possibility of pretrial diversion or of a plea agreement. In light of the duty of counsel to proceed in good faith, it seems unnecessary to use mandatory language. ABA Standards, Pleas of Guilty 3.1(a), F.R.Crim.P. 11(e)(1), and Alaska R.Crim.P. 11(e)(1) similarly specify "may." *Cf.* Fla.R. Crim.P. 3.171(a) ("The Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by a defendant").

Unrepresented defendants

The discussions are not limited to defendants represented by counsel, in light of the stringent requirements for waiver of counsel, the protection subdivision (d) *infra*, gives against use of discussions, statements, and agreements, and the principle stated

in ABA Standards, Pleas of Guilty 3.1(c), that "similarly situated defendants should be afforded equal plea agreement opportunities." See *id.* 3.1(a); Nat'l Advisory Comm'n, Courts Standards 2.2(1), 3.5; F.R.Crim.P. 11(e)(1); Fla.R.Crim.P. 3.171(a). Professional ethics preclude the prosecutor from dealing directly with a defendant represented by counsel absent defense counsel's prior consent. ABA Code of Professional Responsibility DR 7-104(a).

Court nonparticipation

It is common to specify that the court not participate in plea discussions. See ABA Standards, Pleas of Guilty 3.3(a); ALI § 350.3(1); Nat'l Advisory Comm'n, Courts Standard 3.7; F.R.Crim.P. 11(e)(1); Pa.R.Crim.P. 319(b)(1). *Cf.* ABA Standards, The Function of the Trial Judge 4.1(a) (Approved Draft, 1972); Informal Opinion No. 779, ABA Professional Ethics Committee, 51 A.B.A.J. 444 (1965). As pointed out in the Commentary to ABA Standards, Pleas of Guilty 3.3(a):

There are a number of valid reasons for keeping the trial judge out of the plea discussions, including the following: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the

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extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

As stated in *United States ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244, 254 (S.D.N.Y.1966):

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a

question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.

It seems the same rule of nonparticipation should apply to pretrial diversion discussions as applies to plea discussions.

- 1 **(b) Deferring proceedings.** Upon stipulation of the parties,
2 the court shall defer for a reasonable time any pending proceed-
3 ings in the prosecution so that the procedures under this Rule
4 may be pursued.

Comment

This is similar in concept to ment Procedure § 330.2(2) (T.D. 'ALI Model Code of Pre-Arraign- # 5, 1972).

- 1 **(c) Aid of court in developing facts.** Upon stipulation of the
2 parties, the court by order may:

3 (1) Direct the [probation service] to conduct an investi-
4 gation of the defendant's background; and

5 (2) Appoint a doctor, psychiatrist, or psychologist to ex-
6 amine the defendant.

- 7 The order shall specify the purpose and scope of the procedure
8 and the matters to be covered, and shall direct that the results of
9 any investigation or examination be embodied in a written report,
10 copies of which shall be made available to the parties.

Comment

This is very similar to ALI 1000.1(a) (use of probation de-
Model Code of Pre-Arraignment partment as to diversion of cer-
Procedure § 320.4 (T.D. # 5, tain drug cases). It seems that
1972). Cf. Calif.Penal Code § both parties should agree before

the court orders any of the procedures specified to develop facts for a possible agreement as to disposition. If either party deems it necessary to use one of the pro-

cedures to verify representations made by the other party, he might condition his acceptance of the agreement upon use of the procedure.

1 (d) Inadmissibility of discussions, statements, and agree-
2 ments. No discussion between the parties or statement by the
3 defendant or his lawyer under this Rule, or agreement under
4 Rule 442 or 443 is admissible in evidence against the defendant in
5 any criminal, civil, or administrative proceeding except a pro-
6 ceeding:

7 (1) To secure termination or modification of an agree-
8 ment under Rule 442(e) (2) or (g);

9 (2) To secure concurrence in a plea agreement under
10 Rule 443(b);

11 (3) To secure acceptance of a plea under Rule 444(b);

12 (4) To secure withdrawal of a plea under Rule 444(e);
13 or

14 (5) To cause a judgment based upon a plea to be reversed
15 or held invalid.

Comment

This is similar in concept to a number of comparable provisions. See ABA Standards, Pleas of Guilty 3.4 (Approved Draft, 1968) ("Unless the defendant subsequently enters a plea of guilty or *nolo contendere* which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings"); ALI Model Code of Pre-Arraignment Procedure § 350.7 (T.D. # 5, 1972) (same); *id.* § 320.3(3) ("If the case goes to trial, any statements made by the defendant or his counsel in connection with the precharge

conference shall not be admissible in evidence"); F.R.Crim.P. 11(e) (6) ("Evidence of * * * an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any * * * offers, is not admissible in any civil or criminal proceeding against the person who made the * * * offer"). Cf. Alaska R.Crim.P. 11(e)(6); Calif.Penal Code § 1000.1(b); Fla.R.Crim.P. 3.171(d).

The purpose of this subdivision is to encourage free and open discussions regarding disposition—"without concern over the use of such discussions against the defendant." See Advisory Committee Note to Proposed Amendment to F.R.Crim.P. 11(e) (6) (Prelim-

inary Draft, April 1971). As stated in the Note to ALI § 320.3, to encourage full disclosure by the defense, this creates a privilege, although "the privilege does not extend to fruits as such statements since the 'tree' is not 'poisonous' and it might frequently be difficult to trace the prosecution's evidence back to its original source."

The inadmissibility specified herein and in the comparable provisions cited appears to extend to prevent use of the matters specified for impeachment purposes and even in a perjury prosecution. (Since none of the discussions, statements, or agreements would be under oath, the perjury prosecution would have to be based upon a sworn statement made at some other time, and the issue would be merely whether the state's proof of the statement's falsity may include a discussion, statement or agreement covered by this subdivision.)

As to the impeachment point, it seems that the discussions, statements, and agreements should not be admissible. The policy favoring resolution of criminal cases without trial should make them "privileged" even for this purpose. The existence of this policy makes the situation wholly distin-

guishable from that in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), where the Court allowed Miranda-warnings statements to be used against a defendant for impeachment purposes. Cf. Note, *Improbident Guilty Pleas and Related Statements: Inadmissible Evidence at Later Trial*, 53 Minn. L.Rev. 559, 580 (1969).

The perjury point is more difficult. The law's extreme antipathy toward perjury suggests that the state's interest in using the discussion, statement, or agreement to prove perjury is stronger than its interest in using it merely to raise a credibility issue in the main prosecution. But that interest is not as substantial as it would be if it were the discussion, statement, or agreement itself which was allegedly perjurious and, although this presents a closer question than does the matter of impeachment, the state's interest seems insufficient to outweigh the strong interest favoring resolution of criminal cases without trial which calls for making the discussions, statements, and agreements privileged.

The inadmissibility of pleas, judgments, and related statements is treated in Rule 444(f), *infra*.

Rule 442. [Pretrial Diversion.]

1 (a) **Agreements permitted.** The parties may agree that the
2 prosecution will be suspended for a specified period after which
3 it will be dismissed under subdivision (f), on one or more of the
4 following conditions to be observed by the defendant during the
5 period:

6 (1) That he not commit any offense;

7 (2) That he not engage in specified activities, conduct,
8 and associations, bearing a relationship to the conduct upon
9 which the charge against him is based;

10 (3) That he participate in a supervised rehabilitation
11 program which may include treatment, counseling, train-
12 ing, and education; and

13 (4) That he make restitution in a specified manner for
14 harm or loss caused by the offense.

15 The agreement may include stipulations concerning the admissi-
16 bility into evidence of specified testimony, evidence, or deposi-
17 tions if the suspension of the prosecution is terminated and there
18 is a trial on the charge. The agreement shall be in writing
19 signed by the parties and state that the defendant waives his
20 right to a speedy trial.

Comment

Pretrial diversion generally

The reasons for providing for pretrial diversion are indicated at the outset of the Comment to Rule 441(a), *supra*. Rule 442 is generally quite similar to ALI Model Code of Pre-Arrestment Procedure §§ 320.5 through 320.9 (T.D. # 5, 1972). Court approval of pretrial diversion agreements is not required, in light of the facts that the defendant will either be represented by counsel or will have met the stringent requirements for waiver of counsel, that the agreement is limited by the provisions of subdivision (b), *infra*, that the agreement may be terminated unilaterally by the defendant under subdivision (e)(1), *infra*, and that in the event of material misrepresentation by the prosecutor or anyone under his control, the defendant may have the court modify the agreement or, if appropriate, dismiss the prosecution with prejudice under subdivision (g), *infra*.

Agreements permitted

This subdivision (a) is very similar to ALI § 320.5. Clause (2)'s explicit reference to "associations" and use of the concept "bearing a relationship to" derive from the *Note* to the ALI provision. Clause (4), authorizing restitution as a condition, derives from Pa.R.Crim.P. 182(a). The permissible period for suspension of prosecution is limited only by subdivision (b)(1), *infra* (not longer "than could be imposed upon probation following conviction"). Although one year should normally be sufficient, see ALI § 320.5(1); Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Courts Standard 2.2 (1973), in some cases it may not be sufficient, *e. g.*, where the condition includes restitution or attendance at periodic meetings. *Cf.* Calif. Penal Code § 1000.2 (up to two years). As to the final sentence, regarding waiver of speedy trial, see Calif.

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Penal Code § 1000.1(a). Compare ALI § 320.7(2)(a); Pa.R.Crim.P. 178(3). Since the prosecution will already have been commenced, and will merely be suspended during the period of the agreement, there are no statute of limitation problems.

(b) **Limitations on agreements.** The agreement may not:

(1) Specify a period longer or any condition other than could be imposed upon probation following conviction of the offense charged; or

(2) Require the defendant to reside in any designated place, except it may require him to reside in a residential facility for persons participating in a particular program of rehabilitation if residence there is necessary in order to participate fully in the program and:

(i) He is not required to reside there for more than [three months]; or

(ii) The rules of the facility, other than those relating to reasonable curfew restrictions during the nighttime, permit him free ingress and egress.

Comment

This is quite similar to ALI Model Code of Pre-Arrestment Procedure § 320.6 (T.D. # 5, 1972) (except parallel to clause (2)(i) specifies 30 days). Compare Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 2.2(2), (3), (5) (1973). As stated in the Note to the ALI provision, certain serious sanctions ought not to be imposed upon a defendant who has not been convicted; if such sanctions are necessary they can be secured by use of plea agreement and plea procedures.

(c) **Filing of agreement and notice.** Promptly after the agreement is made, the prosecuting attorney shall file it with the court together with a notice stating that pursuant to agreement of the parties under this Rule, the prosecution is suspended for a period specified in the notice. Upon this filing, if the defendant is in custody he shall be released on his promise to appear if the suspension of prosecution is terminated and there is a trial on the charge.

Comment

Insofar as this subdivision requires the agreement to be filed with the court, it accords with ALI Model Code of Pre-Arrestment Procedure § 320.5(4) (T.D. # 5, 1972). As stated in the Note thereto, this provides "a public record of the basis for the

dismissal or suspension of the prosecution, a basis for judicial review of the agreement in cases in which such review is required, and a record of the agreement in the event of later dispute over its terms."

The notice filed by the prosecutor operates to suspend the prosecution.

The last sentence hereof is rather similar to ALI § 320.7(4).

- 1 (d) **Modification of agreement by mutual consent.** Subject
- 2 to subdivisions (a), (b), and (c), the parties by mutual consent
- 3 may modify the terms of the agreement at any time before its
- 4 termination.

Comment

This is to the same effect as ment Procedure § 320.8(1) (T.D. ALI Model Code of Pre-Arraign- # 5, 1972).

- 1 (e) **Termination of agreement—resumption of prosecution.**
- 2 The agreement shall be terminated and the prosecution may re-
- 3 sume as if there had been no agreement if:

- 4 (1) The defendant files a notice that the agreement is
- 5 terminated; or

- 6 (2) The court finds, upon motion by the prosecuting at-
- 7 torney stating the facts supporting the motion and after
- 8 opportunity for the parties to be heard, that:

- 9 (i) The defendant or his lawyer wilfully misrepresented
- 10 material facts affecting the agreement, and the
- 11 motion is made within [six months] after the date of
- 12 the agreement; or

- 13 (ii) The defendant has violated a material condition
- 14 in the agreement, and the motion is made not later than
- 15 [one month] after expiration of the period of suspen-
- 16 sion specified in the agreement.

Comment

This subdivision includes provisions similar to some of those in ALI Model Code or Pre-Arraignment Procedure § 320.8 (T.D. # 5, 1972). It does not seem necessary to provide specially for the court's control over the manner in which the prosecution is resumed.

Clause (1) is similar to ALI § 320.8(3). It does not seem neces-

sary to provide specially for the defendant consulting with counsel before being allowed to terminate the agreement. The reasons for letting the defendant unilaterally terminate the agreement are expressed in the Note to the ALI provision:

The defendant's consent to the agreement should not be ir-

reversible. He may after some time find that the conditions are more onerous than he originally realized. A disillusioned defendant should not have to violate a condition of the agreement in order to terminate it.
* * *

While some defendants may revoke their consent after some adverse development occurs in the prosecution's case, such as the death of an important witness, such manipulation could occur even if the defendant did not have a power of revocation, as the defendant could ignore the conditions of the agreement anyway with less concern for successful prosecution. In any event, the prosecutor can protect himself to some degree by appropriate stipulations pursuant to [provision like penultimate sentence of subdivision (a) hereof].

Clause (2) is quite similar to ALI § 320.8(2). It does not seem necessary to provide for a hearing before the prosecutor before he moves for termination or, in light of subdivision (d), *supra*, to provide specially that instead of the prosecutor moving for termination the parties may modify the agreement in response to the defendant's misrepresentation or violation.

As to the six month limitation in clause (2)(i), the Note to the ALI provision states, "If the defendant has abided by the agreement and has not violated the law for that [six month] period, the suspension of prosecution was probably a sound decision notwithstanding the misrepresentation."

The "not later than [one month] after expiration" limitation of clause (2)(ii) derives from Pa.R.Crim.P. 184(b), 185.

(f) **Termination of agreement—automatic dismissal.** The agreement shall be terminated and the prosecution automatically dismissed with prejudice:

(1) Upon the expiration of [one month] after expiration of the period of suspension specified in the agreement, if no motion by the prosecuting attorney to terminate the agreement is pending; or

(2) If that motion is then pending, upon the entry of a final order denying the motion.

If the prosecution is dismissed with prejudice, the court shall enter an order so stating.

Comment

This is similar in effect to Pa. on Criminal Justice Standards & R.Crim.P. 185. Compare ALI Goals, Courts Standard 2.2(6) Model Code of Pre-Arraignment (1973); Calif. Penal Code § 1000.- Procedure § 320.8(6) (T.D. # 5, 2. 1972); Nat'l Advisory Comm'n

1 (g) **Modification or termination and dismissal upon defend-**
2 **ant's motion.** If the court finds, upon motion by the defendant
3 stating the facts supporting the motion and after opportunity
4 for the parties to be heard, that the defendant's consent to the
5 agreement was obtained as a result of a material misrepresenta-
6 tion made by the prosecuting attorney or anyone under his con-
7 trol, the court shall:

8 (1) Order the agreement modified to relieve the defend-
9 ant from terms as to which there was misrepresentation;
10 or

11 (2) If the court determines that the interests of justice
12 require, order the agreement terminated and the prosecution
13 dismissed with prejudice.

Comment

Except for the inclusion of be where the burdens of the
clause (1), this accords in sub- agreement are heavy yet rein-
stance with ALI Model Code of statement of the prosecution
Pre-Arraignment Procedure § would be unfair to the defendant
320.8(5) (T.D. #5, 1972). As to due to the intervening death of a
the matter in clause (2), the Note defense witness or loss of other
to the ALI provision states, "An evidence."
example of such a situation would

Rule 443. [Plea Agreements.]

1 (a) **Agreements permitted.** The parties may agree that the
2 defendant will plead on one or more of the following conditions:

3 (1) That the prosecuting attorney will amend the infor-
4 mation [or indictment] to charge a specified offense;

5 (2) That the prosecuting attorney will dismiss or not
6 bring certain charges against the defendant;

7 (3) That the sentence or other disposition not exceed
8 specified terms; and

9 (4) That the defendant will not seek appellate review, as
10 permitted under Rule 444(d), of an order denying a pretrial
11 motion.

Comment

Except for clause (4), this is of Guilty 3.1(b) (Approved Draft,
quite similar to ALI Model Code 1968); F.R.Crim.P. 11(e). The
of Pre-Arraignment Procedure § term "or other disposition" covers
320.5(1)(e), (f) (T.D. #5, 1972). deferral of imposition of sentence.
Compare ABA Standards, Pleas

The parties' agreement upon terms of sentence is, of course, not binding upon the court unless it concurs in the agreement pursuant to subdivision (b) of this Rule, *infra*. But if the court imposes a sentence inconsistent with the specified terms the defendant may withdraw his plea. See Rules 444(b)(2), (e)(2)(iv), *infra*; Calif. Penal Code § 1192.5.

No provision is made for "recommendations" as to sentence—since fairness requires allowance of withdrawal if such "recommendations" are not followed, see ABA Standards, The Function of the Trial Judge 4.1(c) (Approved Draft, 1972), it seems very misleading to speak of "recommendations," and appears much preferable to explicitly provide for a plea being *conditioned* upon the sentence not exceeding the specified terms.

Rule 444(d), *infra*, recognizes that a defendant who has pleaded may, on appeal from an ensuing judgment of conviction, obtain review of an order denying a pretrial motion to suppress evidence or an order denying any pretrial motion which, if granted, would be dispositive of the case. As noted in the Comment to that provision, its purpose is to avoid the need for a sham trial when the only litigable questions arise before trial.

If the right set out in Rule 444 (d) were absolute, in the sense that it could never be surrendered in the plea agreement process,

then the result might be to discourage plea negotiations. In every case, the prosecutor would know that notwithstanding the defendant's plea the case really is not "over," as the defendant might still appeal on several grounds unrelated to the sufficiency of the procedures used in receiving the plea. Under such circumstances, it is likely that defendants could not obtain concessions to the extent that they are now obtained, as presently, where (for example) a defendant's pretrial motion to suppress is denied, one of the elements in the bargaining equation is the probability of the trial judge being upheld on appeal. That is, the defendant may gain concessions by his plea because the prosecutor knows that as a consequence of the plea the judge's ruling can no longer be challenged.

The effect of Rule 444(d) and the instant provision, taken together, is that a defendant may, without agreement by the prosecutor or court, maintain his right to obtain appellate review of the pretrial rulings specified in Rule 444(d). However, the defendant may, whenever that appears to be tactically advantageous, surrender all or part of his rights under Rule 444(d) as part of the plea agreement process as a means for gaining added concessions. Under clause (4), the defendant could agree not to seek appellate review of any pretrial order or not to seek appellate review of one or more specified pretrial orders.

- 1 (b) Concurrence. If the parties agree that the defendant
- 2 will plead on condition that the sentence or other disposition not
- 3 exceed specified terms, they may submit the agreement in writing

4 to the court, whereupon the court shall inform the parties wheth-
5 er it will consider the agreement in advance of a plea. If the
6 court determines to consider the agreement, it shall concur in or
7 reject the agreement. To aid it in determining whether to concur
8 in the agreement, the court may first examine any [probation
9 service] report made under Rule 441(c), direct the making of a
10 presentence investigation and report and examine that report,
11 and conduct a conference in chambers. The court may require
12 any person, including the defendant, the alleged victim, and
13 others, to appear and testify at the conference. If the court re-
14 jects the agreement, it may state the reasons for the rejection and
15 afford the parties an opportunity to modify the agreement ac-
16 cordingly. Records of proceedings under this subdivision shall be
17 open to public inspection only after disposition of the case. If the
18 court concurs in the agreement, proceedings shall be had under
19 Rule 444. If a plea is not accepted, a judge who has examined
20 a report under this subdivision may not over the defendant's
21 objection preside at the trial of the case.

Comment

A number of provisions accord with this subdivision in permitting the court to state in advance of a plea's tender whether it concurs in a plea agreement. See ABA Standards, Pleas of Guilty 3.3(b) (Approved Draft, 1968); ABA Standards, The Function of the Trial Judge 4.1(d) (Approved Draft, 1972); ALI Model Code of Pre-Arrestment Procedure § 350.3(5) (T.D. # 5, 1972); Fla. R.Crim.P. 3.171(c). Several others permit such concurrence at the time the plea is offered but before sentence. See F.R.Crim.P. 11(d) (2); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 3.2 (1973); Alaska R.Crim.P. 11(d) (2).

The reason for providing for such advance concurrence or rejection is that although plea agreements are rejected in only a small percentage of cases, in those

cases it is very difficult for the defendant to obtain a fair trial if his offer to plead is public knowledge.

The wording of the first two sentences accommodates the fact that some judges are strongly opposed to giving advance consideration to plea agreements. It seems, however, that the advance consideration method has great advantages, particularly in preventing prejudice to defendants who will face trial as a result of an agreement's rejection.

The first part of the third sentence respecting presentence reports, is similar in effect to ABA Standards, Sentencing Alternatives & Procedures 4.2(b)(ii) (Approved Draft, 1968), ABA Standards, The Function of the Trial Judge 4.1(d), ALI Model Code of Pre-Arrestment § 350.5 (3), F.R.Crim.P. 11(e)(2), Alas-

Rule 443 . RULES OF CRIMINAL PROCEDURE

Art. 4

ka R.Crim.P. 11(e)(2), 32(c)(1),
and Fla.R.Crim.P. 3.711(b)(2).

sentence accords with ALI § 350.-
5(4).

The last part of the third sentence, and the fourth sentence, reflect the fact that in some cases the judge may desire more information than that in the plea agreement and the Rule 441(c) or presentence report.

The sixth sentence is included because of the severe prejudice which would attend public knowledge before trial that a plea agreement has been rejected.

Except in being permissive rather than mandatory, the fifth

The final sentence hereof is analogous to Uniform Juvenile Court Act § 34(e).

Rule 444. [Plea of Admission.]

- 1 (a) Making. Upon reasonable notice to the prosecuting at-
- 2 torney, the defendant may appear before the court and, after the
- 3 charge has been read as directed by the court, plead that he ad-
- 4 mits the charge.

Comment

These Rules do not provide for a plea of not guilty, on the ground that the normal arraignment at which a perfunctory not guilty plea is entered is a waste of time and of legal and judicial resources. See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.8 and Commentary (1973). Such matters as determining whether there are special defenses, whether there will be a waiver of jury and when to set the trial may be handled otherwise than by a traditional arraignment. The defendant, clothed with the presumption of innocence, is "not guilty" until such time as he is convicted, whether upon plea or verdict. It has been related that scrupulous persons sometimes feel they are lying when they plead not guilty.

Rather than provide for guilty and nolo contendere pleas, these Rules provide a single plea of ad-

mission. ALI Model Code of Pre-Arraignment Procedure § 350.1 (1) (T.D. # 5, 1972), F.R.Crim.P. 11, and the laws of about half the states (see Commentary to ABA Standards, Pleas of Guilty 1.1(a) (Approved Draft, 1968)) provide for nolo pleas (sometimes specifying "no contest," see Wis.Stat. § 971.06) and in several states no judicial or prosecutorial consent is needed to plead nolo, so that it may be pleaded as a matter of right. See Alaska R.Crim.P. 11(a); Tex. Code Crim.P. art. 26.13. The Committee initially drafted this subdivision to provide for a plea of "no contest," but in deference to objections from the ABA Special Committee on the Administration of Criminal Justice (responsible for the ABA Standards) changed this subdivision to its present form.

Because a plea that the defendant admits the charge does not

bear the moral connotations of a "guilty" plea, it is expected that a greater number of uncontested cases will result.

The only legal difference between the guilty plea and the plea here provided is that the latter is not an admission *for*

purposes of civil litigation. See subdivision (f), *infra*. Serving the ends of civil litigation does not seem a legitimate function of the criminal justice system, and if more pleas can be obtained if the plea has no civil consequences, it seems this is to be encouraged.

(b) Acceptance.

(1) *Understanding.* The court shall not accept the plea without first addressing the defendant personally and determining that he fully understands and has had reasonable time to consider:

(i) The nature of the charge;

(ii) Unless the court's previous concurrence in a plea agreement renders it unnecessary, the maximum possible sentence on the charge, including, if there are several charges, that possible from consecutive sentences and including, when applicable, that a different or additional punishment may be authorized by reason of a previous conviction or other factors, which may be established, in the present action, after his plea;

(iii) The mandatory minimum sentence, if any, on the charge and any mandatory limitations on parole;

(iv) That by his plea he waives his right to a speedy and public trial and waives the rights he would have at such a trial, including his right to be convicted only if the State, without using evidence obtained in violation of his constitutional rights, proves beyond a reasonable doubt that he is guilty, his right, if any, to trial by jury, his right to be confronted by the witnesses against him, his right to present witnesses in his behalf and to have the court's aid in securing their attendance, and his right to either be or decline to be a witness in his own behalf; and

(v) That he need not make the plea.

If the defendant is represented by counsel, the court shall not accept the plea unless it is satisfied that he has had adequate legal services.

Comment

In requiring the court to address the defendant personally, this paragraph accords with ABA Standards, Pleas of Guilty 1.4 (Approved Draft, 1968), ABA Standards, The Function of the Trial Judge 4.2(a) (Approved Draft, 1972), ALI Model Code of Pre-Arraignment Procedure § 350.4(1) (T.D. # 5, 1972), F.R. Crim.P. 11(c), Alaska R.Crim.P. 11(c), Maine R.Crim.P. 11, Nev. Rev.Stat. § 174.035(1), and N.J. Rules of Court 3:9-2.

In requiring the court to determine that the defendant "has had reasonable time to consider" the matters specified, this paragraph serves a purpose similar to that of ABA Standards, Pleas of Guilty 1.3(b) and of ALI § 350.2(2). See Fla.R.Crim.P. 3.170(i). It is anticipated that courts will often assure compliance with this requirement as to defendants who waive counsel by appointing counsel for the limited purposes of explaining the specified matters to the defendant, but it may also be complied with by the court explaining the matters to the defendant and then giving him time to reflect before he returns to make his plea.

As to the matters which the court must determine the defendant understands, former Uniform Rule 24 specifies only "the nature of the charge." On the other hand, ABA Standards, Pleas of Guilty 1.4, ABA Standards, The Function of the Trial Judge 4.2(a), ALI § 350.4(1), Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts

Standard 3.7 (1973), and F.R. Crim.P. 11(c) include considerable detail as to these matters. In light of the fact that the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), reversed a guilty plea conviction of a defendant who was represented by appointed counsel because the record did not affirmatively show that his plea was intelligent and voluntary and that he waived his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers, it seems highly desirable to follow the approach of the latter provisions in carefully specifying the matters the court must determine the defendant understands. See Erickson, *The Finality of a Plea of Guilty*, 48 Notre Dame Law, 835, 845-49 (1973).

Clause (i) accords with ABA Standards, Pleas of Guilty 1.4(a), ABA Standards, The Function of the Trial Judge 4.2(a)(i), ALI § 350.4(1)(a), Nat'l Advisory Comm'n 3.7(2), former Uniform Rule 24, F.R.Crim.P. 11(c)(1), Alaska R.Crim.P. 11(c)(1), Idaho Crim.R. 11, Maine R.Crim.P. 11, Mont.Rev.Codes § 95-1606, Nev. Rev.Stat. § 174.035(1), N.J. Rules of Court 3:9-2, and Wis.Stat. § 971.08(c).

Clause (ii) is very similar to ABA Standards, The Function of the Trial Judge 4.2(a)(iv). See ABA Standards, Pleas of Guilty 1.4(c)(i), (iii); ALI § 350.4(1)(e)(i), (iii). Compare Nat'l Advisory Comm'n 3.7(6); F.R.Crim.

P. 11(c)(2); Alaska R.Crim.P. 11(c)(3)(i); Colo.R.Crim.P. 11(c)(4); 38 Ill.Stat. § 115-2; Mont. Rev.Codes § 93-1902(b); Wis.Stat. § 971.08(c). As stated in the Commentary to ABA Standards, The Function of the Trial Judge 4.2:

[This requires,] when appropriate, a caution that the defendant's plea could lead to a proceeding in the present action not only under a multiple-offense statute (increasing punishment by reason of a previous conviction) but also under laws similar to the recently-enacted 18 U.S.C. § 3575, which provides for increased punishment on other grounds, *e. g.*, the defendant is a professional criminal or a leader of a continuing criminal conspiracy. While such laws are likely to require notice of such a proceeding before acceptance of the plea, the judge should determine that the defendant understands what additional punishment is authorized if the alleged grounds are established.

Clause (iii) is similar to ALI § 350.4(1)(e)(ii). The reference to "mandatory minimum sentence if any" also accords with ABA Standards, Pleas of Guilty 1.4(c)(ii), ABA Standards, The Function of the Trial Judge 4.2(a)(iv), and Nat'l Advisory Comm'n 3.7(6). See F.R.Crim.P. 11(c)(2); Alaska R.Crim.P. 11(c)(3)(i).

Clause (iv) enumerates certain constitutional rights which the court must determine the defendant understands before accepting his plea. As indicated previously, the Court in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.

Ed.2d 274 (1969) specified the "privilege against compulsory self-incrimination," the "right to trial by jury," and the "right to confront one's accusers" as "important federal rights" waiver of which it could not presume from a silent guilty plea record. In light of Mr. Justice Douglas' concurring opinion in *Santobello v. New York*, 404 U.S. 257, 264, 266, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), it seems prudent to anticipate that the Court may add the right "to present witnesses in one's defense" and "to be convicted of proof beyond all reasonable doubt." (It should be noted that the Court first held the latter to be a federal constitutional right in a post-*Boykin* case, *In re Winship*, 397 U.S. 238, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1969), but had recognized the former's applicability to the states in a pre-*Boykin* case, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). This paragraph covers each of these matters, although it does not specify "the privilege against compulsory self-incrimination" in those words but rather by specifying in clause (v) hereof "that he need not make the plea" and in this clause (iv) that he waives the right to trial, the right to the convicted only upon the state's proving his guilt beyond a reasonable doubt, and the right to either be or decline to be a witness in his own behalf at trial. See Advisory Committee Note to the recent amendment to F.R.Crim.P. 11(c)(3) (Preliminary Draft, April 1971), which states, "The draft takes the position that the defendant's right not to incriminate himself is best

explained in terms of his right to plead not guilty and to persist in that plea if it has already been made." Compare ABA Standards, The Function of the Trial Judge 4.2(a)(ii).

The reference to waiver of the right to a trial accords with ALI § 350.4(1)(c), Nat'l Advisory Comm'n 3.7(4)(b), F.R.Crim.P. 11(c)(4), and Alaska R.Crim.P. 11(c)(2). As stated in the Advisory Committee Note to the recent amendment to the federal rule (Preliminary Draft, April 1971) "Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow." The Sixth Amendment's words "speedy and public" are added to underline the value of a trial.

The reference, "without using evidence obtained in violation of his constitutional rights," is similar to ALI § 350.4(1)(d). As stated in the Commentary thereto, this "is designed to insulate pleas from attack on grounds of involuntariness based on a defendant's fear that illegally seized evidence would be used against him," and, as stated in the Note thereto:

These additional statements by the court will not add materially to time devoted to the proceeding. And since they are crucial to the defendant's making an informed decision to give up his right to a trial that would be far more time consum-

ing, whatever additional burden they place on the court seems warranted.

In referring to proof beyond a reasonable doubt, clause (iv) accords with ALI § 350.4(1)(c) and Nat'l Advisory Comm'n 3.7(4)(b). Cf. Commentary to ABA Standards, The Function of the Trial Judge 4.2(a)(ii).

The reference to waiver of trial by jury accords with ABA Standards, Pleas of Guilty 1.4(b), ABA Standards, The Function of the Trial Judge 4.2(a)(ii), ALI § 350.4(1)(c), Nat'l Advisory Comm'n 3.7(4)(c), Alaska R. Crim.P. 11(c)(2), and Colo.R. Crim.P. 11(c)(3).

The reference to the right to be confronted by witnesses accords with ABA Standards, The Function of the Trial Judge 4.2(a)(ii), ALI § 350.4(1)(c), and Alaska R.Crim.P. 11(c)(2). See Nat'l Advisory Comm'n 3.7(4)(d). Compare Commentary to ABA Standards, The Function of the Trial Judge 4.2(a)(ii).

The reference to the right to present witnesses and have the court's aid in securing their attendance is similar to Nat'l Advisory Comm'n 3.7(4)(e). Compare Commentary to ABA Standards, The Function of the Trial Judge 4.2(a)(ii).

As indicated previously, the reference to the right to either be or decline to be a witness in his own behalf is one of the means by which the privilege against compulsory self-incrimination is covered. Compare Commentary to ABA Standards, The Function of the Trial Judge 4.2(a)(ii).

Clause (v) is to the same effect as ABA Standards, The Function of the Trial Judge 4.2(a)(ii), ALI § 350.4(1)(b), Nat'l Advisory Comm'n 3.7(4)(a), F.R.Crim. P. 11(c)(3), and Alaska R.Crim.P. 11(c)(3)(ii).

The last sentence of this paragraph is included in order to assure the defendant's right to effective counsel and to protect convictions against collateral attack.

- 1 (2) *Voluntariness*. The court shall not accept the plea
- 2 without first determining that it is voluntary. By inquiry
- 3 of the prosecuting attorney, the defendant, and the defend-
- 4 ant's lawyer, if any, the court shall determine whether the
- 5 tendered plea is the result of prior plea discussions or of a
- 6 plea agreement, and, if it is, what discussions were had
- 7 and what agreement, if any, was reached. If the parties
- 8 have agreed that the plea is on the condition that the sen-
- 9 tence or other disposition will not exceed specified terms,
- 10 unless it has concurred or then concurs in the agreement,
- 11 the court shall inform the defendant that the condition is not
- 12 binding on the court, but that if the court imposes a sentence
- 13 or other disposition exceeding that agreed upon, the defend-
- 14 ant may then withdraw his plea. The court shall address
- 15 the defendant personally and determine whether any other
- 16 promise or any force or threat was used to obtain the plea.

Comment

The first sentence hereof accords with ABA Standards, Pleas of Guilty 1.5 (Approved Draft, 1968), ABA Standards, The Function of the Trial Judge 4.2(a)(iii) (Approved Draft 1972), F.R.Crim. P. 11(d), Alaska R.Crim.P. 11(d), and Colo.R.Crim.P. 11(c)(2). See former Uniform Rule 24; Mont. Rev.Codes § 95-1606(e); N.J. Rules of Court 3:9-2; Pa.R.Crim. P. 319(a); Wis.Stat. § 971.08(1)(a). Compare ALI Model Code of Pre-Arrestment Procedure § 350.4(2) (T.D. # 5, 1972); Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 3.7 (1973).

The second sentence is quite similar to provisions in ABA

Standards, Pleas of Guilty 1.5, ALI §§ 350.4(2), 350.5(1), F.R.Crim.P. 11(d), (e)(2) and Alaska R.Crim.P. 11(d), (e)(2). As stated in the Commentary to the ABA Standard, this type of inquiry is desirable to "give visibility to the plea discussion-plea agreement process" and to "disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor."

The inquiry must be of the defendant as well as of the lawyers. *Accord*, ALI § 350.4(2); Alaska R.Crim.P. 11(d). See F.R.Crim. P. 11(d). This is to ensure full disclosure and that the defendant understands the nature of any

discussions or agreement. The inquiry is designed to disclose whether there were any plea discussions, even discussions which may not have resulted in an agreement. See ALI § 350.4(2); F.R.Crim.P. 11(d). It seems that a proper determination of voluntariness must necessarily reach this matter, as well as the matter of the substance of any plea discussions.

In requiring disclosure of any plea agreement, this paragraph accords with ABA Standards, Pleas of Guilty 1.5, ABA Standards, The Function of the Trial Judge 4.1(b), ALI § 350.5(1), Nat'l Advisory Comm'n 3.2, 3.7, F.R.Crim.P. 11(e)(2), Alaska R.

Crim.P. 11(e)(2), Fla.R.Crim.P. 3.171(c), and Pa.R.Crim.P. 319(b)(2).

The third sentence is to the same effect as ABA Standards, The Function of the Trial Judge 4.1(c) and Fla.R.Crim.P. 3.171(c). See *State v. Loyd*, 291 Minn. 523, 190 N.W.2d 123 (1971). Compare ABA Standards, Pleas of Guilty 1.5; ALI §§ 350.5(4), 350.6; F.R.Crim.P. 11(e)(2), (3), (4); Alaska R.Crim.P. 11(e)(2), (3), (4).

The final sentence hereof accords with ABA Standards, Pleas of Guilty 1.5. See F.R.Crim.P. 11(d); Alaska R.Crim.P. 11(d). Compare ALI § 350.4(2); Nat'l Advisory Comm'n 3.6.

- 1 (3) *Factual basis*. The court shall defer acceptance of
- 2 the plea until it is satisfied there is a factual basis for the
- 3 offense charged or to which the defendant pleads.

Comment

Current provisions generally do not extend their factual basis requirements to nolo pleas. See ABA Standards, Pleas of Guilty 1.6 (Approved Draft, 1968); ABA Standards, The Function of the Trial Judge 4.2(b) (Approved Draft 1972); F.R.Crim.P. 11(f); Alaska R.Crim.P. 11(f); Fla.R.Crim.P. 3.170(j); Nev.Rev.Stat. § 174.055. *But see* Calif. Penal Code § 1192.5 (where plea specifies punishment); Maine R.Crim.P. 11; Tex.Code Crim.P. arts. 1.15, 27.14; Wis.Stat. § 971.08 (1)(b). But these provisions apparently contemplate the nolo plea being used primarily by sophisticated defendants in business cases. See Commentary to ABA

Standards Pleas of Guilty 1.6. It seems that for the plea of admission under these Rules a factual basis showing should be required.

In making the standard that the court be "satisfied" that there is a "factual basis," this subdivision accords with ABA Standards, Pleas of Guilty 1.6, ABA Standards, The Function of the Trial Judge 4.2(b), and F.R.Crim.P. 11(f). As stated in the Commentary to ABA Standards, Pleas of Guilty 1.6:

Consistent with the position taken in the revision of Federal Rule 11, no attempt is made here to state specifically a particular probability-of-guilt standard for

this inquiry. The matter is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary. * * *

If the trial judge is otherwise satisfied that there is a factual basis for the plea, it is not required that he call upon the defendant to make an unequivocal confession of guilt.

- 1 (c) **Plea to other offense.** Upon acceptance of a plea or after
2 a verdict or finding of guilty, the defendant may request permis-
3 sion to plead to any other offense he has committed in the State
4 the penalty for which does not exceed the jurisdictional power
5 of the court. Upon written approval of the prosecuting attorney
6 of the governmental unit in which the offense is or could be
7 charged, the defendant may plead in conformity with this Rule.
8 So pleading constitutes a waiver of venue as to an offense com-
9 mitted in another governmental unit of the State and a waiver of
10 formal charge as to an offense not yet charged.

Comment

This subdivision is substantially the same as ABA Standards, Pleas of Guilty 1.2 (Approved Draft, 1968) and ALI Model Code of Pre-Arraignment Procedure § 350.1(3) (T.D. # 5, 1972), and is quite similar in effect to Wis.Stat. § 971.09, and, except for not being limited to *pending* charges to Fla.R.Crim.P. 3.170(b). As stated in the Commentary to the ABA Standard:

[This] makes it possible for a defendant to seek a simultaneous disposition as to all offenses he has committed in the same state, whether or not he has been theretofore charged with all of these offenses. The offenses, however, must be within the jurisdiction of coordinate courts of that state, so that, for example, a defendant may not enter a plea and be sentenced on a murder charge in a court which only has jurisdic-

tion over misdemeanors. Such a disposition can be of considerable benefit to the defendant: (1) he will be able to start with a clean slate when he is released from prison; (2) he may gain some benefit from the imposition of concurrent sentences or similar consideration in sentencing; and (3) he can avoid the risk of an intrastate detainer being lodged against him while he is serving his sentence. The public is also benefited by a prompt disposition as to all those offenses.

The objectives served by the above standard, then are similar to those of the British practice of "taking into account," at the request of the defendant being sentenced, other crimes of which he has not been convicted * * *. [Cf.] Model Penal Code § 7.05(4) (P.O.D.1962) * * *.

1 **(d) Effect.** The plea bars an appeal based upon any nonjuris-
2 dictional defect in the proceedings, but an order denying (1) a
3 pretrial motion to suppress evidence, or (2) any pretrial motion
4 which, if granted, would be dispositive of the case, may be re-
5 viewed on appeal from an ensuing judgment of conviction.

Comment

Under existing law in most jurisdictions, a plea of guilty or nolo contendere waives all nonjurisdictional defects in the proceedings. This means, for example, that a defendant who has entered such a plea may not thereafter claim that the prosecution obtained evidence by an illegal search, *Hughes v. United States*, 371 F.2d 694 (8th Cir. 1967), that he was illegally detained, *Kost v. Cox*, 317 F.Supp. 884 (D.C.Va.1970), that the prosecution constituted double jeopardy, *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967), that a confession was obtained from him illegally, *Cox v. United States*, 428 F.2d 877 (9th Cir. 1970), that there has been a denial of speedy trial, *Fowler v. United States*, 391 F.2d 276 (5th Cir. 1968), or that the grand jury was improperly selected, *Honesty v. Cox*, 337 F. Supp. 5 (D.C.Va.1972). There are a few matters which are deemed jurisdictional and which thus may be raised on appeal notwithstanding a guilty plea; illustrative are the claims that the indictment or information failed to state an offense, *Kolaski v. United States*, 362 F.2d 847 (5th Cir. 1966), that the statute under which the defendant was charged is unconstitutional, *Haynes v. United States*, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968), or that the pleadings showed that the prosecution was barred by the

statute of limitations, *United States v. Harris*, 133 F.Supp. 796 (D.C.Mo.1955).

One noteworthy deviation from this general state of the law exists in the state of New York. Subdivision 2 of N.Y.Crim.P.Law § 710.70 provides: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." The New York procedure has considerable merit. As noted in *United States ex rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 214 (2d Cir. 1967):

New York has thus provided a specific statutory exception to the general rule that a plea of guilty bars a defendant from raising on appeal alleged non-jurisdictional defects. And, we are quite easily able to discern legitimate and powerfully compelling reasons for establishing such an exception. In the greater number of cases, the present one being illustrative, a defendant in a criminal case recognizes that unless he succeeds in suppressing the evidence seized, the state will have little difficulty in proving the charges filed against him. A defendant may well have no desire to go to trial once his pre-

trial suppression motion has been denied, and thereafter may lose heart for any defense to the charges. If, however, the defendant is confronted with state law which decrees that a plea of guilty bars him from appealing the denial of his motion, then he will be presented with a *fait accompli* and be forced to proceed to trial just so that he can preserve his right to appeal. [The New York provision] is an enlightened statute and was designed to alleviate this undesirable and archaic end which can only result in cluttering trial calendars. The guilty plea in such circumstances is merely a procedural step which permits review of the defendant's constitutional claims without the necessity of a trial that would be a waste of time, money and manpower.

See also 1 Wright, Federal Practice & Procedure—Criminal § 175 (1969) ("highly desirable"); Commentary to ABA Standards, Criminal Appeals 1.3 (Approved Draft, 1970) ("is sound").

In one respect, however, the New York procedure is too narrow. While the situation in which a defendant would prefer to plead no contest *if* he could nonetheless preserve the right to appeal a pretrial ruling may occur most often

with respect to rulings on defense motions to suppress evidence, it will occur as to other pretrial rulings as well. Illustrative are adverse pretrial rulings on defense motions that (a) defendant's right to a speedy trial has run; (b) prosecution is barred as a matter of double jeopardy; or (c) the selection of the defendant for prosecution was arbitrary. Thus, the Commentary to ABA Standards, Criminal Appeals 1.3 (Approved Draft, 1970), takes the position:

Where, under defense strategy, the only litigable questions arise before trial, it is wasteful to force a sham trial in order not to have a forfeiture of appellate review. The New York provision is sound, but should be enlarged to include other pretrial defenses.

Consequently, this subdivision recognizes that a defendant may plead no contest and yet preserve his right to appeal an order denying a pretrial motion to suppress evidence or any pretrial motion which, if granted, would be dispositive of the case. If the defendant wishes to surrender that right in order to gain some concessions in the plea agreement process, he is permitted to do so under Rule 443(a)(4), *supra*.

1 (e) **Withdrawal.** The court shall allow the defendant to with-
2 draw his plea:

3 (1) Before sentencing or other disposition for any fair
4 and just reason unless the prosecution shows it has been
5 substantially prejudiced by reliance upon the plea; or

6 (2) Whenever a motion for withdrawal is timely made
7 and withdrawal appears necessary in the interest of jus-

tice. A motion for withdrawal is timely if made with reasonable diligence, considering the nature of the allegations therein, and is not necessarily barred because made after judgment or sentence. Withdrawal is necessary in the interest of justice if the defendant proves, for example, that:

(i) The plea was accepted without substantial compliance with subdivision (b);

(ii) The plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence actually imposed could be imposed;

(iii) The sentence exceeds that specified in a plea agreement;

(iv) The plea resulted from the denial to him of effective assistance of counsel guaranteed him by constitution, statute or rule; or

(v) The plea was not entered or ratified by the defendant if the defendant is an individual, or was not ratified by a person authorized to so act in the defendant's behalf, if the defendant is a corporation.

The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea was entered.

Comment

This subdivision is similar in many respects to ABA Standards, Pleas of Guilty 2.1 (Approved Draft, 1968) and Alaska R.Crim. P. 32(d).

Except for being mandatory rather than permissive, clause (1) accords with the last sentence of ABA Standards, Pleas of Guilty 2.1(b) (Approved Draft, 1968) and of Alaska R.Crim.P. 32(e). See Fla.R.Crim.P. 3.170(f) ("The court may, in its discretion, and shall upon good cause, at any time before sentence, permit a plea of guilty to be withdrawn"). Compare Ga.Code § 27-1404 ("At any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty'"). The

reasons for providing that the court *shall* allow withdrawal before sentence for any fair and just reason unless the prosecution *shows* it has been substantially prejudiced by reliance upon the plea are stated in *Santobello v. New York*, 404 U.S. 257, 267-269, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (Marshall, J., joined by Brennan and Stewart, JJ., concurring in part and dissenting in part):

There is no need to belabor the fact that the Constitution guarantees to all criminal defendants the right to a trial by judge or jury, or, put another way, the "right not to plead guilty" * * *. This and oth-

er federal rights may be waived through a guilty plea, but such waivers are not lightly presumed and, in fact, are viewed with the "utmost solicitude." * * *. Given this, I believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained at least where the motion to vacate is made prior to sentence and judgment. In other words, in such circumstances, I would not deem the earlier plea to have irrevocably waived the defendant's federal constitutional right to a trial.

Here, petitioner never claimed any automatic right to withdraw a guilty plea before sentencing. Rather, he tendered a specific reason why, in his case, the plea should be vacated. * * *

It is worth noting that in the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal. More pointedly, here the State claims no such harm beyond disappointed expectations about the plea itself.

Some waivers of constitutional rights are revocable, *e. g.*, the right to counsel and the right to remain silent in the face of police interrogation. It seems that waiver of the right to a trial should be revocable to the extent provided by clause (1) hereof.

As noted in the Commentary to ABA Standard 2.1(b), federal cases commonly refer to any "fair and just reason" as a basis, albeit permissive, for allowing presentence withdrawals, and the standard would appear to cover such situations as "when the defendant establishes that there are circumstances which might lead a jury to refuse to convict notwithstanding his technical guilt of the charge" or where "the defendant has become aware of some collateral consequences of conviction which he wants to avoid."

With regard to the prosecution showing it has been substantially prejudiced by reliance upon the plea, see Commentary to ABA Standard 2.1(b):

[T]he prosecution [may sometimes be] substantially prejudiced by reliance upon the defendant's plea * * * even though only a few days have passed since entry of the plea. See *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940), where defendant moved to withdraw his guilty plea within three days, but by that time the prosecution had dismissed fifty-two witnesses who had come from all over the United States and from its overseas naval bases.

Expense alone should not be deemed to constitute substantial prejudice to the state.

Except for the reference "necessary in the interest of justice," the opening words of clause (2) are similar to those of ABA Standard 2.1(a) ("The court should allow the defendant to withdraw his plea * * * when-

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ever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice"). The "necessary in the interest of justice" standard derives from former Uniform Rule 24 and Md. R.Proc. 772,¹ and seems preferable in viewing the court's function affirmatively, to *do* justice rather than negatively, "to correct manifest injustice." *But see* F.R. Crim.P. 32(d); Alaska R.Crim.P. 32(d)(1); Nev.Rev.Stat. § 176-165; N.J.Rules of Court 3:21-1. Compare Mont.Rev.Codes § 95-1902 ("for good cause shown").

The second sentence hereof, regarding timeliness, accords with ABA Standard 2.1(a)(i). See Alaska R.Crim.P. 32(d)(1)(i). As stated in the Commentary to the ABA Standard:

[This] expresses the position, consistent with that found in the federal system but contrary to that taken in most states, that sentence or judgment should not necessarily cut off the opportunity for plea withdrawal. It does not follow, however, that the time of the defendant's motion is totally irrelevant. The fact that it comes after sentence and judgment or a considerable time thereafter may have a bearing upon whether the motion is timely, considering the nature of the allegations in the motion.

In specifying that the substantive standard for withdrawal is met if the defendant "proves" certain matters, clause (2) accords with ABA Standard 2.1(a)(ii). See Alaska R.Crim.P. 32(d)(1)

(ii) ("demonstrates"). As stated in the Commentary to the ABA Standard:

It is generally agreed that the burden of proof rests with the defendant * * * and it is typically stated that this means the defendant must establish grounds for withdrawal by clear and convincing evidence. * * * Actually, the defendant's burden is considerably greater in a case in which all the safeguards have been followed * * *. For example, a defendant who alleged he was unaware of the charge to which he pleaded would find it extremely difficult to show grounds for withdrawal if the record established that the judge, as required by section 1.4, advised him of the charge.
* * *

Clause (2)(i) accords with *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), where the Supreme Court concluded that failure to comply with F.R.Crim.P. 11 requires setting aside the plea and allowing the defendant to plead anew. In that case, the arrainging judge failed to address the defendant personally to determine he understood the nature of the charge and failed to determine that there was a factual basis for the plea. The Court rejected the government's contention that the plea should be allowed to stand if it could prove at an evidentiary hearing that the defendant had in fact understood the nature of the charge, reasoning:

From the defendant's perspective, the efficacy of shifting the burden of proof to the

Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This *prima facie* case for voluntariness is likely to be treated as irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing. * * *

We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded these procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of when the original record is inadequate.

The words "without *substantial* compliance" are used because Rule 32(b), *supra*, is considerably more specific than F.R.Crim.P. 11 was at the time *McCarthy* was decided. As stated in the Commentary to ABA Standard, 2.1(a)(ii):

Less than full compliance with these standards * * * is not per se grounds for withdrawal. For example, if the judge misstated the maximum penalty as being lower than provided by law, but the defendant's sentence does not exceed that stated as possible by the judge, there is no manifest injustice.

Similarly, the Commentary to ABA Standard 1.4(c)(i) and (ii) (informing of maximum possible and mandatory minimum sentences) states, "It does not follow, or course, that some deviation in this procedure, such as failure to disclose the minimum, would justify withdrawal of the plea."

Clause (2)(ii) hereof tracks ABA Standard 2.1(a)(ii)(3) and Alaska R.Crim.P. 32(d)(1)(ii)(cc). As stated in the Commentary to the ABA Standard: "such circumstances are unlikely if the trial judge acts in accordance with these standards in receiving the plea" and "No attempt has been made * * * to identify all the pressures which could render a plea involuntary."

Clause (2)(iii) accords in substance with ABA Standards, The Function of the Trial Judge 4.1(c)(iii) (Approved Draft, 1972), which specifies, "If the plea agreement contemplates the granting of charge or sentence concessions by

the trial judge, he should * * * permit withdrawal of the plea * * * in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement." See ALI Model Code of Pre-Arrestment Procedure § 350.6 (T.D. # 5, 1972); Fla.R.Crim.P. 3.171(c); Pa.R.Crim.P. 319(b)(3). Compare ABA Standards, Pleas of Guilty 2.1(a)(ii)(5); Alaska R.Crim.P. 32(d)(1)(ii)(dd)(B).

Clause (2)(iv) hereof is substantially identical to ABA Standards, Pleas of Guilty 2.1(a)(ii)(1) and Alaska R.Crim.P. 32(d)(1)(ii)(aa). Compare Calif. Penal Code § 1018; La.Code Crim.P. art. 516. As stated in the Commentary to the ABA Standard:

This, of course, includes the case in which a defendant, entitled to appointment of counsel, entered his plea without first effectively waiving counsel. It also covers those cases in which there has been a significant interference with retained or appointed counsel's opportunity to represent effectively his client's interest prior to receipt of the plea, as will at least sometimes be true * * * when the prosecutor bypasses defense counsel and deals directly with the defendant * * *.

Finally, this * * * also covers those cases in which defendant's counsel was so incompetent that his client was denied the effective assistance guaranteed him by the constitution.

Clause (2)(v) accords with ABA Standards, Pleas of Guilty

2.1(a)(ii)(2) and Alaska R.Crim.P. 32(d)(1)(ii)(bb), each of which specifies, "the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf," except that it makes the "person authorized to act in behalf" reference applicable only to corporation defendants.

The last sentence of this subdivision is identical to ABA Standards, Pleas of Guilty 2.1(a)(iii) and Alaska R.Crim.P. 32(d)(1)(iii). The Commentary to the ABA Standard states:

Although this section in the standard may appear to state the obvious, it is included to clarify a point as to which there continues to be considerable uncertainty. A number of cases are to be found in which it is said that a defendant must allege his innocence before a motion to withdraw a guilty plea may be granted. See cases cited in Note, 112 U.Pa.L.Rev. 865, 877 (1964). As other courts and commentators have correctly pointed out, if a manifest injustice has occurred, the defendant should be allowed to withdraw his plea even though he may actually be guilty of the offense to which the plea was entered. Note, 64 Yale, L.J. 590, 598 (1955); Note, 55 Colum.L.Rev. 366, 368 (1955). That is, even assuming the defendant's guilt, fairness requires that he be allowed to withdraw the plea if he was denied counsel; if he did not enter, authorize, or ratify the plea; if the plea was not voluntary or was entered with-

out knowledge of the charge or possibility of the sentence imposed; or if the plea was ob-

tained by an unkept and unfulfilled plea agreement.

¹ However, those Rules use it as a permissive standard and under former Uniform Rule 42(c) the court may permit withdrawal *after sentence* only "to prevent manifest injustice."

- 1 **(f) Inadmissibility of pleas, statements, and judgments.** A plea
2 is not¹ admissible in evidence against the defendant in any crim-
3 inal, civil, or administrative proceeding. A statement by the de-
4 fendant in connection with the making or acceptance of a plea
5 or as a basis for sentence or other disposition thereon is not ad-
6 missible in evidence against the defendant in any criminal, civil,
7 or administrative proceeding except for purposes of impeach-
8 ment or proof of perjury or in a challenge to the conviction or
9 sentence. A record of conviction based upon a plea shall be
10 treated in the same manner as a record of conviction based
11 upon a verdict or finding of guilty. If a plea is not accept-
12 ed or is withdrawn, or results in a judgment which is re-
13 versed or held invalid on direct or collateral review, a judgment
14 resulting therefrom is not admissible in evidence against the
15 defendant in any criminal, civil, or administrative proceeding.

Comment

The first sentence accords with F.R.Crim.P. 11(e)(6) and Proposed F.R.Ev. 410.

The second sentence is similar in effect to F.R.Crim.P. 11(e)(6) and Proposed F.R.Ev. 410, which provide:

Evidence of * * * an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 3.7 (1973) (if plea not accepted, required

statement to court respecting commission of offense and previous convictions, and any evidence obtained through use of statement, inadmissible against defendant in any criminal prosecution); La. Code Crim.P. art. 559 (if plea withdrawn or set aside, facts surrounding its entry not admissible against defendant at a trial of a case); N.J. Rules of Court 3:9-2 (if plea refused, no admission made by the defendant admissible at trial). The second sentence is intended to cover statements by the defendant:

(1) before the court, in which he requests permission to plead, makes statements or responds to questions relative to whether the plea is voluntary or

accurate, or exercises his right to allocution, and

(2) to probation or other officers responsible for preparing a presentence report or otherwise making recommendations as to sentence.

The reasons for making these statements inadmissible are discussed at length in Note, Improvident Guilty Pleas and Related Statements: Inadmissible Evi-

dence at Later Trial, 53 Minn.L. Rev. 559, 573-79 (1969).

The third sentence makes clear that the admissibility of a judgment of conviction is not affected by the fact that it was upon a plea rather than upon a verdict or finding of guilt.

The last sentence is substantially identical to Alaska R.Crim.P. 11(e)(6).

PART 5

PRETRIAL MOTIONS GENERALLY

Rule 451. [Pretrial Motions.]

- 1 (a) Use. Any defense, objection, or request capable of deter-
- 2 mination without trial of the general issue may be raised, and if
- 3 raised before trial shall be raised, by pretrial motion made in
- 4 conformity with this Rule.

Comment

Rule 451 generally

Rule 451 employs the traditional motion practice approach rather than the omnibus hearing approach of ABA Standards, Discovery and Procedure Before Trial 5.3 (Approved Draft, 1970), National Advisory Commission on Criminal Justice Standards and Goals, Courts Standard 4.10 (1973), and Alaska R.Crim.P. 16(f). In practice the omnibus hearing approach has apparently not produced the hoped-for results. See Nimmer, *A Slightly Moveable Object: A Case Study in Judicial Reform in the Criminal Justice System—The Omnibus Hearing*, 48 Denver L.J. 179 (1971). It seems that the burden

should be on the prosecution and defense to present objections and requests by adequately prepared and supported written motions, rather than on the court to ferret out objections and requests by checklists. Further, since discovery under these Rules is so automatic and requires so little judicial supervision, there is less reason for favoring an omnibus approach under them than under current provisions. These Rules' discovery provisions should eliminate much of what would normally occur at an omnibus hearing.

Subdivision (a)

This subdivision (a) is similar in effect to former Uniform Rule

25(a), (b)(1), F.R.Crim.P. 12(a), (1), Nev.Rev.Stat. §§ 174.075, (b), Alaska R.Crim.P. 12(a) 174.095, N.J.Rules of Court 3:10- (b), Colo.R.Crim.P. 12(a), (b) 1, and Wis.Stat. § 971.31(1). (1), Maine R.Crim.P. 12(a), (b)

1 (b) **Time for motion.** Except as to a motion for a pretrial
2 judgment of acquittal under Rule 481, unless otherwise permitted
3 by the court in the interest of justice:

4 (1) All pretrial motions shall be made by the time set by
5 the court; and

6 (2) A party making a pretrial motion shall make at the
7 same time all other pretrial motions he intends to make for
8 which grounds are then available.

Comment

The "unless" clause is similar to the provision in N.Y.Crim.P.Law §§ 170.30(2), 210.20(2), "in the interest of justice and for good cause shown, [court] may in its discretion" entertain late motion. *Cf.* N.J.Rules of Court 3:10-5 ("court may for good cause shown enlarge the time"). Compare Mont.Rev.Codes § 95-1704 ("court for cause may permit [motion] to be made within a reasonable time" after deadline). Other provisions are like Montana's except that they omit "for cause." See former Uniform Rule 25(b)(3); Colo.R.Crim.P. 12(b)(3); Maine R.Crim.P. 12(b)(3); Nev.Rev.Stat. § 174.115.) *Cf.* Wis.Stat. § 971.31(5) (a) (by deadline "unless the court otherwise permits"). Provisions on motions to suppress often require moving before trial or hearing "unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." See F.R.Crim.P. 41

(e); Alaska R.Crim.P. 37(c); Maine R.Crim.P. 41(e); Nev. Rev.Stat. § 179.085(3). *Cf.* Colo. R.Crim.P. 41(e), (g), 41.1(e); Fla.R.Crim.P. 3.190(h)(4), (i) (2); La.Code Crim.P. art. 703 (A); N.J.Rules of Court 3:5-7 (a); N.Y.Crim.P.Law § 710.40 (2). Compare Pa.R.Crim.P. 323 (b) ("unless the opportunity did not previously exist, or the interests of justice otherwise require").

Clause (1) hereof is similar in effect to provision in F.R.Crim. P. 12(c) and Alaska R.Crim.P. 12(c). *Cf.* Calif.Penal Code § 1003; Fla.R.Crim.P. 3.190(c); 38 Ill.Stat. § 114-1(b).

Clause (2) is similar to the requirement included in N.J.Rules of Court 3:10-5 and in many provisions on defenses and objections which *must* be raised before trial, "The motion shall include all such defenses and objections then available to the defendant." See former Uniform Rule 25(b)(2); Alaska R.Crim.P. 12(b)(2); Colo.R.Crim.P. 12(b)

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(2); Maine R.Crim.P. 12(b)(2); Crim.P.Law §§ 170.30(3), 210.-
Mont.Rev.Codes § 95-1702; Nev. 20(3); Pa.R.Crim.P. 304(e).
Rev.Stat. § 174.105(1). Cf. N.Y.

(c) Matters to be asserted by pretrial motion. Unless otherwise ordered by the court for cause shown, a party may assert the following only in a pretrial motion made in conformity with subdivision (b):

(1) Defenses and objections based on defects in the institution of the prosecution, other than the lack of jurisdiction of the court over the person or subject matter which can be raised at any time;

(2) Defenses and objections based on defects in the information [or indictment];

(3) Requests regarding discovery under Rules 411 through 438;

(4) Requests that potential testimony or other evidence should be suppressed under Rule 461;

(5) Requests for joinder, dismissal, or severance under Rules 471 and 472; and

(6) Requests for transfer of prosecution under Rule 462.

Comment

This is very similar to F.R. 3.190; 38 Ill.Stat. § 114-1(b); Crim.P. 12(b), (f) and Alaska R. Wis.Stat. § 971.31(2). Crim.P. 12(b), (e).

The introductory portion hereof is similar to F.R.Crim.P. 12(f) and Alaska R.Crim.P. 12(e). A number of current provisions provide that specified defenses and objections may be raised only "by motion before trial," and that failure to so present them "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." See former Uniform Rule 25(b)(2); Maine R.Crim.P. 12(b)(2); Mont.Rev.Codes § 95-1702; Nev. Rev.Stat. § 174.105. Cf. Colo.R. Crim.P. 12(b)(2); N.J.Rules of Court 3:10-2. Compare Calif. Penal Code § 996; Fla.R.Crim.P.

Clauses (1) and (2) are to the same effect as provision in former Uniform Rule 25(b)(2), F.R.Crim.P. 12(b)(1), (2), Alaska R.Crim.P. 12(b)(1), (2), Colo.R.Crim.P. 12(b)(2), Maine R.Crim.P. 12(b)(2), Mont.Rev. Codes § 95-1702, and Nev.Rev. Stat. § 174.105. Cf. Calif.Penal Code §§ 995, 1004, 1012; 38 Ill. Stat. § 114-1; N.J.Rules of Court 3:10-2, 3:10-3, 3:10-4.

Clause (3) is to the same effect as F.R.Crim.P. 12(b)(4).

Clause (4) is to the same effect as F.R.Crim.P. 12(b)(3), Alaska R.Crim.P. 12(b)(3), Nev.Rev. Stat. § 174.125(1), and Pa.R.Crim. P. 323. Cf. F.R.Crim.P. 41(e);

Colo.R.Crim.P. 41(e), (g); Fla. R.Crim.P. 3.190(h)(i); 38 Ill. Stat. §§ 114-11, 114-12; Maine R.Crim.P. 41(e); Mont.Rev. Codes §§ 95-1805, 95-1806; N.J. Rules of Court 3:5-7; N.Y.Crim. P.Law §§ 710.20, 710.40; Pa.R. Crim.P. 324.

Requiring the motion to suppress to be made before trial is supported by the following considerations: (1) the pretrial motion assists orderly presentation of evidence at trial by eliminating from the trial disputes over police conduct not immediately relevant to the question of guilt; (2) it avoids the possibility of having to declare a mistrial because the jury has been exposed to unconstitutional evidence; (3) it spares the state as well as the defense the expense of useless trials in cases where a purely legal determination by the judge alone will settle disposition of the case; (4) by giving the prosecutor advance notice of defendant's objection (or lack thereof), the pretrial motion enables the prosecutor to determine which officers, if any, must be available to testify at the hearing on any pretrial motion and at trial; (5) it facilitates prosecution and defense preparation for trial (and possibly plea negotiation) by giving them advance knowledge of the evidentiary status of the seized items; and (6) by requiring that objection be made before defendant is placed in jeopardy, it facilitates utilization of provisions for interlocutory appeal by the prosecution. These considerations will ordinarily offset the inconvenience of police officers having to appear at the suppression

sion motion hearing and then, if the motion is denied, at the trial; in the exceptional case where the inconvenience to witnesses appears to outweigh the advantages cited, the court may schedule the hearing immediately before or even during the trial so as to minimize or eliminate such inconvenience. See subdivisions (d) and (e), *infra*.

As with other matters covered by this subdivision, the court may allow a request for suppression to be asserted other than by a timely pretrial motion, "for cause shown." The defendant's previous unawareness of the bases for such a request would certainly constitute "cause shown," but Rule 422(a)(1)'s requirement that the prosecutor notify the defendant of his intent to use evidence of types commonly subject to a suppression motion should keep instances of such unawareness to a minimum. In *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965), the Court suggested that when a constitutional objection was not timely presented under state law, but state procedure had not been deliberately bypassed, the state court might find it preferable to consider the objection on its merits rather than to deny the objection as untimely (which would only delay consideration of the merits until the same objection is presented in a habeas corpus application to a federal court). The "for cause shown" standard is sufficiently broad to permit the court to follow this policy.

Clause (5) is similar to F.R. Crim.P. 12(b)(5) and Alaska R.

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Crim.P. 12(b)(4), each of which specifies "requests for a severance of charges or defendants under Rule 14." Compare Nev.Rev.Stat. § 174.125(1) ("all motions * * * for severance of joint defendants").

Under clause (6), the motion for transfer of prosecution must be made by the time set for other pretrial motions, unless otherwise ordered by the court for cause shown. This produces a result similar to that under the several current provisions which

specify, "A motion to transfer under these rules may be made at or before arraignment or *at such other time as the court* or these rules *may prescribe*." See F.R. Crim.P. 22; Alaska R.Crim.P. 21; Colo.R.Crim.P. 22; Idaho Crim.R. 22. In allowing the transfer motion to be made later than the deadline "for cause shown," this is similar to Fla.R. Crim.P. 3.240(c), Mont.Rev.Codes § 95-1710(a), and Wis.Stat. § 971.22(1). Cf. La.Code Crim.P. art. 621.

- 1 (d) **Hearing.** Unless the court otherwise permits, all pre-
- 2 trial motions pending at the time set for hearing of a pretrial
- 3 motion shall be heard at the same time.

Comment

This serves an aim sought by reducing the number of pretrial the omnibus hearing approach, hearings.

- 1 (e) **Determination.** A pretrial motion shall be determined
- 2 before trial unless the court, with consent of all parties or upon a
- 3 finding that it would be impractical to determine the motion be-
- 4 fore trial, orders the determination deferred until trial of the
- 5 general issue or until after verdict.

Comment

Except for requiring the specified consent or finding for deferral, this accords with F.R. Crim.P. 12(e). Cf. former Uniform Rule 25(b)(4); Alaska R.

Crim.P. 12(d); Maine R.Crim.P. 12(b)(4); Mont.Rev.Codes § 95-1705; Nev.Rev.Stat. § 174.135 (1); N.J.Rules of Court 3:10-6.

- 1 (f) **Effect of determination.** If the court grants a motion
- 2 based on a defect in the institution of the prosecution or in the
- 3 information [or indictment], it may order that the defendant be
- 4 held in custody or that his terms or conditions of release be con-
- 5 tinued for a specified time pending the filing of a new informa-
- 6 tion [or indictment]. This Rule does not affect the provisions of
- 7 any statute relating to periods of limitations.

Comment

This is substantially identical to F.R.Crim.P. 12(h) and Nev. Rev.Stat. § 174.145(2), (3). Alaska R.Crim.P. 12(g) and N.J. Rules of Court 3:10-7 accord with the first sentence, as does former Uniform Rule 25(b)(5) except for specifying "not to exceed []," and Wis.Stat. § 971.31(6) except for specifying "not more than 72 hours pending issuance of a new summons or warrant or the filing of a new indictment, information or complaint." Other provisions which

authorize the court to require the defendant's custody or bail to be continued pending further proceedings include Calif.Penal Code §§ 997, 998, 1007, Fla.R.Crim.P. 3.190(e), 38 Ill.Stat. § 114-1, La. Code Crim.P. art. 538, Mont.Rev. Codes § 95-1706, N.Y.Crim.P. Law § 210.45(9), and Tex.Code Crim.P. arts 28.05 to 28.08. *But see* Maine R.Crim.P. 12(b)(5) (unless defect may be cured by amendment, defendant shall be discharged).

PART 6

PARTICULAR PRETRIAL MOTIONS

Rule 461. [Motion to Suppress.]

1 (a) Generally. Upon motion of the defendant conforming to
2 Rule 451, the court shall suppress potential testimony or other
3 evidence if it finds that:

4 (1) Suppression is required under the Constitution of the
5 United States or the law of this State; or

6 (2) The evidence was derived from a violation of these
7 Rules or the law of this State and the violation significantly
8 affected the discovery of the evidence or the defendant's
9 substantial rights.

Comment

Clause (1) recognizes that there may be federal or state requirements that evidence obtained in a certain manner be suppressed. See, *e. g.*, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (federal constitutional requirement); *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955) (state constitutional requirement); N.Y.Crim.P.Law §

710.20 (statutory requirement). No standard is presented for determining the requisite relationship between the challenged evidence and the violation of the federal or state Constitution or state law. This is a matter to be determined by reference to appropriate state or federal laws. The reference to the "law of this State" encompasses state constitutional

provisions, statutes, and judicial decisions that may require suppression of evidence.

Clause (2) extends the exclusionary remedy to evidence derived from a violation of these Rules and other state law regulating the criminal process. It should be noted, however, that where a violation also constitutes a constitutional violation, the evidence will be subject to suppression under clause (1), and the suppression motion will most likely be based upon that provision since constitutional standards for suppression may not require as substantial a relationship between the acquisition of the evidence and the violation as clause (2) requires. Thus, clause (1) will probably encompass most situations in which evidence was derived from violations of those Rules contained in Article II. Several provisions in that article are based upon federal constitutional standards. See, *e. g.*, Rule 243, *supra* (procedure for questioning). Violations of other Rules, such as those limiting the authority to arrest (*e. g.*, Rules 211, 221, *supra*), are most likely to produce evidence through a search conducted incident to the unlawful detention. Under the prevailing view of the Fourth Amendment, evidence obtained from a search incident to an unlawful arrest must be suppressed even though the illegality of the arrest itself stems from a violation of state law rather than the Fourth Amendment. See, *e. g.*, *United States v. DiRe*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *United States v. Mills*, 472 F.2d 1231 (D.C.Cir. 1972).

There are certain Rule violations, however, that are likely to lead to the production of evidence that would not be subject to suppression under clause (1). Thus violations of certain non-constitutional aspects of Rules 432 and 436, *supra*, may lead to acquisition of evidence from persons subjected to investigatory depositions or nontestimonial evidence procedures who are subsequently charged with criminal offenses. Violations of state requirements not included in these Rules are less likely to lead to the production of evidence. However, there are some state provisions that relate to evidence producing situations, and yet are not encompassed by these Rules. Thus in a state that utilizes a grand jury, violation of safeguards relating to the witness may lead to witness disclosures that are incriminating. Suppression of evidence obtained through violations of Rules and other state requirements related to the production of evidence is supported by legislation and court decisions in several jurisdictions. The exclusionary rule has been applied in various instances to evidence obtained through violations of statutes or court rules that may not be constitutionally required, but are designed to supplement constitutionally protected rights. See, *e. g.*, *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (recognizing potential exclusion of evidence obtained in violation of federal statute restricting no-knock entry even where such entry did not also violate the Fourth Amendment); *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.

Ed.2d 1479 (1967) (excluding confession obtained in violation of the prompt appearance requirement of F.R.Crim.P. 5(a); 18 U.S.C. § 2515 (requiring suppression of evidence obtained in violation of federal law governing electronic surveillance, including violations of various provisions that probably are not constitutionally required); Wis.Stat. § 768.22 (indicating suppression is authorized for violation of state provisions governing search warrants that affect the "substantial rights of the defendant," although such provisions may not be constitutionally required).

The application of the exclusionary rule even as to constitutional violations has been a subject of considerable debate. It has been urged that other, more appropriate remedies could be devised. See, *e. g.*, *Bivens v. Six Unknown Agents*, 403 U.S. 388, 411, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1973) (Burger, C. J., dissenting). But within the framework of rules governing only the area of criminal procedure, the exclusion of evidence remains the only available means of deterring official disregard of significant safeguards. It also serves to preserve the "imperative of judicial integrity" by denying judicial sanction of substantial violations through the admission of evidence clearly obtained from such violations. See *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

Clause (2) does not require an inflexible application of the exclusionary rule to all evidence derived from a violation of a Rule or other state law no matter how

tenuous the relationship of the evidence to the violation or how insignificant the violation. If the violation significantly affected the substantial rights of the defendant, then the evidence must be excluded if the evidence is "derived" from the violation, *i. e.*, meets the standard of causal relationship traditionally applied to constitutional violations under the "fruit of the poisonous tree" doctrine. See, *e. g.*, *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In determining whether a "substantial" right was "significantly affected," a court would look to the significance of the rights as it serves to implement fundamental (*i. e.*, primarily constitutional) safeguards and the extent of the violation. Cf. *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). A similar standard of "substantiality" is employed in state exclusionary provisions governing violation of search and seizure requirements. See, *e. g.*, Wis.Stat. § 968.22; 38 Ill.Stat. § 108.14. Cf. F.R.Crim.P. 52.

The standard of substantiality under clause (2) looks only to the significance of the right involved and the degree of infringement, not to whether the violation was "willful." Compare ALI Model Code of Pre-Arrestment Procedure §§ 290.2(2) (Official Draft #1, 1972), 150.3(1), 160.7(1) (T. D. #6, 1974). A hearing on a pretrial motion is not an appropriate forum for determining whether either the government of-

ficial involved or the entire agency acted in "good faith." Also, insofar as the defendant is concerned, the significance of the injury is not dependent upon the official's motives. While the deterrence function of the exclusionary rule is significant, the rule also serves as a remedy for the defendant whose rights have been violated.

If the violation does not significantly affect the defendant's substantial rights, exclusion still may be required if the violation significantly affected the discovery of the evidence. This standard of causal connection between the discovery and the violation requires a more significant relationship than the standard application of the "fruit of the poisonous tree" doctrine. A finding that the violation was directly followed by the disclosure of the evidence by the defendant would not necessarily be sufficient. *Cf. People v. Pettis*, 12 Ill.App.3d 123, 298 N.E.2d 372 (1973). The violation must have been a significant factor that contributed to the defendant's disclosure. Ordinarily, only a violation that significantly affected a substantial right would have such an impact. There may, however, be exceptions depending upon the particular situation. For example, the failure to inform an arrested person that he will be taken to a specific detention facility might not be viewed generally as significantly affecting his substantial rights where he has been given the other warnings required under Rule 212(b), *supra*. In a particular case, however, the failure to provide such reassurance may be a significant factor that

leads the defendant to make certain disclosures he would not otherwise have made. *Cf. ALI Model Code of Pre-Arrestment Procedure* § 150.2(3) (T.D. #6, 1974) (providing for possible application of the exclusionary rule to statements obtained after an improper failure to warn a person pursuant to § 120.8(d), which is similar to Rule 212(b), *supra*). It seems likely that where the causal connection is so significant, the violation will often have been committed in the hope of obtaining information, so that a certain element of willfulness will almost be inherent in the cases that fall within this category.

This subdivision does not attempt to establish a particular standard for standing to move for suppression. A state may employ any standard that is constitutionally acceptable. In connection with violations of clause (1), *compare, e. g., Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) with *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855 (1955). In connection with clause (2), the provision for exclusion based upon violation of the "defendant's substantial rights" does impose some limitation upon standing by prohibiting objections based upon violations of the rights of other persons. *Cf. La.Code Crim.P. art. 703* (limiting motion to an "aggrieved defendant"). Beyond this, however, the matter is left for development according to appropriate state law.

This subdivision also does not attempt to establish standards as to the allocation of the burden of going forward and the burden of

proof in a suppression hearing. Neither does it seek to establish the appropriate standard of proof on resolving factual issues. Where exclusion is based upon constitutional violations, the Constitution may establish minimum requirements applicable to the allocation of the burden of proof and the standard of proof. See, *e. g.*, *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Otherwise, the area is left to state law, as in case of other pretrial motions involving factual issues. To some extent, the determination of proper standards may be dependent upon the substantive nature of the particular violation involved.

This subdivision also does not attempt to identify all proceedings to which the exclusionary rule might apply. It requires suppression only at the trial and at those other proceedings governed by these Rules in which the same evidentiary standards apply (compare Rule 344(f), *supra*, specifically permitting introduction of illegally acquired evidence in a detention hearing).¹ Similarly, it does not determine the scope of the suppression with respect to

collateral use—*i. e.*, whether the evidence may be used for impeachment purposes. See *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Many jurisdictions have special provisions governing the form of allegations made in support of a motion to suppress. Such provisions may require that motions be supported by affidavits, or that factual matters be alleged “with particularity.” See, *e. g.*, Nev. Rev.Stat. § 174.125; N.Y.Code Crim.P. § 710.60; N.J.Rules of Court 3:5–7. These provisions were generally designed with a particular type of constitutional objection in mind. Where the suppression motion may be based on various grounds, there appears to be no greater reason to apply special pleading rules to that motion than to other motions required to be made before trial under Rule 451, *supra*. Where appropriate to a particular type of objection, special requirements may be provided by local rule designed to implement the requirement of Rule 751, *infra*, that the motion “shall state the grounds upon which it is made.”

¹ Rule 432(i)(3) independently extends the exclusionary principle to examination on an investigatory deposition. See Comment thereto, *supra*.

- 1 (b) **Pre-charge motion.** A person having reasonable grounds
- 2 to believe that evidence subject to suppression may be used
- 3 against him in a criminal proceeding may move for its suppression
- 4 under subdivision (a), even though an information [or indictment]
- 5 charging him has not yet been filed.

Comment

Although many jurisdictions may permit the filing of a pre-charge motion to suppress. See, *e. g.*, Colo.R.Crim.P. 41(e); Maine R.Crim.P. 41(e). Compare Fla.R.

Crim.P. 3.190(h). Federal courts, relying on former F.R.Crim.P. 41 (e), have recognized that a motion could be brought prior to the filing of an indictment for the (1) return of illegally seized evidence and (2) suppression of any evidence derived from that illegal seizure. See *Grant v. United States*, 282 F.2d 165 (2d Cir. 1960). The language in earlier cases suggests that the pre-charge motion is designed primarily to bar the "grievous, irreparable injury" to a person indicted on the basis of illegally seized evidence, and therefore that the request for return of the illegally seized property was not essential to the court's jurisdiction. See *In re Grand Jury Proceedings*, 450 F.2d 199 (3d Cir. 1971), affirmed 408 U.S. 4, 92 S.Ct. 2357, 33 L.Ed.2d 179; *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947). See also N.J.Rules of Court 3:5-7 (permitting motion to be made by "a person aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used

against him in a penal proceeding").

The need for a pre-charge motion is not limited to challenges based upon Fourth Amendment violations since the same "irreparable injury" may flow just as readily from issuance of an information on the basis of evidence subject to suppression on other grounds. Accordingly, this provision reaches all motions to suppress that might be made under subdivision (a).

The impact of a ruling denying the pre-charge motion upon subsequent attempts to raise the suppression issue after prosecution is initiated ordinarily should be the same as the impact of the denial of a pretrial motion on subsequent objections. In some jurisdictions, the court is bound by the initial ruling, while in others, it may have considerable discretion to review that ruling. See Pa.R. Crim.P. 323(j); *Anderson v. United States*, 122 U.S.App.D.C. 277, 352 F.2d 945 (D.C.Cir. 1965).

Rule 462. [Transfer of Prosecution.]

- 1 (a) For prejudice in the [county]. Upon motion of the de-
- 2 fendant [or the prosecuting attorney] conforming to Rule 451,
- 3 [or upon its own motion,] the court shall transfer the prosecution
- 4 as to the defendant to another [county] if satisfied that there is
- 5 a reasonable likelihood that a fair and impartial trial cannot be
- 6 had in the [county] in which it is pending. The motion may be
- 7 supported by qualified public opinion surveys or opinion testi-
- 8 mony offered by individuals. A showing of actual prejudice is
- 9 not required. It is not a ground for a denial of the motion that
- 10 one transfer has already been granted.

Comment

Unlike former Uniform Rule 33 and some state provisions, this subdivision does not specify that

the motion must be in writing and verified by affidavit. No writing or affidavit requirement is in-

cluded in F.R.Crim.P. 21, Idaho Crim.R. 21, Maine R.Crim.P. 21, N.J.Rules of Court 3:14-2, or Pa.R.Crim.P. 313, and none is included here for the following reasons:

(1) Rule 751 provides that a motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally.

(2) The requirement would be inappropriate for states which adopt the bracketed reference, "or upon its own motion."

(3) Affidavits should be unnecessary if the factual basis otherwise appears of record or is susceptible of judicial notice.

ABA Standards, Fair Trial and Free Press 3.2(b) (Approved Draft, 1968), states that "testimony or affidavits of individuals in the community * * * shall not be required as a condition of the granting of a motion for change of venue." The Commentary thereto states:

Subsection (b) * * * is designed to make clear, contrary to some existing state laws, that affidavits of members of the community are not required in order for a motion to be granted. In one case, the inability to obtain affidavits was apparently due to fear of reprisal on the part of prospective affiants, and yet denial of a change of venue was sustained. It seems plain that confronted with certain types of pretrial news coverage, the defendant is constitutionally entitled to a change of venue

even if he fails to produce the requisite number of affidavits. Moreover, motions for a change of venue have been known to degenerate into an unenlightening contest to see who can pile up the most affidavits. In one case, the state produced 2251 affidavits that the defendant would receive a fair trial, but the denial of a change of venue was reversed on appeal. Not infrequently, affidavits are submitted by the same people who played a significant role in the dissemination of potentially prejudicial publicity.

This subdivision makes optional provision for the motion to be by the prosecutor. Former Uniform Rule 33 is similar. ABA Standard 3.2(a) provides, "Except as federal or state constitutional provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense." The Commentary thereto states:

Although not too frequent, there are occasions when news coverage or other causes of sentiment in a particular community may prevent the state from obtaining a fair trial. In such instances the prosecution should be able to obtain a * * * change of venue, provided * * * that a change of venue does not deprive the defendant of his right to be tried in a particular locality. It should be noted that in a majority of the states in which the question has been litigated, a grant of authority to change the venue on application by the prosecution has been upheld

against constitutional challenge. [Footnotes omitted.]

Provisions which allow the state as well as the defendant to move for a change of venue include Calif. Penal Code § 1033(b), Fla. R.Crim.P. 3.240(a), Idaho Crim. R. 21(a), La.Code Crim.P. art. 621, Mont.Rev.Codes § 95-1710, Nev.Rev.Stat. § 174.455, N.Y. Crim.P.Law § 230.20, Pa.R.Crim. P. 313(a), and Tex.Code Crim.P. arts. 31.01, 31.02. Provisions which allow only the defendant to so move include F.R.Crim.P. 21(a), (b), Colo.R.Crim.P. 21(a), (b), 38 Ill.Stat. § 114-6, Maine R.Crim.P. 21(a), (b), N.J.Rules of Court 3:14-2, and Wis.Stat. § 971.22.

This subdivision also provides a bracketed alternative allowing the court to transfer for prejudice in the county "upon its own motion." (This would not be used by states with constitutions giving the defendant an absolute right to trial in the county of offense.) This type of provision appears in Calif. Penal Code § 1033(b), Pa.R.Crim. P. 313, and Tex.Code Crim.P. art. 31.01.

The standard, "if satisfied that there is a *reasonable likelihood* that a fair and impartial trial cannot be had in the [county] in which it is pending" derives from ABA Standard 3.2(c) and Calif. Penal Code § 1033(a) (defense motion). Cf. N.Y.Crim.P.Law § 230.20(2) (court may transfer upon motion "demonstrating reasonable cause to believe that a fair and impartial trial cannot be had in such county"). The Commentary to the ABA Standard observes, "[T]his standard is less

restrictive than that currently in force in many jurisdictions, but it is believed to be a desirable and probably a constitutionally necessary standard if the guarantee of a fair trial is to be fulfilled." Former Uniform Rule 33 specifies merely "*if satisfied* that a fair and impartial trial cannot be had in the county in which it is pending." See Fla.R.Crim.P. 3-240(a); Idaho Crim.R. 21(a); Nev.Rev.Stat. § 164.455(1); N.J. Rules of Court 3:14-2; Pa.R. Crim.P. 313. F.R.Crim.P. 21(a) specifies "satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." See 38 Ill.Stat. § 114-6 (a); Maine R.Crim.P. 21(a); Mont.Rev.Codes § 95-1710(a); Wis.Stat. § 971.22(3).

The second and third sentences derive from ABA Standard 3.2(c). See *id.* 3.2(b). As stated in the Commentary to the ABA Standard, "there are occasions when the inherently prejudicial nature of the material, coupled with knowledge of its wide dissemination in the community, requires the granting of relief without elaborate soundings of community sentiment."

The final sentence hereof is substantially identical to ABA Standard 3.2(e), the Commentary to which states:

Several states currently provide that only one change of venue may be granted on application of a party. Although the fact that one transfer has

been permitted is certainly relevant in considering a second application, it seems unreasonable to impose an absolute bar, particularly in view of the possibility of new developments after the first change. Indeed,

in certain circumstances such an absolute bar may operate to deprive the defendant of his constitutional rights. [Citing *Irvin v. Dowd*, 366 U.S. 717, 720-21, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).]

- 1 **(b) Transfer in other cases.** For the convenience of parties or
2 witnesses and in the interest of justice, the court upon motion of
3 the defendant may transfer the prosecution as to him to another
4 [county].

Comment

This is substantially identical R.Crim.P. 21(b), and is very similar to Idaho Crim.R. 21(b) and N.D. lar to F.R.Crim.P. 21(b).

- 1 **(c) Disposition.** A motion for transfer made before the jury
2 is impaneled shall be disposed of before impaneling. If a motion
3 for transfer is permitted to be made, or if reconsideration or re-
4 view of a prior denial is sought, after impaneling, the fact that
5 the jury satisfies legal requirements is not controlling if it ap-
6 pears there is a reasonable likelihood that a fair and impartial
7 trial cannot be had in the [county] in which the prosecution is
8 pending.

Comment

Except for specifying "legal requirements" rather than "prevailing standards of acceptability," this is substantially identical to ABA Standards, Fair Trial and Free Press 3.2(d) (Approved Draft, 1968). The Commentary thereto states in part:

It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standards could be obtained. [Footnote omitted.] There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard,

there will remain the problem of obtaining accurate answers on voir dire—is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus if change of venue and continuance are to be of value, they should not turn on the results of the voir dire; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone.

The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the voir dire, defense counsel may

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be placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may

be waiting in the wings. And yet to make an adequate record for appellate review, he must object as much as possible, and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable.

- 1 (d) **Claim not precluded.** A claim that a prosecution should
2 have been transferred is not precluded by a waiver of the right
3 to trial by jury or by a failure to exercise all available peremptory
4 challenges.

Comment

This is substantially identical to ABA Standards, Fair Trial and Free Press 3.2(e) (Approved Draft, 1968). The Commentary thereto states:

The suggestion of some courts that such conduct amounts to a waiver [footnote omitted] seems to require the defendant to take unnecessary risks. If the defendant has

satisfied the criterion for the granting of relief, it should not matter that he has subsequently waived a jury, perhaps out of fear that even a jury meeting accepted standards will not be truly free from bias, or has failed to use his peremptory challenges, perhaps because he prefers the ills he has to others he has not yet seen.

- 1 (e) **Proceedings on transfer.** If the prosecution is transferred,
2 all documents in the case or certified copies thereof shall be trans-
3 mitted to the court to which it is transferred, but transcripts of
4 recorded proceedings shall be made or transmitted only if re-
5 quested by that court.

Comment

Except for specifying "or certified copies thereof," the first sentence hereof parallels Rule 321 (e), *supra* (transmittal of documents after first appearance). Cf. former Uniform Rule 33;

F.R.Crim.P. 21(c); Colo.R.Crim.P. 21(c); La.Code Crim.P. art. 624; Maine R.Crim.P. 21(c); Nev.Rev.Stat. § 174.485; N.Y. Crim.P.Law § 230.20(4); Tex. Code Crim.P. art. 31.05.

PART 7

JOINDER AND SEVERANCE

Rule 471. [Joinder or Dismissal of Offenses upon Defendant's Motion.]

- 1 (a) **Related offenses defined.** Two or more offenses are re-
2 lated offenses, for the purposes of this Rule, if they are within

- 3 the jurisdiction of the same court and are based on the same
4 conduct or arise from the same criminal episode.

Comment

Rule 471 generally

Subdivisions (a), (b), and (c) of this Rule deal only with the problem of multiple trials for what are defined as "related offenses." This problem must be distinguished from certain other problems which may arise from repeated trials or from prosecution of defendants for a number of related offenses, such as: (a) the double jeopardy problem of when a prosecution is barred by a former prosecution for the same offense; (b) the collateral estoppel question of when a finding of not guilty in one trial will bar conviction for a related offense at a subsequent trial because the second trial would require a finding of fact inconsistent with that in the first trial; or (c) the question of multiple sentencing on related offenses.

The purpose of subdivisions (a), (b), and (c) of this Rule, as is true of the comparable section of the Model Penal Code, is to protect defendants from "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials." Model Penal Code § 1.08, Comment (T.D. # 5, 1956). To accomplish this result, the Model Penal Code provides, in § 1.07 (P.O.D.1962):

(2) *Limitation on Separate Trials for Multiple Offenses.*

Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) *Authority of Court to Order Separate Trials.* When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

This Rule does not represent a major departure from the approach taken in the Model Penal Code; the definition of "related offenses" is the same (see Comment to subdivision (a), *infra*) and the basis for separate trials is generally the same as expressed in the Code. In contrast to the Code, however, the Rule deals separately with the case in which the defendant knows before the first trial that related offenses have been charged, and the case in which there is a subsequent attempt to try the defendant for a related offense not charged (or not known by the defendant to have been charged) prior to the first trial. The most significant difference between the Rule and

the Code is that the former places the burden on the defendant to move for joinder when he knows in advance of the first trial that he has been charged with related offenses. In this respect, the Rule follows ABA Standards, Joinder and Severance 1.3 (Approved Draft, 1968).

Subdivision (a)

The definition of related offenses in subdivision (a) is the same as that in ABA Standard 1.3(a) and Model Penal Code § 1.07(2) (P.O.D.1962). The latter section, as originally drafted, was considerably broader, and would have required joinder in most of the cases in which joinder of offenses is now merely permissible.¹

As noted in the Commentary to ABA Standard 1.3(a):

Conduct usually means an act or omission. Thus, a separate trial could be barred if several offenses arose out of the same act, as where a single act of negligence has caused two deaths. Compare *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 215 (1937). "Episode" means "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series." Webster, *Third New International Dictionary* 765 (1961). This would cover the killing of several people with successive shots from a gun, * * * the successive

burning of three pieces of property, * * * or such contemporaneous and related crimes and kidnapping and robbery.

The United States Supreme Court has not held that joinder of such related offenses is constitutionally required. See *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *Ciucci v. Illinois*, 356 U.S. 571, 78 S.Ct. 839, 2 L.Ed.2d 983 (1958); *Hoag v. New Jersey*, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958). Three concurring Justices in *Ashe* were of the view that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant which grow out of a single criminal act, occurrence, episode, or transaction." There is considerable conflict in the state decisions, see Model Penal Code § 1.08, Comment (T. D. #5, 1956), although there is some evidence that state courts are becoming increasingly aware of the possible unfairness of successive trials for related offenses. See, e. g., *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972); *People v. Golson*, 32 Ill.2d 398, 207 N.E.2d 68 (1965), certiorari denied 384 U.S. 1023, 86 S.Ct. 1951, 16 L.Ed.2d 1026. Rule 471 takes the position that, except where the ends of justice would otherwise be defeated, the defendant should not be subjected to multiple trials of related offenses (as defined above) against his wishes.

¹ This section at first read:

(2) *Requirement of Single Prosecution.* Except as provided in paragraph (3) of this Section, if a person is charged with two or more of-

fenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when:

- (a) the offenses are based on the same conduct; or
- (b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or
- (c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

[Model Penal Code § 1.08 (T.D. # 5, 1956).]

The Model Penal Code Advisory Committee favored broadening the formulation to include all offenses "based on a course of conduct having a common criminal purpose or plan or involving repeated commission of the same kind of offense," but the Council viewed both this and the original language as too inclusive in scope. See Model Penal Code § 1.07, status of section (P.O.D., 1962); 39 ALI Proceeding 65-66 (1962).

- 1 (b) Joinder of related offenses. Upon motion of the defend-
- 2 ant conforming to Rule 451, the court shall join for trial two or
- 3 more charges of related offenses, unless it determines that be-
- 4 cause the prosecuting attorney does not presently have sufficient
- 5 evidence to warrant trying one or more of the charges, or for
- 6 some other reason, the joinder would defeat the ends of justice.

Comment

Under this subdivision, if the defendant has been charged with two or more related offenses and he is aware of the charges (which will usually be the case, and which ordinarily will be subject to verification later by reference back to an arraignment on those charges or similar in-court proceedings), he is given the opportunity to present a timely motion for joinder. Failure to so move constitutes waiver of any right of joinder as to related offenses with which the defendant knew he was charged, but quite clearly does not bar the defendant from subsequently objecting to a second prosecution on some other grounds (*e. g.*, collateral estoppel).

This subdivision follows ABA Standards, Joinder and Severance

1.3(b) (Approved Draft, 1968) in placing the burden on the defendant to move for joinder. By contrast, Model Penal Code § 1.07 (3) puts the burden on the prosecutor to move for severance, in that otherwise a trial on one of the related offenses is a bar to subsequent prosecution of charges of other related offenses known to the prosecutor at the time of the first trial. As noted in the Commentary to the ABA Standard:

It is the judgment of the Advisory Committee that it is preferable to place this burden on the defendant, for whose protection this joinder-of-related-offenses requirement is intended. In this way the trial court will be spared the necessity of holding a hear-

ing on the question of whether related offenses should be tried together or separately in those cases in which the defendant concludes that it is in his best interests not to attempt to force a joint trial of related offenses. There may be many occasions when the defendant will make this judgment. For one thing, as the Code draftsmen recognized, the defendant may not want the offenses joined "because of prejudice arising out of a danger that the jury will use evidence adduced to support one charge to convict of another * * * or of plain confusion of issues due to the number of charges." Model Penal Code § 1.08, Comment (Tent. Draft No. 5, 1956). Or, the defendant may be more than willing to go to trial on one offense because of an expectation that the charge of any related offense will be dropped if he is convicted.

The language as to the court's granting the motion is taken

from the ABA Standard and is similar to the Model Penal Code provision to the effect that the court may sever when "it is satisfied that justice so requires."

The usual case will be that specifically set forth: lack of evidence. As the Code draftmen point out:

One reason for allowing the prosecution to ask for a separate trial is to deal with the situation where the commission of an offense is known, and it is known that the defendant committed it, but further investigation is needed to produce evidence sufficient to obtain a conviction. Under such circumstances, the state should be able to prosecute for offenses for which they have sufficient evidence without precluding the possibility of subsequent prosecution for such other offense. [Model Penal Code § 1.08, Comment (T.D. # 5, 1956).]

(c) Dismissal of related offenses. Upon motion of the defendant conforming to Rule 451, the court shall dismiss a charge of an offense if the defendant was previously convicted or acquitted of a related offense, unless:

(1) The defendant knew he was charged with the offense by the time set by the court for making pretrial motions, but failed to move for joinder of the charges;

(2) A motion for joinder of the charges was previously denied; or

(3) The court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying the charge before the conviction or acquittal of the related offense, or for some other reason, the dismissal would defeat the ends of justice.

Comment

This subdivision, which is based upon ABA Standards, Joinder and Severance 1.3(c) (Approved Draft, 1968), provides that the defendant may move to dismiss a charge because of his prior conviction or acquittal of a related offense. Such a motion is normally to be granted unless the matter was previously decided against the defendant upon his motion for joinder prior to the first trial or unless he has waived his right to object by his earlier failure to request joinder of related offenses with which he knew he was charged. This motion to dismiss is the means by which a defendant may protect himself from multiple trials on charges of related offenses, when the charges later brought up for trial were not known to the defendant (most likely because they were then nonexistent) at the time of the first trial. Compare Model Penal Code § 1.07 (P.O.D.1962), which apparently contemplates the motion to dismiss being used to bar trial of any related offenses "known to the appropriate prosecuting officer at the time" of the first trial.

Clause (3) employs the same standard as that concerning whether joinder of related offenses should be required, as set forth in subdivision (b). As noted in the Commentary to the ABA Standard:

This being so, there is nothing to be gained by a prosecutor deferring or concealing charges of related offenses prior to the first trial. If the

defendant knows before the first trial that related offenses have been charged and he makes the appropriate motion, the offenses are merely joined; if the defendant does not have this knowledge before the first trial, the defendant's subsequent motion will bar prosecution of related offenses in *every* case in which the offenses would have been joined but for the prosecutor's failure to charge or to apprise the defendant of the charge. Also, the prosecutor is discouraged from deferring or concealing charges of related offenses * * * in that notification to the defendant that several related offenses have been charged puts the burden on him to move for joinder. * * * [T]here are several reasons why a defendant might not so move; by contrast, there does not appear to be any reason why a defendant would fail to move for dismissal * * *.

Except for the tactical difference just referred to, the prosecutor will not be substantially disadvantaged if for some reason a related offense known to him was not charged prior to the first trial. He is still free, under the "ends of justice" exception, to seek denial of the defendant's motion. Compare Model Penal Code § 1.07, whereunder the prosecutor might obtain severance of related offenses by raising the issue before the first trial and satisfying the court that "justice so requires," but there is no compara-

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ble way in which, after one trial has been held, he can then argue that another trial should be permitted on a related offense of which he was aware in advance of the first trial.

ABA Standard 1.3(d) provides that "entry of a plea of guilty or nolo contendere to one offense does not bar the subsequent prosecution of a related offense." The Commentary thereto expresses concern that if this were not the case "a defendant charged with

one offense would, in many jurisdictions, be in a position to enter a plea promptly after being charged and thus bar prosecution of other related offenses then being processed (*e. g.*, awaiting grand jury action) by the prosecutor." A provision comparable to ABA Standard 1.3(d) has not been included in this Rule, as the situation described above would justify denial of the motion for dismissal under the "ends of justice" test in clause (3).

- 1 (d) Joinder of unrelated offenses. Upon motion of the de-
- 2 fendant conforming to Rule 451, the court shall join for trial two
- 3 or more charges of unrelated offenses upon a showing that fail-
- 4 ure to try the charges together would constitute harassment, un-
- 5 less the court determines that because the prosecuting attorney
- 6 does not presently have sufficient evidence to warrant trying one
- 7 or more of the charges, or for some other reason, the joinder
- 8 would defeat the ends of justice.

Comment

While defendants are likely to desire joinder of related offenses for the reasons set out above, the joinder of unrelated offenses will seldom appear desirable. See Comment to Rule 472(a), *infra*. On rare occasion, however, a defendant may wish to have unrelated offenses joined because of the time and expense which would be involved in the seriatim trial of a number of charges. This is most likely to be the case when the prosecutor has separately charged the defendant with a large number of offenses which, viewed individually, are not serious but which would require an undue amount of time in court by the defendant and his counsel if they were brought up for trial one at a time. Thus, subdivision (d) re-

quires joinder of unrelated offenses on motion of the defendant and a showing that "failure to try the offenses together would constitute harassment."

This requirement is qualified by the provision that the court shall not order joinder if it finds that the joinder would defeat the ends of justice. One possibility, specifically identified in subdivision (d), is that the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time. Another, somewhat more likely to be present here than as to related offenses, is that the number of offenses and the complexity of the evidence is such that if the offenses were joined the trier of fact would be unable to distin-

guish the evidence and apply the law intelligently as to each offense. See ABA Standards, Join-

der and Severance 2.2(b) (Approved Draft, 1968).

Rule 472. [Severance of Offenses and Defendants upon Party's Motion.]

- 1 (a) When granted. Subject to the defendant's right
- 2 of joinder under Rule 471, upon motion of the prosecuting at-
- 3 torney or defendant conforming to Rule 451, the court shall sever
- 4 offenses or defendants unless it determines that because of a
- 5 significant risk that material evidence which cannot otherwise
- 6 be preserved will be lost, the severance would defeat the ends of
- 7 justice.

Comment

Severance of offenses

Rule 231(d), *supra*, permits unlimited joinder of offenses by the prosecutor in a single information, so that a joint trial of the offenses joined will be held when the prosecutor and defendant concur in such a disposition, and, in addition, the trial judge does not deem a severance necessary as provided in Rule 473(b), *infra*. However, such joinder may be prejudicial to the defendant, and for this reason subdivision (a) recognizes a right of the defendant to obtain a severance of joined offenses, subject only to denial of his motion for severance when there is significant risk that material evidence which cannot otherwise be preserved will be lost before the offenses can be tried seriatim.

One reason that joinder of offenses may be prejudicial is that "the jury may consider that a person charged with doing so many things is a bad man who must have done something, and may cumulate the evidence

against him." 1 Wright, *Federal Practice and Procedure—Criminal* § 222 (1969). This kind of prejudice has been recognized by the courts, *e. g.*, *Drew v. United States*, 118 U.S.App.D.C. 11, 331 F.2d 85 (D.C.Cir. 1964), although under rules requiring the defendant to prove prejudice in order to obtain a severance it has not been deemed sufficient that the defendant is being held out to the jury as a habitual criminal, *Johnson v. United States*, 356 F.2d 680 (8th Cir. 1966), certiorari denied 385 U.S. 857, 87 S.Ct. 105, 17 L.Ed.2d 84, or that the proof on one count is stronger than on the other, so that the jury may be induced to convict on the weaker count because it is swayed by proof supporting the stronger count, *United States v. Sherman*, 84 F.Supp. 130 (D.C.N.Y.1947), affirmed in part and reversed in part 171 F.2d 619, certiorari denied 337 U.S. 931, 69 S.Ct. 1484, 93 L.Ed.2d 1738. Notwithstanding this reluctance by courts to grant severance under these circumstances, commentators have

been extremely critical of rules which force defendants to be tried for several offenses in one trial. See, e. g., Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 Ore.L. Rev. 56, 58-59 (1943): "We all know that, if you can pile up a number of charges against a man, it is quite often the case that the jury will convict, where, if they were listening to the evidence on one charge only, they would find it wholly insufficient as to the degree of proof required."

A second reason why joinder of offenses may be prejudicial to the defendant is that he may wish to testify in his own defense on one charge but not on the other. In *Cross v. United States*, 118 U.S. App.D.C. 324, 335 F.2d 987, 989 (D.C.Cir. 1964), the court noted:

Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both

counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced in testifying on the count upon which he wished to remain silent.

The defendant's dilemma is reflected in Cross's testimony; as to one robbery charge he testified that he was a victim and not a cohort of the armed robbers, but he then felt compelled also to deny the other offense. The latter denial, observes the court, was "plainly evasive and unconvincing. * * * In a separate trial of that count the jury would not have heard his admissions of prior convictions and unsavory activities; nor would he have been under duress to offer dubious testimony on that count in order to avoid the damaging implication of testifying on only one of the two joined counts." *Id.* at 990-91.

Yet a third reason why joinder of offenses may be prejudicial is through introduction of evidence which fails to meet the other crimes test. "Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial." *Drew v. United States*, 118 U.S.App.D.C. 11, 331 F.2d 85, 90 (D.C.Cir. 1964). In *Drew* the court con-

cluded that the defendant had been prejudiced because he was required to stand trial on two separate robberies at the same time. Had the defendant been prosecuted on each robbery separately, the evidence of the other crime would not have been admissible under the other crimes rule. Thus, by joining the unrelated offenses together for trial, the prosecution brought about the evil to be avoided by the general rule that evidence of other crimes is not admissible: "the likelihood that juries will make * * * an improper inference." See Note, 74 Yale L.J. 553, 556-57 (1965).

It is undoubtedly true that the above forms of prejudice are most severe when unrelated offenses are joined for trial. This explains why two-thirds of the states make no provision for that type of joinder, Note, 74 Yale L.J. 553, 560 (1965); why such joinder has been specifically rejected in recent law reform efforts, see ABA Standards, Joinder and Severance 30 (Approved Draft, 1968); and why ABA Standard 2.2(a) grants the defendant a right to a severance for unrelated offenses. By contrast, subdivision (a) permits the defendant, subject to the limited exception stated, to obtain a severance of offenses notwithstanding the fact that they may be related to each other. While it is likely that defendants will seldom desire a severance when the offenses are related, see Comment to Rule 471, *supra*, there will be occasions when severance of related offenses will be desired because of the risk of prejudice.

Although it may be true that the *Drew* problem will not be present when the offenses are related, in that evidence of the entire transaction would be admissible even if the offenses were severed, *Bayless v. United States*, 381 F.2d 67 (9th Cir. 1967), this is not necessarily the case as to the other forms of prejudice described above, Note, 74 Yale L.J. 553, 561 (1965).

Under subdivision (a), a defendant's motion for a severance of offenses is to be granted, except where it is shown that there is a significant risk that evidence will be lost, without any specific showing by the defendant that he will actually be prejudiced by the joinder. Defendants generally have not fared well under rules requiring proof of prejudice; motions for severance of offenses have generally been denied by the courts, 1 Wright, Federal Practice and Procedure—Criminal § 222 (1969). It is very difficult for the trial judge to make a finding on the prejudice issue before trial, as it involves speculation about many things which may or may not occur. In the *Cross* situation, for example, it is not possible to force the defendant to make an irrevocable decision as to whether he will testify on one count and not the other, Note, 74 Yale L.J. 553, 559-60 (1965); *cf.* *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L. Ed.2d 358 (1972) (defendant may not be forced to elect to testify first or not at all). Judges are understandably reluctant to make a finding of prejudice during the trial, after the prosecution has put in most or all of its proof. If

a trial judge denies a defendant's motion for severance under the prevailing requirement that the defendant show prejudice, it is virtually impossible for the defendant to prevail on appeal. Appellate courts are inclined to find no prejudice by resort to one or more of the following notions: (a) that the jury is capable of following the judge's instructions to consider certain evidence only as to some of the charges; (b) that if the jury has acquitted the defendant on any count this shows that the jury has been selective and thus must have kept the evidence separate; (c) that the defendant has no ground for complaint if he was convicted of the several counts but received concurrent sentencing; (d) that any prejudice from the joinder is cured by overwhelming evidence of guilt. These four notions have been justly criticized, see Note, 74 Yale L.J. 553, 554-56 (1965).

In opposition to the broad right of severance of offenses allowed under subdivision (a), it might be argued that the public interest in avoiding duplicitous, time-consuming trials has been sacrificed. However, it must be kept in mind that defendants are most likely to desire a severance of offenses when they are unrelated. In that situation, "since the offenses on trial are distinct, trial of each is likely to require its own evidence and witnesses. The time spent where similar offenses are joined may not be as long as two trials, but the time saved by impanelling only one jury and by setting the defendant's background only once seems minimal." Note, 74 Yale L.J. 553, 560 (1965). It may be

true that some time can be saved by the joint trial of related offenses, but this is not necessarily the case. If the prosecutor proceeds with but one offense and obtains a conviction, he may (particularly when the offenses are related) be satisfied with the sentence imposed for that conviction and forego prosecution for the other offenses. Or, if the prosecutor does not forego prosecution, the conviction for one offense (again, particularly when the offenses are related) is likely to influence the defendant to dispose of the other charges by a plea of no contest. And, in any event, the public interest in avoiding multiple trials "is a factor of small moment compared to the probable prejudice to defendants of disposing of all charges in one grandiose trial." United States v. Solomon, 26 F.R.D. 397, 404 (S.D.Ill.1960).

It must be emphasized that while the defendant has a right of severance of offenses under subdivision (a), he does not have a right to determine the order in which the offenses may be tried. To provide otherwise "would ignore the government's traditional discretion to bring trial in any sequence it desires and would confer upon the defendant an advantage he would not have possessed had there been single trials *ab initio*." Note, 74 Yale L.J. 553, 561 (1965).

Subdivision (a) gives a comparable right of severance of offenses to the prosecutor, subject to the defendant's right of joinder under Rule 471, *supra*. Thus, if the defendant wishes related offenses to be tried together, the

prosecutor must show that, because he does not presently have sufficient evidence or for some other reason, trying them together would defeat the ends of justice. See Rule 471(b), *supra*. The view has sometimes been taken that once the government has decided to proceed with prosecution for various offenses, it should be prepared to present proof as to each count of the charges, so that a severance because of a lack of evidence on one of the offenses charged would not be permitted. *United States v. Cappello*, 209 F. Supp. 959 (E.D.N.Y.1962). That position has been rejected here on the ground that it is too strict; the prosecutor, although originally prepared to go to trial on several counts, may sometimes be confronted with an unanticipated change of circumstances, as where an important witness on one of the counts cannot be found. When this occurs, it is preferable to permit the prosecutor to obtain a severance, rather than to force him to seek a continuance as to all joined offenses or to have all counts dismissed to toll the running of the time for speedy trial.

Severance of defendants

Rule 231(e), *supra*, sets forth the criteria for the joinder of defendants in a single information. If the defendants are amenable to such a disposition, as they sometimes will be (particularly when represented by the same attorney), and if in addition the trial judge does not deem a severance necessary as provided in Rule 473(b), *infra*, the defendants will be tried together. However, such joinder may be prejudicial to one

or more of the defendants, and for this reason subdivision (a) recognizes a right of a defendant to obtain a severance from the other defendants, subject only to denial of his motion when there is a significant risk that material evidence which cannot otherwise be preserved will be lost before the defendants can be tried separately.

There are a variety of reasons why a defendant might properly view joinder for trial with other defendants as prejudicial. One is that as a consequence the case would be so complex that the trier of fact would not be able to keep straight the evidence relating to the various defendants and charges; see, *e. g.*, *United States v. Moreton*, 25 F.R.D. 262 (W.D. N.Y.1960). Even if the case is relatively simple, there is always the risk that the jury will decide the case against the defendants collectively on the ground that birds of a feather flock together.

The "birds of a feather" problem is compounded by the fact that unless a defendant has a right to a severance, he may actually be tried with defendants as to whom it turns out the joinder provisions of Rule 231(e) do not apply. This is because under current law, at least in the federal system, there is no automatic right of severance during the trial once the proof fails on the allegation which originally supported the joinder of defendants. In *Schaffer v. United States*, 362 U.S. 511, 516, 80 S.Ct. 945, 4 L. Ed.2d 921 (1960), in a 5-4 decision, the Supreme Court rejected "a hard-and-fast formula that * * * joinder is error as a

matter of law" in such a case. Rather, such lack of evidence merely requires a re-examination of the question of whether the defendant is prejudiced by the joinder.

Although the majority in *Schaffer* found the trial judge's denial of severance not to be "clearly erroneous," *id.* at 513, the facts of that case do illustrate how the failure of evidence on the charge supporting joinder might be thought to show prejudice. Count 1 charged the Stracuzzas and two other defendants with transporting stolen goods from New York to Pennsylvania; count 2 charged the Stracuzzas and still another defendant with transporting stolen goods from New York to West Virginia; count 3 charged the Stracuzzas and yet another defendant with transporting stolen goods from New York to Massachusetts; and count 4 charged all defendants with engaging in a conspiracy as to all the above acts. If the joint trial is allowed to continue where "the several defendants, though unconnected, commit the crimes charged by dealing with one person, one house, or one establishment," then, as the dissent in *Schaffer* pointed out, "a subtle bond is likely to be created between the several defendants though they have never met or acted in unison." *Id.* at 523 (dissenting opinion).

A defendant might also wish to avoid trial with another defendant because certain evidence will be admissible against the latter defendant only. While the Supreme Court has dealt with the situation in which a confession by

the second defendant implicates the first, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476 (1968), prejudice is also possible as to other evidence, such as a confession implicating only the maker, *Baker v. United States*, 329 F.2d 786 (10th Cir. 1964), certiorari denied 379 U.S. 853, 85 S.Ct. 101, 13 L.Ed.2d 56; a prior criminal record, *United States v. Greenberg*, 223 F.Supp. 350 (S.D.N.Y.1963); or proof of flight to raise an inference of guilt, *United States v. Stein*, 140 F.Supp. 761 (S.D.N.Y.1956). This prejudice is not necessarily cured by a cautionary instruction, for while "our theory of trial relies upon the ability of a jury to follow instructions," *Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101, 45 A.L.R.2d 1308 (1954), what empirical evidence is available tends to show that in some situations jurors do not do so. Thus, "it would be unrealistic to dismiss lightly the prospect that the jury may fail to completely segregate the applicable testimony among the defendants in accordance with the Court's charge," *United States v. Stein, supra*.

In addition, a defendant may desire to obtain a severance from another defendant because of a possibility that their defenses will be antagonistic to each other. What is to be avoided is the kind of trial fitting this description by one appellate court of the proceedings below: "The trial was in many respects more of a contest between the defendants than between the people and the defendants. It produced a spectacle where the people frequently stood

by and witnessed a combat in which the defendants attempted to destroy each other." *People v. Braune*, 363 Ill. 551, 557, 2 N.E. 2d 839, 842, 104 A.L.R. 1513 (1936).

Also, a defendant may want to be severed from other defendants because he is a relatively minor participant who would otherwise be subjected to a lengthy trial in which most of the evidence would be irrelevant as to him. Currently, a defendant is not entitled to a severance merely because of unequal proof, *United States v. Sherman*, 84 F.Supp. 130 (E.D.N.Y. 1947), affirmed in part and reversed in part 171 F.2d 619, certiorari denied 337 U.S. 931, 69 S. Ct. 1484, 93 L.Ed. 1738, expense of a joint trial, *United States v. Van Allen*, 28 F.R.D. 329 (S.D. N.Y.1961), being named in only a few counts, *United States v. Nomura Trading Co.*, 213 F.Supp. 704 (S.D.N.Y.1963), or having a lesser role in the crime, *West v. United States*, 311 F.2d 69 (5th Cir. 1962).

Similarly, it may be relevant that the moving defendant desires the testimony of a codefendant, which would be unavailable at a joint trial but which might be obtained if the defendant were severed and tried later. This, by itself, has not been viewed as grounds for severance. Of course, if the severed defendant were tried first "there is no reason to think that a codefendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a

defendant not to take the stand." *Gorin v. United States*, 313 F.2d 641, 645-46 (1st Cir. 1963), certiorari denied 374 U.S. 829, 83 S. Ct. 1870, 10 L.Ed.2d 1052. If a severance were granted, only one defendant can be tried last, and even the other defendants may rely on the Fifth Amendment if "there remains the possibility of other prosecutions under related statutes." *United States v. Van Allen*, 28 F.R.D. 329, 339 (S.D.N. Y.1961).

Under subdivision (a), a defendant's motion for a severance of defendants is to be granted, except where it is shown that there is a significant risk that evidence will be lost, without any specific showing by the defendant that he will actually be prejudiced by the joinder. Defendants generally have not fared well under rules requiring proof of prejudice; motions for severance of defendants have generally been denied by the courts, 1 Wright, *Federal Practice and Procedure—Criminal* § 223 (1969). The problem is essentially the same as that described above concerning the necessity of proof of prejudice to obtain severance of offenses: it is difficult to ascertain the degree of prejudice before trial; once the trial is under way there is great reluctance to grant a severance and allow some defendants a fresh start; and on appeal there is even greater reluctance to find the trial judge's denial of the motion erroneous.

For these reasons, subdivision (a) follows the approach of a growing minority of states which do not require a specific showing of prejudice for a severance of

defendants. See statutes and rules collected in Appendix A, ABA Standards, Joinder and Severance (Approved Draft, 1968). Empirical data gathered in some of these jurisdictions supports the conclusion that no undue additional burden is placed upon the prosecution or the courts as a consequence of this right of severance. It has been noted, for example, that if a severance of defendants has been granted and one defendant is tried and convicted, then the severed defendants are very likely to plead guilty.

It must be emphasized that while the defendant has a right of severance of defendants under subdivision (a), he does not have a right to determine the order in which the defendants are to be tried. Nor does he have a right, by virtue of the fact that he is being tried alone upon evidence also implicating others, to an unwarranted inference that he has been unjustly selected out for prosecution; the prosecuting attorney must be allowed to explain to the jury why the other defendants are not on trial at the same time.

Subdivision (a) gives a comparable right of severance of defendants to the prosecutor. That is, the prosecutor is likewise under no obligation to show prejudice if he now decides that the defendants should be tried separately. One reason why the prosecutor may desire a severance is because of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), holding that admission at a joint trial of a confession by a codefendant who

did not take the stand, where that confession implicated the defendant, constituted prejudicial error even though the trial court gave a clear, concise and understandable instruction that the confession could only be used against the codefendant and must be disregarded with respect to the defendant. To avoid the *Bruton* result, the prosecutor must "elect one of the following courses: (i) a joint trial at which the statement is not admitted into evidence; (ii) a joint trial at which the statement is admitted into evidence only after all references to the [other] defendant have been deleted, provided that, as deleted, the confession will not prejudice the [other] defendant; or (iii) severance of the [other] defendant." ABA Standards, Joinder and Severance 2.3(a) (Approved Draft 1968).

Assuming the prosecutor desires to have the confession admitted against the maker, severance will often be the only solution. Editing of the confession requires more than removing the other defendant's name, for if the statement indicates that another unnamed party is involved in the crime, the jury is nearly certain to draw the inference that the codefendant is this party, *People v. Serritello*, 385 Ill. 554, 53 N.E.2d 581 (1944). Also, there are many instances in which editing is not possible; the references to the other defendant may be so frequent or so closely interrelated with references to the maker's conduct that little would be left of the statement after editing, *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959). Editing is

not permissible if as a consequence the substance of the statement is changed in such a way which operates to the detriment of the maker. See *State v. Montgomery*, 182 Neb. 737, 157 N.W. 2d 196 (Neb.1968), where defendant A confessed that he participated in a robbery with defendant B but said that he did so because he was forced to do so by defendant B; if all references to defendant B (or, indeed, to the existence of another participant which the jury would take to be defendant B) were deleted, the

substance of A's confession would be changed to his disadvantage.

If the defendant fails to move for a severance of defendants under subdivision (a), this is in no sense a waiver of his rights under *Bruton*. If the defendant does not obtain a severance, then the prosecutor must decide which of the three options set out above he prefers (subject, of course, if option (ii) is elected, to a determination by the trial court that the necessary editing can be accomplished).

- 1 **(b) Effect of severance on collateral estoppel.** A defendant's
- 2 motion for severance of offenses precludes him from asserting
- 3 the collateral estoppel defense, so that a finding of fact in the
- 4 trial of one of the severed offenses does not bar a contrary find-
- 5 ing in the trial of another of the severed offenses, unless the
- 6 motion was made and granted or should have been granted on the
- 7 specified ground that the trier of fact would be unable to dis-
- 8 tinguish the evidence and apply the law intelligently as to each
- 9 offense because of the number of offenses charged and the com-
- 10 plexity of the evidence.

Comment

This subdivision deals with a situation which will arise infrequently. This is because a collateral estoppel defense under *Ashe v. Swenson*, 297 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), will be available only as to related offenses, as to which the defendant is unlikely to desire a severance, see Comment to Rule 471. In the rare instance in which the defendant does want such offenses severed, it is not unfair to provide that the motion precludes assertion of the collateral estoppel defense, given the fact that the prosecution is prepared to proceed with these offenses in one

trial and thereby avoid the necessity of a complicated collateral estoppel inquiry prior to a second trial. Under *Ashe*, such an inquiry can be extremely burdensome upon the prosecution and court, for it necessitates an examination of the full record of the prior proceedings, including the pleadings, evidence, charge, and all other relevant matters in order to determine whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

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An exception is provided when the defendant's motion was made and was granted (or, should have been granted) on the specific ground that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each offense because of the number of offenses

charged and the complexity of the evidence. In this situation, also unlikely when the offenses are related, the collateral estoppel defense is not precluded. The defendant should not be required to forfeit that defense in order to obtain a fair determination of his guilt or innocence.

Rule 473. [Joinder or Severance upon Court's Own Motion]

- 1 (a) Joinder. The court may order two or more [indictments
2 or] informations to be tried together if no party objects and the
3 offenses, and the defendants if more than one, could have been
4 joined in a single [indictment or] information.

Comment

This subdivision, which is very similar to former Uniform Rule 30 and ABA Standards, Joinder and Severance 3.1(a) (Approved Draft, 1968), recognizes the necessity of giving the judge the power to avoid a multiplicity of trials by consolidating charges which the prosecutor could have incorporated into the same information or (where authorized) indictment. Whether the circumstances are such as to allow joinder is determined by Rule 231(d) and (e), *supra*.

Some jurisdictions so provide by statute or rule, *e. g.*, F.R.Crim. P. 13; Ky.R.Crim.P. 9.12. Elsewhere, it is generally recognized

that this is within the power of the trial judge. 5 Wharton, Criminal Law and Procedure §§ 1942-43 (12th ed. 1957); Annot., 59 A.L.R.2d 841 (1958).

The court's power to join offenses or defendants is qualified by the "if no party objects" language, as if there was objection joinder would be pointless because of the broad right of severance under Rule 472, *supra*. Even if no objection is raised at that time and the court consolidates the charges for trial, the defense or prosecuting attorney may still obtain a severance under Rule 472 if the motion therefore is timely.

- 1 (b) Severance. Subject to the defendant's right of joinder
2 under Rule 471, the court may order a severance of offenses or
3 defendants before trial in order to promote a fair and orderly
4 trial.

Comment

This subdivision, based upon Severance 3.1(b) (Approved ABA Standards, Joinder and Draft, 1968) is the counterpart of

the court's authority to order consolidation. As noted in the Commentary to the ABA Standard:

Because the court is responsible for the orderly progress of the trial, it is advisable to give the court power, absent a request by either prosecution or defense, to sever counts or defendants when this seems reasonably necessary to ensure against undue confusion over the various charges.

F.R.Crim.P. 14 allows the court to act on its own motion, as does former Uniform Rule 31. Compare ALI Code of Criminal Procedure § 312 (1931), allowing severance of a defendant only on motion of one of the parties.

Under subdivision (b), the court could order a severance of offenses on the ground that, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each offense. Similarly, the court could order a severance of defendants in the interests of an orderly trial, as where antagonistic defenses are anticipated or where

undue procedural complications are expected because of the number of defendants and defense counsel, or in the interest of a fair trial, as where the number of defendants and complexity of evidence is such that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant.

Subdivision (b) is subject to "the defendant's right of joinder under Rule 471." That is, if the defendant moves for joinder under Rule 471(b) or (d), *supra*, that motion may be denied only as provided therein.

Subdivision (b) permits the court to sever on its own motion only prior to trial. As observed in the Commentary to the ABA Standard:

If the court is concerned about the number of counts or defendants, it would undoubtedly act before trial. Allowing severance during trial not at the instance of the defendant would raise a double jeopardy problem. See Model Penal Code § 1.09, Comment (T.D. #5, 1956).

PART 8

PRETRIAL JUDGMENT OF ACQUITTAL

Rule 481. [Pretrial Judgment of Acquittal.]

- 1 (a) Motion. On or before the time set by the court under
- 2 Rule 411, or at a later time before trial if the court permits in the
- 3 interest of justice, the defendant may move for a pretrial judg-
- 4 ment of acquittal. The motion shall particularize:

- 5 (1) The grounds upon which it is based, which shall speci-
- 6 fy those elements of the offense charged or other necessary

parts of the State's case as to which it is believed the prosecuting attorney's evidence is insufficient;

(2) Any matters the prosecuting attorney has indicated under Rule 422 he intends to use at trial, and any statements discovered under Rule 421(a) or depositions taken under Rule 431 of persons the prosecuting attorney has indicated under Rule 422 he intends to call as witnesses at trial, which are believed to disprove or show the absence of the elements or other necessary parts specified; and

(3) Any lesser included offense as to which it is believed the prosecuting attorney's evidence is also insufficient for the grounds particularized.

Comment

The Rule 481 pretrial judgment of acquittal procedure is the device provided in these Rules whereby the defendant may obtain a judicial determination as to whether the prosecutor's evidence is sufficient to merit requiring the defendant to stand trial. Although this function is usually performed in current practice by a preliminary hearing (no such hearing is provided for in these Rules; but see Rule 344, which provides for a detention hearing for those defendants who are unable to obtain pretrial release), it is believed that the pretrial judgment of acquittal device is preferable for the following reasons: (1) it focuses attention more directly upon the prosecutor's case, as the motion is to be decided upon the basis of that evidence and the depositions and statements of those witnesses the prosecutor plans to introduce or call at trial; (2) because it comes somewhat later, it is feasible to decide the issue solely in terms of admissible evidence (generally not the case at preliminary hearings) and by re-

sort to a higher test, namely, that used for a motion for acquittal at trial (by contrast, only probable cause need be shown at a preliminary, and this is usually taken to mean the same test as for issuance of an arrest warrant); and (3) the motion can be ruled upon on the basis of the prior discovery and depositions, thus rendering unnecessary a lengthy formal hearing or the calling of witnesses to testify.

The time referred to in the first sentence will be set pursuant to Rule 411, which also provides for the court to set times with respect to certain other matters, such as discovery and pretrial motions. To conform to the present Rule, the judge will set the time for this motion so that it may be made after certain other events. Most important, it must remain open to the defendant to move for acquittal after the prosecutor has given notice under Rule 422 as to what his evidence will be at trial and after there has been a ruling upon the defendant's suppression motions under Rule 461.

While the specificity called for by clause (1) is not now generally required for a motion for acquittal at trial, in contrast to the generally accepted requirements as to a motion for a directed verdict in a civil action, see 2 Wright, Federal Practice & Procedure—Criminal § 466 (1969), it is appropriately required here. Unlike the case where the motion is made at trial, the judge has not had an opportunity to observe an orderly presentation of evidence. If faced only with a general claim of an insufficiency in the prosecutor's case, the judge would have to engage in a roving inquiry into all of the evidence the prosecutor intends to offer at trial. Requiring the defendant to be specific at this point identifies the issues for the judge and makes it possible for the parties to limit the evidentiary matters which are brought to the attention of the judge. Illustrative of what the defendant might do by way of particularizing grounds are: in a possession of heroin case, asserting that the element of possession is not proved because the prosecution's file only shows that the heroin was found in a car in which the defendant was a passenger; in an attempt case, asserting that the acts of the defendant shown by the prosecution's file do not show a substantial step.

Clause (2) requires particularization of any matters, statements, and depositions believed to show the absence of necessary parts of the State's case. Sometimes the prosecutor's case will affirmatively show something inconsistent with guilt (to take the illustra-

tion given above, that, for example, the prosecutor's witnesses say that the narcotics were not found on the defendant or otherwise in his possession, but rather were secreted in a car in which he was only a passenger). When that is the case, the defendant will of course want to particularize the statements of those witnesses. On other occasions some element or other essential part of the state's case will simply be missing from the prosecutor's case. In such a case, the defendant may desire, for example, to direct attention to the statement of a witness who would have been expected to speak to the missing matter, although under these circumstances it would suffice for the defendant merely to note that the missing element or part is nowhere accounted for in the prosecutor's evidence.

It must be noted that clause (2) does not grant the defendant an unlimited right to specify anything which he believes tends to show that he is not guilty. Rather, by the tie-in to Rule 422, whereby the prosecutor is required to give notice (sometimes automatically, sometimes on demand) of what his evidence at trial will be, the defendant may only specify that evidence the prosecutor has said he will use; the defendant is not permitted to bring into the picture any of his own evidence. That is, the defendant is limited to the following: (i) matters the prosecuting attorney has indicated pursuant to Rule 422 he intends to use at trial; (ii) statements from the prosecutor's file discovered by the defendant under Rule 421(a) of

persons the prosecutor has indicated pursuant to Rule 422 he intends to call as witnesses at trial; and (iii) depositions, whether taken by the prosecutor, defendant or court, of persons the prosecutor has indicated pursuant to Rule 422 he intends to call as witnesses at trial. (Whenever the prosecutor has indicated his intention to call a particular witness, it is not inappropriate to permit consideration of a deposition of such a person even if not taken by the prosecutor, as the prosecutor will have had the opportunity for cross-examination of that witness when the deposition was taken.)

The limitations stated above have the advantage of ensuring that the pretrial motion is decided, as would a motion for acquittal at the close of the prosecution's case, on the prosecution's evidence only. This is not unfair to the defendant. If something is missing from the prosecution's evidence, in the sense that all elements of the offense charged

are not covered, then the defendant does not need any of his own evidence. Likewise, if the prosecution's evidence affirmatively shows something inconsistent with guilt, then again the defendant does not need any of his own evidence. If the prosecutor's evidence standing alone would reasonably permit a finding of guilty beyond a reasonable doubt, then there is no point in having the judge see the defendant's contrary evidence, as then there would be only conflicting evidence, which (by analogy to the generally accepted rule as to motions for acquittal at trial) would not ordinarily justify granting the motion.

Clause (3) reflects the view that, because the judge will be looking only at the specified grounds and will have examined only that evidence relating thereto, it would be inappropriate to require him to make a determination as to any possible included offenses absent a particularization of them by the defendant.

(b) Production by prosecuting attorney. If the grounds stated in the motion, if true, would justify granting the motion, the court shall direct the prosecuting attorney to produce for examination by the court:

(1) The matters, statements, and depositions particularized in the defendant's motion; and

(2) Other matters the prosecuting attorney intends to use at trial and statements or depositions of persons he intends to call as witnesses at trial, which he believes establish the elements or other necessary parts specified by the defendant under subdivision (a) (1).

Comment

This subdivision stresses that the court is not to call upon the prosecutor to produce the materials otherwise necessary to a de-

cision unless the defendant has stated grounds which, if true, would justify granting the motion. If, for example, the defendant were to claim that the prosecutor's case does not show the presence of a certain element, but the purported omission is not in fact an element of the crime charged, then the motion may be denied on that basis.

Clause (1) does not impose an undue burden on the prosecution. The alternative, namely, to have the defendant produce whatever he may have been able to copy, would only lead to confusion.

Clause (2) is not the precise counterpart of subdivision (a)(2), *supra*, in that the prosecutor is not limited to production of those matters and the statements and depositions of those witnesses as to which he has given notice under Rule 422. While this may appear to give the prosecutor greater leeway than the defendant, it is justified for two reasons: (i)

were it otherwise, the defendant could limit the evidence which the prosecutor could put forward in support of his case by not making a demand under Rule 422; and (ii) to so limit the prosecutor would attach more serious consequences at the pretrial stage than at the trial itself for a violation of Rule 422 by the prosecutor, for at trial barring evidence is only one possible sanction provided by Rule 422(c). In connection with the latter point, it must be emphasized that subdivision (c) of this Rule requires the judge to exclude from consideration that evidence and potential testimony which would be inadmissible at trial. This means that *if* certain evidence will not be admitted at trial as a sanction for violation of Rule 422 by the prosecutor (a somewhat unlikely prospect given the fact that the notice is delinquent but still given before trial), then that same evidence will not be subject to consideration on the pretrial motion for acquittal.

- 1 **(c) Ruling.** The court's ruling on the motion shall be made
- 2 upon the basis of the materials produced by the prosecuting at-
- 3 torney under subdivision (b), except for that evidence and the
- 4 statements and depositions relating to that potential testimony
- 5 which would be inadmissible at trial. The court shall rule on the
- 6 motion as to the offense charged and any lesser included offense
- 7 particularized in the defendant's motion, and shall grant the mo-
- 8 tion as to any offense for which it appears, for the reasons par-
- 9 ticularized in the defendant's motion, there is not evidence which
- 10 would reasonably permit a finding of guilty beyond a reasonable
- 11 doubt.

Comment

Under this Rule, there is no occasion for the court to conduct a hearing at which evidence is formally introduced, as would occur

at a preliminary hearing. Rather, the judge is called upon to rule on the defendant's motion on the basis of physical evidence the

prosecutor intends to offer at trial and statements and depositions of witnesses the prosecutor intends to call at trial. Those matters must be produced by the prosecution under subdivision (b), *supra*, and thus the first sentence hereof states that the court's ruling is to be based upon the materials the prosecutor has produced.

The first sentence's "except" clause, however, precludes taking into account that evidence and the statements and depositions relating to that potential testimony which would be inadmissible at trial. For one thing, this means that evidence suppressed upon a suppression motion may not be considered. Although this is different from the rule usually followed in preliminary hearings, it should be noted that the explanations offered for not applying exclusionary rules at preliminary hearings (such as that to do so would require the matter of admissibility to be ruled upon twice) have no application here. In addition, under subdivision (c) the judge may not consider matters which would not be admitted at trial under other provisions of these Rules. Illustrative are those statements by a defendant covered by Rule 444(f) and evidence which the prosecutor will be barred from using at trial under Rules 421(f) and 422(c) because of his noncompliance with the discovery and notice provisions.

Likewise, the judge is not to consider evidence and potential testimony which for other reasons would not be admitted at trial. That is, the rules of evidence which apply at trial are applicable. However, it must be kept in mind that the rules of evidence will not bar consideration of statements and depositions merely because the statements and depositions could not be received at trial; rather, the question is whether the probable testimony of a prosecution witness, as reflected in a statement or deposition, could be received. Such will sometimes not be the case, as where that testimony would violate a privilege which the defendant has claimed or would constitute hearsay.

The last sentence's formula, if "there is not evidence which would reasonably permit a finding of guilty beyond a reasonable doubt," is often used to express the standard to be applied on a motion for acquittal at trial. See Comment, 24 U.Chi.L.Rev. 561 (1957). However, unlike the situation at trial, the qualifying phrase "for the reasons particularized in the defendant's motion" is necessary here, as the judge is called upon only to pass upon those aspects of the prosecution's case which have been called into question specifically in the defendant's motion.

- 1 (d) **Effect of acquittal.** If the motion is granted, the acquittal
- 2 has the same effect as an acquittal at trial, except:
- 3 (1) The order granting the motion may be appealed by the
- 4 State; and

- 5 (2) The acquittal does not bar prosecution for any lesser
6 included offense as to which the court did not also direct an
7 acquittal.

Comment

The introductory portion hereof means that the prosecution would be terminated, that the prosecutor could not bring a new prosecution for the same offense, and that the acquittal may be utilized for collateral estoppel purposes.

In this respect, a pretrial acquittal under this Rule is quite different from a finding of no probable cause at a preliminary hearing. The double jeopardy provision of the Constitution does not apply to preliminary hearings, *United States ex rel. Rutz v. Levy*, 268 U.S. 390, 45 S.Ct. 516, 69 L. Ed. 1010 (1925), so that in most jurisdictions it is permissible, after a judicial determination that probable cause is lacking, to have the defendant, rearrested on the same charge, *People v. Miklovich*, 375 Mich. 536, 134 N.W.2d 720 (1965), and a second hearing is not barred even if all the evidence to be introduced at the second hearing is the same as that introduced at the first, *State ex rel. Beck v. Duffy*, 38 Wis.2d 159, 156 N.W.2d 368 (1968).

While it is doubtless true that the double jeopardy provision of the Constitution does not apply to a pretrial acquittal motion, there are nonetheless good reasons for giving the pretrial acquittal essentially the same effect as an acquittal at trial. The pretrial acquittal motion, which requires the defendant to particularize the defects in the prosecution's case, would be of relatively little utility

were the prosecuting attorney free simply to begin the prosecution anew. Whatever reasons may be given for the lack of finality at the preliminary hearing, such as that the ruling is by a lesser judicial officer not authorized to try the charge or that the ruling comes relatively early in the prosecutor's development of the case, have no application to the procedures under this Rule.

Because the prosecution cannot begin anew and, unlike the defendant, does not get a second chance on the merits at trial if it loses at this stage, clause (1) authorizes the State to appeal from a pretrial acquittal. While in this respect a pretrial acquittal differs from an acquittal at trial, the absence of an opportunity to appeal in the latter instance is a consequence of the fact that jeopardy has attached.

It is generally accepted that an acquittal at trial bars a subsequent prosecution for any offense of which the defendant could have been convicted in that prosecution, that is, what is usually referred to as an included offense. See Model Penal Code §§ 1.08, 1.10, Comments (T.D. #5, 1956). Of course, if a motion for acquittal is made at trial, the judge may grant it as to the offense charged and let the case proceed as to some lesser offense. See 2 Wright, *Federal Practice & Procedure—Criminal* § 467 (1969). Because the procedure under Rule 481 is such that the judge will not be

reviewing all of the prosecution's case, but only those portions challenged by the defendant, it might be difficult for the court to rule on all possible included offenses as a matter of course. Thus, subdivision (a), *supra*, requires the defendant to make it clear if he is also questioning the sufficiency, of the evidence for certain

lesser included offenses, and subdivision (c), *supra*, provides for the court to rule on such offenses only if the defendant has done so. The impact of clause (2) is that if such procedures are not followed, then pretrial acquittal of the offense charged does not bar prosecution for lesser included offenses.

- 1 (e) **No appeal by defendant.** The defendant may not appeal
- 2 an order denying his pretrial motion for acquittal, but the order
- 3 does not bar the defendant from moving for acquittal at trial under
- 4 Rule 522 or after trial under Rule 551.

Comment

The impact of this subdivision is that if the defendant's motion for acquittal is denied, he may not then take an immediate appeal instead of proceeding to trial. In this respect, the pretrial motion is treated in essentially the same fashion as a motion for acquittal at the conclusion of the prosecution's case at trial; in the latter situation, no immediate appeal is possible and the trial continues. While appeal from a pretrial ruling would not present the problems of immediate appeal in the midst of a trial, there are valid reasons for not permitting such an appeal. The considerations are essentially the same as those which underly the prevailing rule that a defendant may not appeal from a probable cause finding at a preliminary hearing. As to the latter, the Note to ALI Model Code of Pre-Arraignment Procedure § 330.6 (T.D. #5, 1972) observes:

Some states permit some form of higher court review of the decision to hold the defendant for trial; most do not. It

is doubtful whether a right of pretrial review would result in enough reversals to justify providing such a procedure. A California study disclosed very few cases in which the defendant was released by an appellate court for lack of probable cause. * * * It is not clear that appellate review could generally be had any sooner than trial, and to grant the defendant a right to appeal would introduce an additional pretrial step with the possibility of greater pretrial delay.

This subdivision does not speak to the question of whether, if the defendant's pretrial motion is denied and the defendant is thereafter tried and convicted, he may then raise on appeal the question of whether the judge erred in ruling on the pretrial motion. This matter is left open. A state might, on the one hand, decide to permit this question to be raised in this fashion to ensure that pretrial motions for acquittal are not routinely denied, or, on the other hand, decide that the judge's

erroneous decision before trial is of little consequence if the defendant has in fact been convicted on sufficient evidence.

This subdivision makes it clear that the denial of the pretrial motion does not bar the defendant from moving for acquittal at trial. Certainly it should not bar such a motion at the close of all the evidence, when the defendant is able to obtain judicial consideration of the case in light of the

entire case as it has actually developed, including that evidence introduced by the defendant. Nor should denial of a pretrial motion bar a motion for acquittal at the close of the prosecution's case at trial, as while the two situations are quite similar they are not necessarily identical; the prosecution's case at trial may not in fact develop in the manner which seemed likely at the time the pretrial ruling was made.

PART 9

PRETRIAL CONFERENCE

Rule 491. [Pretrial Conference.]

- 1 If a trial is likely to be protracted or otherwise unusually com-
- 2 plicated, or upon request by agreement of the parties, the trial
- 3 court may hold one or more pretrial conferences, with trial coun-
- 4 sel present, to consider the possibility of stipulations, orders, and
- 5 other steps to promote a fair and expeditious trial. At the con-
- 6 clusion of a conference a court-approved memorandum of the mat-
- 7 ters agreed upon shall be signed by counsel and filed. The memo-
- 8 randum is binding upon the parties at trial, on appeal, and in
- 9 post-conviction proceedings, unless it is set aside or modified by
- 10 the court in the interest of justice, but admissions of fact by the
- 11 defendant at the conference may be used against him only if in-
- 12 cluded in a writing signed by him.

Comment

The opening language hereof as to when conferences may be held accords with ABA Standards, Discovery and Procedure Before Trial 5.4(a) (Approved Draft, 1970). Other provisions similarly make the holding of pretrial conferences discretionary with the court. See F.R.Crim.P. 17.1; Alaska R.Crim.P. 22(a); Colo.R. Crim.P. 17.1; Fla.R.Crim.P. 3.-

220(l); Idaho Crim.R. 17.1; N. J.Rules of Court 3:13-1. Compare National Advisory Commission on Criminal Justice Standards and Goals, Courts Standard 4.10 (1973).

The specification, "with trial counsel present," derives from ABA Standard 5.4(a) and Fla.R. Crim.P. 3.220(l). Cf. Alaska R. Crim.P. 22(a). As stated in the

Commentary to the ABA Standard, "Planning with respect to conduct of a trial is merely 'wasted motion' if attempted by an attorney other than the one who will be active in the conduct of the trial."

The statement of the pretrial conference's purpose, "to consider the possibility of stipulations, orders, and other steps to promote a fair and expeditious trial," is slightly more detailed than the common reference, "to consider such matters as will promote a fair and expeditious trial." See F.R.Crim.P. 17.1; Colo.R.Crim.P. 17.1; Fla.R.Crim.P. 3.220(l); Idaho Crim.R. 17.1; N.J.Rules of Court 3:13-1. But it is not nearly so detailed as ABA Standards, Discovery and Procedure Before Trial 5.4(a) (Approved Draft, 1970), which, after specifying "to consider such matters as will promote a fair and expeditious trial," goes on to provide:

Matters which might usefully be considered include:

- (i) making stipulations as to facts about which there can be no dispute;
- (ii) marking for identification various documents and other exhibits of the parties;
- (iii) waivers of foundation as to such documents;
- (iv) excision from admissible statements of material prejudicial to a codefendant;
- (v) severance of defendants or offenses;
- (vi) seating arrangements for defendants and counsel;
- (vii) use of jurors and questionnaires;

(viii) conduct of voir dire;

(ix) number and use of peremptory challenges;

(x) procedure on objections where there are multiple counsel;

(xi) order of presentation of evidence and arguments where there are multiple defendants;

(xii) order of cross-examination where there are multiple defendants; and

(xiii) temporary absence of defense counsel during trial.

Cf. National Advisory Commission on Criminal Justice Standards and Goals, Courts Standard 4.10 and Commentary (1973). Compare Alaska R.Crim.P. 22(a).

The second sentence accords with ABA Standard 5.4(b). *Cf.* F.R.Crim.P. 17.1; Idaho Crim.P. 17.1; N.J.Rules of Court 3:13-1. Compare Alaska R.Crim.P. 22(b); Colo.R.Crim.P. 17.1.

The first part of the concluding sentence hereof accords with ABA Standard 5.4(b). *Cf.* Alaska R.Crim.P. 22(b); Colo.R.Crim.P. 17.1.

The final portion of the last sentence is similar in effect to provisions in ABA Standard 5.4(b), F.R.Crim.P. 17.1, Colo.R.Crim.P. 17.1, and N.J.Rules of Court 3:13-1. As stated in the Commentary to the ABA Standard:

This * * * is to ensure that the accused and his attorney can feel free to enter actively into the planning for the trial. The purpose of the Pretrial Conference is planning, not the acquisition of evidence.

ARTICLE V

TRIAL

PART 1. JURY

Rule

- 511. Trial by Jury or by the Court.
 - (a) Trial by jury; waiver.
 - (b) Stipulation as to size of jury.
 - (c) Additional jurors.
 - (d) Challenge to process of selecting prospective jurors.
 - (e) Trial without a jury.
- 512. Selection of Jury.
 - (a) Preliminary admonitions.
 - (b) Examination.
 - (c) Challenges for cause.
 - (d) Peremptory challenges.
- 513. Trial Jurors.
 - (a) Oath.
 - (b) Admonitions.
 - (c) Preliminary instructions.
 - (d) Sequestration.
 - (e) Note taking.
 - (f) Discharge of juror.
 - (g) Questioning jurors as to grounds for discharge.
 - (h) Discharge of jury.

PART 2. PROCEEDINGS AT TRIAL

- 521. Order of Parties' Proceeding upon Trial.
- 522. Trial Motion for Acquittal.
 - (a) Motion.
 - (b) Reservation of decision on motion.
- 523. Instructions.
 - (a) Requests for instructions.
 - (b) Hearing on instructions.
 - (c) Time for instructions.
 - (d) Limitations upon comment and instructions.
 - (e) Objections after instructions.
 - (f) Failure to object.

PART 3. SUBMISSION TO JURY

- 531. Retirement of Jury.
 - (a) Directions upon retirement.
 - (b) Submission of instructions and verdict forms.
 - (c) Submission of exhibits.
 - (d) Submission of other evidence.

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Art. 5

Rule

- 532. Jury Deliberations.
- 533. Jury Request to Review Evidence.
- 534. Additional Instructions.
 - (a) Upon request by jury.
 - (b) For correction or clarification.
 - (c) Other instructions.
 - (d) Hearing; instructions; objections; failure to object.
- 535. Verdict.
 - (a) Form.
 - (b) Return.
 - (c) Several defendants.
 - (d) Several offenses.
 - (e) Poll of jury.

PART 4. MISTRIAL

- 541. Mistrial.
 - (a) For prejudice to defendant.
 - (b) For prejudice to State.
 - (c) For impossibility of proceeding.

PART 5. POST-TRIAL MOTIONS

- 551. Post-Trial Motion for Acquittal.
 - (a) Upon mistrial.
 - (b) Upon verdict of guilty.
 - (c) Time for motion.
- 552. New Trial.
 - (a) Motion.
 - (b) Time for motion based on newly-discovered evidence.
 - (c) Time for motion based on other ground.

PART 1

JURY

Rule 511. [Trial by Jury or by the Court.]

- 1 (a) Trial by jury; waiver. If the defendant has a right to
- 2 trial by jury, the trial shall be by jury unless the defendant un-
- 3 derstandingly and voluntarily waives the right in open court, in
- 4 which case the trial shall be by the court.

Comment

This is quite similar to ABA v. Alabama, 395 U.S. 238, 89 S.Ct. Standards, Trial by Jury 1.2 (Apr. 1709, 23 L.Ed.2d 274 (1969), the proved Draft, 1968). In Boykin United States Supreme Court held

that waiver of the right to trial by jury cannot be presumed from a silent record. As to the requirement that the waiver be understandingly and voluntarily made, see ABA Standard 1.2(c); 38 Ill.Stat. § 103-6; N.Y.Crim.P. Law § 320.10(2); Pa.R.Crim.P. 1101.¹

If the defendant makes a valid waiver, the court must set the case for trial without a jury—neither the court nor the prosecuting attorney is entitled to insist on a jury.² This appears to be the practice in about one-third of the states. See Note, 51 Cornell L.Q. 339, 343 (1966). Although ABA Standard 1.2 takes no position on this matter, the Commentary thereto sets forth the following convincing arguments against allowing the prosecuting attorney or court to insist on a jury trial:

[Jury] trial is solely for the protection of the accused. The public has no interest in the method of trial other than that every defendant who wants a jury trial should get one. * *

The right of a defendant to a fair and impartial trial should carry with it the unconditional right to waive jury trial. * *

* * * There is a risk that the prosecutor may withhold his consent in order to obtain tactical advantages over the defendant. For example, the prosecutor might insist on a jury trial because of public opinion against the defendant. * * *

¹ Several states' constitutional provisions would prohibit the defendant's making a waiver, at least in serious cases. See Note, 51 Cornell L.Q. 339, 342-43 (1966). Several others would require the waiver to be in writing. See Note, 19 Wyo.L.J. 26, 29n.25 (1964).

Allowing the court to require a jury trial would enable the judge to shirk his duty and avoid the responsibility of deciding serious criminal cases. * * *

Logical consistency requires that waiver of jury trial be accorded the same treatment as a plea of guilty. Waiver of a jury trial has far less damaging results than a plea of guilty, which waives any kind of trial. If a defendant who enters a voluntary, knowing and accurate plea can do so without the approval of the court or the prosecutor * * * then he should be able to waive trial by jury in the same fashion.

* * * [I]t is in the public interest to allow waiver of jury trial. A vast amount of time and money are spent on jury trials. The requirements of consent by the prosecutor and the court are added unnecessary obstacles to the faster and more efficient trial without a jury.

Arguably it would be desirable for scheduling purposes to have a procedure for advance filing of a notice of intent, indicating whether the defendant intended to waive jury trial. Such a procedure, if deemed appropriate, might be established by local court rule under Rule 762. If there were such a procedure and the defendant's notice stated that he intended to waive jury trial, it would still be necessary for him at some stage to make an open-court waiver under this subdivision.

² Several state constitutional provisions require consent of both parties or court approval, see Note, 19 Wyo.L.J. 26, 29n.25 (1964), but it seems this subdivision can validly preclude the withholding of such consent or approval.

- 1 **(b) Stipulation as to size of jury.** At any time before ver-
- 2 dict the parties may stipulate that the jury shall consist of a num-
- 3 ber less than that otherwise required by law, if the defendant in
- 4 open court understandingly and voluntarily waives the right to
- 5 trial by a full jury.

Comment

The first part hereof, authorizing stipulation, accords with ABA Standards, Trial by Jury 1.3 (b) (Approved Draft, 1968), former Uniform Rule 34(b), F.R. Crim.P. 23(b), Alaska R.Crim.P. 23(b), Colo.R.Crim.P. 23(b), Maine R.Crim.P. 23(b), Mont.Rev. Codes § 95-1901, Nev.Rev.Stat. § 175.021(2), and Wis.Stat. § 972.02(2), except that the latter require court approval. Although it does not seem the defendant "should have the exclusive decision as to a jury of *any* size or as to whether there should be a mistrial when part of the original jury is lost," Commentary to

ABA Standard, it seems that requiring the prosecutor's stipulation is sufficient. See Idaho Crim.R. 23 (misdemeanors); Mont.Rev.Codes § 95-2005(a) (justice or police court).

The "if" clause is substantially identical to provision in subdivision (a), *supra*. See ABA Standard 1.3(c) and Commentary; 2 Wright, Federal Practice & Procedure—Criminal § 373 (1969). Some state constitutions may preclude a defendant from making the waiver, at least in serious cases. See Note, 51 Cornell L.Q. 339, 342-43 (1966).

- 1 **(c) Additional jurors.** The court may direct the selection of
- 2 additional jurors, in which case immediately before the jury re-
- 3 tires to deliberate the court shall cause the requisite number of
- 4 jurors to be chosen by lot to constitute the jury and discharge any
- 5 juror not chosen.

Comment

This uses the "additional" or "eliminated" juror system rather than the more common "alternate" system. As stated in the Commentary to ABA Standards, Trial by Jury 2.7 (Approved Draft, 1968) (which allows either system):

A preference for the additional juror system has some-

times been stated on the ground that it is undesirable to give a juror who may be involved in deciding the case second-class standing during some or all of the trial. That is, one who is labelled an alternate at the outset might not take his job as seriously as the regular jurors, as the chances of substitution

are not great. * * * In the course of upholding the Massachusetts statute, the court in *Commonwealth v. Bellino*, 320 Mass. 635, 71 N.E.2d 411 (1947), noted that the 14 jurors originally drawn listened under the sense of responsibility that resulted from the knowledge by each that by the great weight of probability he would not be discharged, but would ultimately have to pass upon the guilt of innocence of the defendant.

In form, this is quite similar to Proposed Amendment to F.R. Crim.P. 24(c) (Preliminary Draft, 1973), except that the latter provides that instead of discharging the extra jurors when the jury retires, they be made alternates who shall replace any regular jurors disabled or disqualified during deliberations, in which event the court advises the jury to review the facts with the newcomer. In rejecting this, and instead providing for discharge of the extra jurors when the jury retires, this subdivision accords with numerous provisions. See, *e. g.*, former Uniform Rule 35(d); F.R.Crim.P. 24(c); Alaska R.

Crim.P. 24(b); Colo.R.Crim.P. 24(c); Fla.R.Crim.P. 3.280; La. Code Crim.P. art. 789; N.D.R. Crim.P. 24(c); Pa.R.Crim.P. 1108(a). Similarly, ABA Standard 2.7 limits replacement to "prior to the time the jury retires to consider its verdict." Noting that a few states are contra, the Commentary thereto explains:

[The opposite approach] has been rejected * * * because of a belief that it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the prior group discussion. The New York Court of Appeals has recently declared unconstitutional a statute of that state which permitted such substitution. * * * It should also be noted that while the 1941 federal rules committee tentatively proposed a rule permitting substitution after final submission, it was withdrawn when the Supreme Court inquired whether the committee was satisfied that the provision would be constitutional.

- 1 (d) Challenge to process of selecting prospective jurors. Chal-
- 2 lenges to the manner of selecting the panel from which prospec-
- 3 tive jurors are to be drawn are [governed by Section 12 of the
- 4 Uniform Jury Selection and Service Act].

Comment

A state which does not have the Uniform Jury Selection and Service Act may include reference to its own act in the brackets, or, if it has no act covering the matter, may include language similar to the following based upon the Uni-

form Act: "by motion on the ground of substantial failure to comply with the law governing that matter. The motion shall be made within seven days after the moving party discovered or by the exercise of diligence could have

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discovered the grounds therefor, Crim.P. 3.290; 38 Ill.Stat. § 114-
and in any event before the jury 3; Mont.Rev.Codes § 95-1908;
is sworn to try the case." Com- N.Y.Crim.P.Law §§ 270.10, 360-
pare ABA Standards, Trial by 15; Pa.R.Crim.P. 1104(b), (c);
Jury 2.3 (Approved Draft, 1968); Tex.Code Crim.P. arts. 35.06-35-
Calif. Penal Code §§ 1057-1065; 08.
Colo.R.Crim.P. 24(a)(3); Fla.R.

1 (e) Trial without a jury. In a case tried without a jury the
2 court shall make a general finding. It may also make special
3 findings, and shall do so if a party at the commencement of trial
4 so requests. Special findings may be in writing or stated orally
5 on the record or may appear in an opinion or memorandum of
6 decision.

Comment

This is to the same effect as are similar except for not specifying
Proposed Amendment to F.R. ing any time for the request or
Crim.P. 23(c) (Preliminary providing for oral findings. See
Draft, 1973), except that the F.R.Crim.P. 23(c); Alaska R.
latter specifies that the request Crim.P. 23(c); Colo.R.Crim.P.
be "before the general finding" 23(d); Maine R.Crim.P. 23(c).
rather than "at the commence- Compare F.R.Civ.P. 52(a).
ment of trial." Other provisions

Rule 512. [Selection of Jury.]

1 (a) Preliminary admonitions. If the trial is to be before a
2 jury, the court shall give the prospective jurors appropriate ad-
3 monitions regarding their conduct during the selection process.
4 These shall include admonitions:

5 (1) Not to communicate with other prospective jurors or
6 anyone else upon any subject connected with the trial nor
7 form or express any opinion thereon;

8 (2) To report promptly to the court any incident involv-
9 ing an attempt by any person improperly to influence any
10 prospective juror or a violation by any prospective juror of
11 any of the court's admonitions; and

12 (3) Not to read, listen to, or view any news reports con-
13 cerning the case; the court shall explain the reasons for this
14 admonition.

Comment

This provides for admonitions process. As to the particular
to prospective jurors regarding matters covered, see the Comment
their conduct during the selection to Rule 513(b), *infra*.

1 **(b) Examination.** The court shall cause the prospective jurors
2 to be sworn or affirmed to answer truthfully the questions they
3 will be asked during the selection process, identify the parties
4 and their lawyers, and briefly outline the nature of the case.
5 The court may put to the prospective jurors appropriate ques-
6 tions regarding their qualifications to serve as jurors in the case,
7 and shall permit questioning by the parties for the purposes of
8 discovering bases for challenge for cause and enabling an intel-
9 ligent exercise of peremptory challenges. The court, upon mo-
10 tion of a party or its own motion, may direct that any portion
11 of the questioning of a prospective juror be conducted out of the
12 presence of the other prospective jurors.

Comment

The opening reference to swearing the jurors is very similar to Fla.R.Crim.P. 3.300(a). The balance of the first sentence, respecting identifying the parties and their lawyers and briefly outlining the nature of the case, derives from ABA Standards, Trial by Jury 2.4 (Approved Draft, 1968).

The opening portion of the second sentence, regarding questioning by the court, accords with a number of provisions in making it discretionary with the court whether to do the initial examining. See, *e. g.*, former Uniform Rule 35(b); F.R.Crim.P. 24(a); Alaska R.Crim.P. 24(a); Colo. R.Crim.P. 24(a); La.Code Crim. P. art. 786; Maine R.Crim.P. 24(a); Pa.R.Crim.P. 1107(B); Tex. Code Crim.P. art. 35.17(1).

In providing that the court *shall* permit questioning by the parties, the second sentence accords with numerous provisions.

See, *e. g.*, ABA Standard 2.4; Idaho Crim.R. 24(a); 38 Ill.Stat. § 115-4(f); La.Code Crim.P. art. 786; Mont.Rev.Codes § 95-1909 (c); Maine R.Crim.P. 24(a); N. Y.Crim.P.Law § 270.15(1); N.D. R.Crim.P. 24(a); Pa.R.Crim.P. 1107(B).

The second sentence's standard as to the purposes of examination is taken from ABA Standard 2.4. See ABA Standards, The Prosecution Function 5.3(c) (Approved Draft, 1971); ABA Standards, The Defense Function 7.2(c) (Approved Draft, 1971); 2 Wright, Federal Practice & Procedure—Criminal § 382 at 31 (1969).

The last sentence is similar to Pa.R.Crim.P. 1106(b) and Tex. Code Crim.P. art. 35.17. ABA Standards, Fair Trial & Free Press 3.4 (Approved Draft, 1968) requires examination outside the presence of other prospective jurors as to exposure to potentially prejudicial material.

1 **(c) Challenges for cause.** Any party may challenge a pros-
2 pective juror for cause on one or more of the following grounds:

3 (1) The prospective juror is disqualified from jury serv-
4 ice [under Section 8(b) of the Uniform Jury Selection and
5 Service Act];

(2) Any ground for challenge for cause provided by law; and

(3) The prospective juror's exposure to potentially prejudicial information makes him unacceptable as a juror. A prospective juror who has been exposed to and remembers a report of highly significant information, such as the existence or contents of a confession or other incriminating matter that may be inadmissible in evidence, or a substantial amount of inflammatory information, is subject to challenge without regard to his testimony as to his state of mind.

The challenge shall be made promptly upon the examination's conclusion, but the court for cause shown may permit it to be made later before any evidence is presented. Challenges shall be tried by the court.

Comment

In providing only for challenge by the parties, and not for excusal by the court, this accords with numerous provisions. See, *e. g.*, Alaska R.Crim.P. 24(c); Calif. Penal Code § 1071; Colo.R.Crim.P. 24(a)(2); 38 Ill.Stat. § 115-4(d); Maine R.Crim.P. 24(b); Mont.Rev.Codes § 95-1909(d)(1); Nev.Rev.Stat. § 175.036(1); N.Y. Crim.P.Law § 270.15(2); Pa.R. Crim.P. 1106(d), 1107(A)(1)(d), (2)(d); Tex.Code Crim.P. art. 35.16(a). *But see* ABA Standards, Trial by Jury 2.5 (Approved Draft, 1968); Fla.R.Crim.P. 3-300(c); La.Code Crim.P. arts. 787, 796; N.D.R.Crim.P. 24(b)(2). *Cf.* Tex.Code Crim.P. art. 35.16(a). It seems it should be the parties' rather than the judge's responsibility to challenge prospective jurors.

Clause (1) is similar to many provisions. See, *e. g.*, Alaska R. Crim.P. 24(c)(1); Calif. Penal Code § 1072(2); Colo.R.Crim.P. 24(a)(2)(i); La.Code Crim.P. art. 797(1); N.Y.Crim.P.Law §§ 270.20(1)(a), 360.25(1)(a).

Clause (2) is similar to provision in former Uniform Rule 35(a) and in Idaho Crim.R. 24(a).

Clause (3) derives from ABA Standards, Fair Trial & Free Press 3.4(b) (Approved Draft, 1968).

The penultimate sentence is very similar to ABA Standards, Trial by Jury 2.5 (Approved Draft, 1968), former Uniform Rule 35(a), and Fla.R.Crim.P. 3.310. *Cf.* La.Code Crim.P. arts. 795, 796; Mont.Rev.Codes § 95-1909(e); N.Y.Crim.P.Law § 270-15(4).

The last sentence is in accord with many provisions. See, *e. g.*, former Uniform Rule 35(a); Calif. Penal Code § 1083; Colo. R.Crim.P. 24(a)(4); Fla.R.Crim.P. 3.330; Idaho Crim.R. 24(a); Mont.Rev.Codes § 95-1909(d)(1); Nev.Rev.Stat. § 175.036(1); N.Y. Crim.P.Law §§ 270.20(2), 360.25(2); Tex.Code Crim.P. art. 35.21.

1 (d) **Peremptory challenges.** Each side is entitled to [] per-
 2 emptory challenges. If additional jurors are selected, each side
 3 is entitled to []. If there are two or more de-
 4 fendants, the court shall allow the defendants additional chal-
 5 lenges in such number as it deems proper, but each defendant is
 6 entitled to the same number as the State if a motion for severance
 7 of defendants has been denied. The parties are entitled to exer-
 8 cise their challenges alternately, out of the hearing of the pros-
 9 pective jurors, commencing with the State. If there are two or
 10 more defendants, the defendants are entitled to exercise their
 11 challenges separately.

Comment

In providing the prosecution the same number of peremptories as the defense, the first sentence accords with many provisions. See, *e. g.*, Proposed Amendment to F.R.Crim.P. 24(b)(1) (Preliminary Draft, 1973); former Uniform Rule 35(c); Calif. Penal Code § 1070; Colo.R.Crim.P. 24(b)(1); Fla.R.Crim.P. 3.350; Idaho Crim.R. 24(b); 38 Ill.Stat. § 115-4(e); La.Code Crim.P. art. 799; Mont.Rev.Codes § 95-1909(f); N.Y.Crim.P. Law § 270.25(2); N.D.R.Crim.P. 24(b)(1); Tex.Code Crim.P. art. 35.15; Wis. Stat. § 972.03.

The bracket in the second sentence might be used to denote either one additional challenge for each additional juror, or one if there are one or two additional jurors and two if there are three or four additional jurors.

Except for making it mandatory to allow *some* additional challenges, the first part of the third sentence is to the same effect as F.R.Crim.P. 24(b), Alaska R. Crim.P. 24(d), Idaho Crim.R. 24(b), Maine R.Crim.P. 24(c)(2), and N.D.R.Crim.P. 24(b)(1).

The last part of the sentence reflects the view that if the defendants would have been tried separately but for the court's finding under Rule 472(a) that "because of a significant risk that material evidence which cannot otherwise be preserved will be lost, the severance would defeat the ends of justice," in fairness they should each have the full number of challenges.

The penultimate sentence's provision for alternate exercise, commencing with the State, accords with many provisions. See, *e. g.*, Alaska R.Crim.P. 24(d); Calif. Penal Code § 1088; Colo.R.Crim.P. 24(d)(2); Maine R.Crim.P. 24(c)(2); Nev.Rev.Stat. § 175-051(3); Pa.R.Crim.P. 1106(d), 1107(a)(1)(e), (2)(f); Wis.Stat. § 972.04(1). The "out of the hearing of the prospective jurors" reference derives from a suggestion at page 78 of the Commentary to ABA Standards, Trial by Jury 2.6 (Approved Draft, 1968).

The last sentence accords with Tex.Code Crim.P. art. 35.15 and Wis.Stat. § 972.03.

Rule 513. **[Trial Jurors.]**

- 1 (a) Oath. The court shall cause the jurors to be sworn or
- 2 affirmed to try the case in a just and impartial manner and ac-
- 3 cording to the law and the evidence.

Comment

This is quite similar to La.Code N.Y.Crim.P.Law § 270.05; Pa.R. Crim.P. art. 790. Cf. Alaska R. Crim.P. 1110; Tex.Code Crim.P. Crim.P. 24(f); Fla.R.Crim.P. art. 35.22. This takes no position 3.360; Nev.Rev.Stat. § 175.111; on the issue of jury nullification.

- 1 (b) Admonitions. The court shall give the jurors appropriate
- 2 admonitions regarding their conduct during the case. These
- 3 shall include admonitions:

(1) Not to communicate with other jurors or anyone else upon any subject connected with the trial nor form or express any opinion thereon until the case is finally submitted to the jury;

(2) To report promptly to the court any incident involving an attempt by any person improperly to influence any member of the jury or a violation by any juror of any of the court's admonitions; and

(3) Not to read, listen to, or view any news reports concerning the case; the court shall explain the reasons for this admonition.



Comment

The admonitions specified in clause (1) are commonly required. See, e. g., Alaska R.Crim.P. 27(c) (1)(ii); Calif. Penal Code § 1122; Mont.Rev.Codes § 95-1913(e); Nev.Rev.Stat. § 175.401(1), (3). Cf. N.Y.Crim.P.Law § 270.40. Crim.P.Law § 270.40 except that it requires giving an explanation of the reasons for the admonition. ABA Standards, Fair Trial & Free Press 3.5(e) (Approved Draft, 1968) sets forth an appropriate admonition which includes an explanation of the reasons, and the Commentary thereto emphasizes that explaining the reasons substantially enhances the chances of compliance.

Clause (2) derives from Nev. Rev.Stat. § 175.121(b) and N.Y. Crim.P.Law § 270.40.

Clause (3) is similar to Nev. Rev.Stat. § 175.401(2) and N.Y.

- 1 (c) Preliminary instructions. The court shall give the jury
- 2 preliminary instructions appropriate for its guidance in hearing
- 3 the case. Rules 523(a), (b), (d), (e), and (f) and 531(b) apply
- 4 to preliminary instructions.

Comment

Except for making it *mandatory* to give *some* preliminary instructions, see N.Y.Crim.P.Law §§ 260.30(2), 270.40, the first sentence accords with ABA Standards, Trial by Jury 4.6(d) (Approved Draft, 1968). Cf. Calif. Penal Code § 1093(6); Mont.Rev.

Codes § 95-1910(a); Wis.Stat. § 972.10(1).

The last sentence is similar in effect to Mont.Rev.Codes § 95-1910(a) and Wis.Stat. § 972.10(1).

- 1 (d) **Sequestration.** The court upon its own motion may, and
- 2 upon motion of the defendant shall, order sequestration of the
- 3 jury if it appears the case is of such notoriety or the issues are
- 4 of such nature that, absent sequestration, highly prejudicial
- 5 matters are likely to come to the jurors' attention. The court
- 6 may order sequestration in other cases upon motion of the de-
- 7 fendant or upon motion of the State with the consent of the
- 8 defendant. A motion to sequester may be made at any time.
- 9 The jury shall not be informed which party requested sequestra-
- 10 tion.

Comment

Except for not specifying a prosecution motion, the first sentence accords with ABA Standards, Fair Trial & Free Press 3.5 (b) (Approved Draft, 1968).

Except for requiring the defendant's consent, the second sentence is similar to many provisions. See, e. g., Calif. Penal Code § 1121; 38 Ill.Stat. § 115-4(m); La.Code Crim.P. art. 791; Mont. Rev.Codes § 95-1913(a); Nev. Rev.Stat. § 175.391; N.Y.Crim.P. Law § 270.45; Pa.R.Crim.P. 1111; Tex.Code Crim.P. art. 35.32; Wis.

Stat. § 972.12. Since jurors' dislike for sequestration may turn them against the defendant, it seems sequestration other than under the first sentence should be only on his motion or with his consent.

The third sentence accords with the ABA Standard, La.Code Crim. P. art. 791, N.Y.Crim.P.Law § 270.45, Pa.R.Crim.P. 1111, and Wis.Stat. § 972.12.

The last sentence accords with the ABA Standard and Tex.Code Crim.P. art. 35.32.

- 1 (e) **Note taking.** If note taking by the jurors will likely as-
- 2 sist them in their deliberations, the court may permit them to
- 3 take notes under appropriate conditions and admonitions. The
- 4 notes may be disclosed only to fellow jurors during deliberations.

Comment

In leaving the question whether court's discretion, this takes the to permit note taking to the trial position of the federal courts and

of the great majority of the states which have ruled on the question, rather than the position of ABA Standards, Trial by Jury 4.2 (Approved Draft, 1968) and ten states that jurors invariably may take notes, or the position of two states that they invariably may not. See Commentary to the ABA Standard. As that Commentary points out, there are some dangers in note taking; the provision herein for appropriate conditions and admonitions is de-

signed to ameliorate them. Compare Nev.Rev.Stat. § 175.131 (court "shall caution them not to rely upon their respective notes in case of conflict among them, because the reporter's notes contain the complete and authentic record of the trial").

The last sentence is to the same effect as that of the ABA Standard, which provides, "Such notes should be treated as confidential between the juror making them and his fellow jurors."

1 (f) **Discharge of juror.** Upon motion of a party, the court
2 shall discharge a juror found to be disqualified or unable to per-
3 form his duties. A juror is disqualified if, had he been subject
4 to the same objection as a prospective juror, he could have been
5 successfully challenged for cause therefor and:

6 (1) The movant could not reasonably have asserted the
7 objection in a challenge for cause; or

8 (2) The motion is by the defendant, discharging the juror
9 is necessary to preserve the defendant's constitutional right
10 to an impartial jury or to a fair trial, and the defendant did
11 not understandingly and voluntarily elect not to assert the
12 objection in a challenge for cause.

Comment

Discharge is authorized only "upon motion of a party" because each party has a right to have the case tried by the jurors who have been selected, absent a proper showing by the other party. Although the court may bring matters to the parties' attention and suggest the possibility of a motion to discharge a juror, it should not discharge a juror upon its own motion.

The first sentence's "disqualified or unable to perform" standard accords with that in Alaska R. Crim.P. 27(d) and Nev.Rev.Stat. § 175.021, and with that in many

replacement-by-alternate provisions. See, e. g., ABA Standards, Trial by Jury 2.7 (Approved Draft, 1968); former Uniform Rule 35(d); F.R.Crim.P. 24(c); Alaska R.Crim.P. 24(b); Colo.R. Crim.P. 24(c); Fla.R.Crim.P. 3-280; Idaho Crim.R. 24(c); La. Code Crim.P. art. 789; Mont.Rev. Codes § 95-1909; Nev.Rev.Stat. § 175.061(1); N.D.R.Crim.P. 24(c); Pa.R.Crim.P. 1108.

The second sentence's introductory portion uses the approach of ABA Standards, Fair Trial & Free Press 3.5(f) (Approved Draft, 1968) which, however, ap-

plies only to claims of exposure during trial to prejudicial material.

Clause (1) reflects the view that the defendant and, except as provided in clause (2), the State are entitled to trial by the jurors who have been selected unless the other side shows not only grounds for discharging a juror but also that it could not reasonably have as-

serted the objection in a challenge for cause.

Clause (2) reflects the view that the defendant is entitled to an impartial jury and a fair trial except to the extent that he waived the right thereto by understandingly and voluntarily electing not to challenge a juror for cause.

- 1 (g) Questioning jurors as to grounds for discharge. The
- 2 court upon its own motion may, and upon motion of a party shall,
- 3 question a juror, outside the presence of the other jurors, as to
- 4 possible grounds for discharge of any juror.

Comment

This takes the same approach as ABA Standards, Fair Trial & Free Press 3.5(f) (Approved Draft, 1968) which, however, applies only to situations of dissemi-

nation during trial of potentially prejudicial material. Cf. Calif. Penal Code § 1120; Nev.Rev.Stat. § 175.121(c).

- 1 (h) Discharge of jury. The court shall discharge the jury
- 2 after it has rendered its verdict or a mistrial is declared.

Comment

This is rather similar to Calif. Penal Code § 1140, Fla.R.Crim.P. 3.560, Mont.Rev.Codes § 95-2006

(d), and Nev.Rev.Stat. § 175.461. See Rule 541, *infra*, on mistrial.

PART 2

PROCEEDINGS AT TRIAL

Rule 521. [Order of Parties' Proceeding upon Trial.]

- 1 Unless the court for cause otherwise permits, the parties shall
- 2 proceed with the trial in the following order:

- 3 (1) The prosecuting attorney shall make an opening state-
- 4 ment.

- 5 (2) Counsel for the defendant or, if the defendant is pro-
- 6 ceeding without counsel or the court in its discretion per-
- 7 mits, the defendant, may make an opening statement or may

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8 defer doing so until after the close of the State's case in
9 chief.

10 (3) The State shall present its case in chief.

11 (4) The defendant may present a case in chief.

12 (5) The State and the defendant may present rebuttal
13 evidence in successive rebuttals as required. The court for
14 cause may permit a party to present evidence not of a re-
15 buttal nature, but if the State is permitted to present fur-
16 ther evidence in chief the defendant may respond with fur-
17 ther evidence in chief.

18 (6) The prosecuting attorney may make a closing argu-
19 ment.

20 (7) Counsel for the defendant or, if the defendant is pro-
21 ceeding without counsel or the court in its discretion per-
22 mits, the defendant, may make a closing argument.

23 The court may allow both sides to make further argument within
24 limits it prescribes. If there are two or more defendants and
25 they do not agree as to their order of proceeding, the court shall
26 determine their order of proceeding.

Comment

Provisions on order of pro-
ceeding upon trial are quite com-
mon. See, *e. g.*, Alaska R.Crim.
P. 27(a); Calif. Penal Code §§
1093 to 1095; La.Code Crim.P.
art. 765; Mont.Rev.Codes §§ 95-
1910, 95-1911; Nev.Rev.Stat. §§
175.141, 175.151; N.Y.Crim.P.
Law §§ 260.30, 360.05; Tex.Code
Crim.P. arts. 36.01, 36.02, 36.07;
Wis.Stat. § 972.10.

The introductory portion here-
of is to the same effect as Calif.
Penal Code § 1094 and Mont.Rev.
Codes § 95-1911. See La.Code
Crim.P. art. 765; N.Y.Crim.P.
Law § 260.30; Tex.Code Crim.P.
art. 36.02.

Clause (1) is to the same effect
as Alaska R.Crim.P. 27(a)(1),
La.Code Crim.P. art. 765(4),
Mont.Rev.Codes § 95-1910(b),
N.Y.Crim.P.Law § 260.30(3), Pa.

R.Crim.P. 1116(a), and Tex.Code
Crim.P. art. 36.01(3). See Calif.
Penal Code § 1093(2); Nev.Rev.
Stat. § 175.141(2).

Clause (2)'s reference to who
makes the defense opening state-
ment is rather similar to provi-
sions which specify "the defend-
ant or his counsel." See Alaska
R.Crim.P. 27(a)(2); Calif. Penal
Code § 1093(3); Nev.Rev.Stat.
§ 175.141(2). *Cf.* Pa.R.Crim.P.
1116(a). Others specify "the de-
fendant." See Mont.Rev.Codes §
95-1910(b); N.Y.Crim.P.Law §
260.30(4); Wis.Stat. § 972.10
(2). *Cf.* La.Code Crim.P. art.
765(4). Compare Tex.Code Crim.
P. art. 36.01(5) ("defendant's
counsel"). Some state constitu-
tions provide that a criminal de-
fendant may defend in person or
by counsel *or both*. See United

States v. Plattner, 330 F.2d 271, 275 nn.6-8 (2d Cir. 1964). Under such provisions or otherwise, some states might recognize a right on the part of a defendant with counsel to make an opening statement personally. It seems that unless required by state constitution no such right should be recognized, and that it should be left to the court's discretion whether to allow a defendant with counsel to make an opening statement personally.

In making it permissive rather than mandatory for the defense to make an opening statement, clause (2) accords with Calif. Penal Code § 1093(3), La.Code Crim.P. art. 765, Mont.Rev.Codes § 95-1910(b), Nev.Rev.Stat. § 175.141(2), N.Y.Crim.P.Law § 250.30(4), Pa.R.Crim.P. 1116(a), and Wis.Stat. § 972.10(2). *But see* Alaska R.Crim.P. 27(a)(2)(ii); Tex.Code Crim.P. art. 36.01(5).

In allowing the defense to elect to make its opening statement after rather than before the state's case in chief, clause (2) accords with Alaska R.Crim.P. 27(a)(2)(ii), Mont.Rev.Codes § 95-1910(b), Nev.Rev.Stat. § 175.141(2), and Pa.R.Crim.P. 1116(a). *But see* La.Code Crim.P. art. 765(4); N.Y.Crim.P.Law § 260.30(4). Compare Calif. Penal Code § 1093(3) (after prosecution's case); Tex.Code Crim.P. art. 36.01(5) (same).

Clauses (3) and (4) are to the same effect as provisions in Alaska R.Crim.P. 27(a)(3), Calif. Penal Code § 1093(2), (3), La. Code Crim.P. art. 765(5), Mont. Rev. Codes § 95-1910(b), Nev.

Rev.Stat. § 175.141(3), N.Y.Crim.P.Law § 260.30(5), (6), Tex. Code Crim.P. art. 36.01(4), (6), and Wis.Stat. § 972.10(3). Use of the term "case in chief" derives from F.R.Crim.P. 16(a)(1)(E) (government's), 16(b)(1)(C) (defendant's) and Alaska R. Crim.P. 27(a)(2)(ii) (State's).

Clause (5) is rather similar to Calif. Penal Code § 1093(4), which provides, "The parties may then respectively offer rebutting testimony only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case," *cf.* Mont.Rev.Codes § 95-1910(c); Nev.Rev.Stat. § 175.141(4); Tex.Code Crim.P. arts. 36.01(7), 36.02; Wis.Stat. § 972.10(3), and to N.Y.Crim.P.Law § 260.30(7), which provides:

The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or sur-rebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.

The last part of clause (5)'s concluding sentence reflects the view that since the defendant is entitled to offer evidence in chief in response to the State's original evidence in chief, he should be entitled to do so in response to

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later-permitted State evidence in chief.

Clause (6) is to the same effect as provision in Alaska R.Crim.P. 27(a)(4), Calif. Penal Code § 1093(5), and Mont.Rev.Codes § 95-1910(f). See F.R.Crim.P. 29.1, Maine R.Crim.P. 30(a), Nev.Rev.Stat. § 175.151, and Wis.Stat. § 972.10(6), each of which makes it mandatory for the prosecution to open the closing arguments. Cf. La.Code Crim.P. art. 765(6). It seems it should not be mandatory, particularly since this Rule applies to bench trials as well as jury trials. Under several provisions, the *defense* gives the first closing argument. See N.Y.Crim.P. Law § 260.30(8), (9); Pa.R.Crim.P. 1116(b). Compare Tex. Code Crim.P. art. 36.07 (up to court who goes first). It seems that since the State has the burden of proof and since, as stated in the Advisory Committee Note to the recently-added F.R.Crim.P. 29.1 (Preliminary Draft, 1970), "fair and effective administration of justice is best served if the defendant knows the argument actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply," the State should commence the argument.

Clause (7) is similar in effect to provision in F.R.Crim.P. 29.1,

Alaska R.Crim.P. 27(a)(4), Calif. Penal Code § 1093(5), La.Code Crim.P. art. 765(6), Maine R. Crim.P. 30(a), Mont.Rev.Codes § 95-1910(f), and Nev.Rev.Stat. § 175.151. The considerations regarding the reference to who makes the defense argument are set forth earlier in this Comment, in the discussion of clause (2).

The penultimate sentence differs from the general approach of providing a rebuttal argument to the prosecution only, see F.R. Crim.P. 29.1; Alaska R.Crim.P. 27(a)(4); Calif. Penal Code § 1093(5); La.Code Crim.P. art. 765(6); Maine R.Crim.P. 30(a); Mont.Rev.Codes § 95-1910(f); Nev.Rev.Stat. § 175.151; Wis. Stat. § 972.10(6), cf. N.Y.Crim.P. Law § 260.30(9); Pa.R.Crim.P. 1116(b); Tex.Code Crim.P. art. 36.07. It rather leaves to the court's discretion whether to permit further argument, and provides for allowing both sides to make a further argument, so that if the State is permitted to make a rebuttal argument the defense has an opportunity to be heard as to it. Cf. Minn.Stat. § 631.07 (State shall commence and defendant conclude the closing argument).

The last sentence is quite similar to La.Code Crim.P. art. 765 and Mont.Rev.Codes § 95-1910(f).

Rule 522. [Trial Motion for Acquittal.]

- 1 (a) Motion. After the close of the State's case in chief or at
- 2 the close of all the evidence, on motion of the defendant or upon
- 3 its own motion, the court shall order the entry of a judgment
- 4 of acquittal as to any offense charged or lesser included offense
- 5 for which the evidence would not reasonably permit a finding of
- 6 guilty beyond a reasonable doubt.

Comment

This is identical in substance to many provisions, see, *e. g.*, ABA Standards, Trial by Jury 4.5(a) (Approved Draft, 1968); former Uniform Rule 38(a); F.R.Crim.P. 29(a); Alaska R. Crim.P. 29(a); Calif. Penal Code § 1181.1; Colo.R.Crim.P. 29(a); Idaho Crim.R. 29(a); Maine R. Crim.P. 29(a); N.J.Rules of Court 3:18-1; N.D.R.Crim.P. 29(a), except that it specifies "any offense charged or lesser included offense" rather than "one or more offenses charged" and specifies the standard rather than merely "the evidence is insuff-

ficient to sustain a conviction." As to the standard, see Comment to Rule 481(c), *supra*.

This takes no position on the practice existing in some states of allowing the motion to be made on the basis of the State's opening statement, *e. g.*, where the opening statement shows a fatal flaw in the State's case. Under such a practice it seems the motion should not be granted without giving the prosecutor an opportunity to correct the statement.

- 1 (b) **Reservation of decision on motion.** If the motion is made
- 2 after the close of the State's case in chief, the court shall rule
- 3 upon it before calling upon the defendant to present his case in
- 4 chief. If it is made at the close of all the evidence in a jury case,
- 5 the court may reserve decision and decide it while the jury is
- 6 deliberating or after it returns a guilty verdict or is discharged
- 7 without having returned a verdict.

Comment

The first sentence is supported by ABA Standards, Trial by Jury 4.5(b) (Approved Draft, 1968) and Colo.R.Crim.P. 29(a) which expressly forbid reserving decision where the motion is made at the end of the State's case. It is also supported by negative inference from those provisions which, like the second sentence, authorize reservation of decision *if* the motion is made at the close of all the evidence.

The second sentence is substantially identical to many provisions. See, *e. g.*, ABA Standard 4.5(b); former Uniform Rule 38(b); F.R.Crim.P. 29(b); Alaska R.Crim.P. 29(b); Colo. R.Crim.P. 29(b); Idaho Crim. R. 29(b); Maine R. Crim.P. 29(a).

Rule 523. [Instructions.]

- 1 (a) **Requests for instructions.** At the close of the evidence,
- 2 or at an earlier time during the trial as the court reasonably

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3 directs, any party may submit to the court written requests that
4 it instruct the jury on the law as set forth in the requests.

Comment

This is substantially identical (b). See ABA Standards, Trial to the first sentence of F.R.Crim. by Jury 4.6(b) (Approved Draft, P. 30, Alaska R.Crim.P. 30(a), 1968). The requests must be Idaho Crim.R. 30, Maine R.Crim. served upon each party by virtue P. 30(b), and N.D.R.Crim.P. 30 of Rule 752(a), *infra*.

1 **(b) Hearing on instructions.** Before closing arguments, the
2 court shall conduct a hearing out of the presence of the jury, at
3 which it shall afford the parties an opportunity to be heard as
4 to what instructions should be given, furnish the parties a copy
5 of all instructions it proposes to give, and afford them an oppor-
6 tunity to object to any proposed instruction or omission of in-
7 struction. An objection shall state with particularity the mat-
8 ter objected to and the grounds for the objection. If the court
9 determines after closing arguments that other instructions should
10 be given, it shall conduct another hearing as to them.

Comment

This type of proceeding is re- by virtue of Rule 754(a)(10), *in-*
quired by ABA Standards, Trial *fra*, but this subdivision does not
by Jury 4.6(c) (Approved Draft, preclude the common practice of
1968), 110 Ill.Stat. § 67, and conducting an informal confer-
Mont.Rev.Codes § 95-1910(d), ence (which per Rule 754(a)(13)
and is strongly recommended in need be recorded only upon re-
2 Wright, Federal Practice & Pro- quest of a party), *in addition* to
cedure—Criminal § 484 (1969). the hearing provided hereby.
The proceeding must be recorded

1 **(c) Time for instructions.** The court shall read the instruc-
2 tions to the jury after closing arguments, but if all parties con-
3 sent it may read some or all of them before closing arguments.

Comment

Except for giving the court dis- (d) (Approved Draft, 1968); F.R.
cretion, with the parties' consent, Crim.P. 30; 38 Ill.Stat. § 115-4
to read some or all of the instruc- (i); La.Code Crim.P. art. 801;
tions before closing arguments, Maine R.Crim.P. 30(b); N.Y.
this accords with Alaska R.Crim. Crim.P.Law § 300.10(1); N.D.
P. 30(a). Many other provisions R.Crim.P. 30(a); Pa.R.Crim.P.
specify giving instructions after 1119(a). A number of other pro-
closing arguments. See, *e. g.*, visions also require *reading* the
ABA Standards, Trial by Jury 4.6 instructions. See, *e. g.*, Colo.R.

Crim.P. 30; Mont.Rev.Codes § 95-1910(e); Nev.Rev.Stat. § 175-161(1); Tex.Code Crim.P. art. 36.14. See N.D.R.Crim.P. 30(a). Requiring the instructions to be in writing is necessary to fully afford the parties an opportunity to object to them before closing arguments and to make closing arguments in light of the instructions. Further, Rule 531(b), *infra*, requires submitting a copy of the instructions to the jury.

1 (d) **Limitations upon comment and instructions.** The court
2 may not summarize the evidence, express or otherwise indicate
3 to the jury any personal opinion on the weight or credibility of
4 any evidence, nor give any instruction regarding the desirability
5 of reaching a verdict other than a single instruction that informs
6 the jury substantially as follows:

7 (1) In order to return a verdict, each juror must agree
8 thereto;

9 (2) Jurors have a duty to consult with one another and
10 to deliberate with a view to reaching an agreement, if it can
11 be done without violence to individual judgment;

12 (3) Each juror must decide the case for himself, but only
13 after an impartial consideration of the evidence with his
14 fellow jurors;

15 (4) In the course of deliberations, a juror should not
16 hesitate to reexamine his own views and change his opinion
17 if convinced it is erroneous; and

18 (5) No juror should surrender his honest conviction as
19 to the weight or effect of the evidence solely because of the
20 opinion of his fellow jurors, or for the mere purpose of re-
21 turning a verdict.

Comment

In prohibiting summarization of the evidence, this accords with La.Code Crim.P. arts. 772, 806 and Tex.Code Crim.P. art. 36.14, and with the ABA House of Delegates' decision to delete ABA Standards, Trial by Jury 4.7 (*Tentative Draft*, May 1968), which would have permitted some summarization and comment upon the evidence. Cf. Colo.R.Crim.P. 30 (court "shall not comment upon the evidence").

The prohibition on indicating personal opinion on the evidence is very similar to that in ABA Standards, The Function of the Trial Judge 5.6(a) (Approved Draft, 1972). See La.Code Crim.P. arts. 772, 806; Tex.Code Crim.P. art. 36.14.

The balance of this subdivision derives from ABA Standards, Trial by Jury 5.4(a) (Approved Draft, 1968). See ABA Standards, The Function of the Trial Judge 5.12(b).

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- 1 (e) **Objections after instructions.** Before the jury retires for
2 deliberations, each party shall be afforded an opportunity out
3 of the hearing of the jury and, upon the request of any party,
4 out of the presence of the jury, to object to any instruction or
5 omission of instruction. Unless otherwise permitted by the court
6 in the interest of justice, a party may object only to a matter
7 to which he could not reasonably have objected under subdivision
8 (b). An objection shall state with particularity the matter ob-
9 jected to and the grounds for the objection.

Comment

The first sentence is substan-
tially identical to provision in F.R.
Crim.P. 30 and, except for pro-
ceeding out of the jury's presence
only upon request, to provision in
former Uniform Rule 39, Alaska
R.Crim.P. 30(a), and Maine R.
Crim.P. 30.

The second sentence reflects the
view that except as to matters
to which the party could not rea-
sonably have objected at the hear-
ing on instructions—*e. g.*, the
manner of reading the instruc-

tions, see 2 Wright, Federal Prac-
tice & Procedure—Criminal § 484
at 287 (1969), or *misreading* of
them—the party should be able to
object at this late point only if
permitted by the court in the in-
terest of justice.

The last sentence is to the same
effect as provision in ABA Stand-
ards, Trial by Jury 4.6(c) (Ap-
proved Draft, 1968), former Uni-
form Rule 39, F.R.Crim.P. 30,
Alaska R.Crim.P. 30(a), and
Maine R.Crim.P. 30(b).

- 1 (f) **Failure to object.** Unless otherwise permitted on the
2 ground that it is required in the interest of justice, no party may
3 assign as error any instruction or omission of instruction unless
4 he objected thereto under subdivision (b) or (e).

Comment

This is very similar to provi-
sion in former Uniform Rule 39,
F.R.Crim.P. 30, Alaska R.Crim.P.
30(a), Maine R.Crim.P. 30(b),
and Pa.R.Crim.P. 1119(b). *Cf.*
Mont.Rev.Codes § 95-1910(d);
Wis.Stat. § 972.10(5). The "un-

less" clause derives from the last
sentence of ABA Standards, Trial
by Jury 4.6(c) (Approved Draft,
1968). *Cf.* Calif. Penal Code §
1259; 2 Wright, Federal Practice
& Procedure—Criminal § 484 at
290-91 (1969).

PART 3

SUBMISSION TO JURY

Rule 531. [Retirement of Jury.]

- 1 (a) **Directions upon retirement.** The court shall direct the
2 jury to select one of its members to preside over the deliberations
3 and sign any verdict agreed upon, and admonish the jurors that
4 until they are discharged as jurors in the case they may com-
5 municate upon subjects connected with the trial only while the
6 jury is convened in the jury room.

Comment

As to the court's direction, this accords with Fla.R.Crim.P. 3.391. *Cf.* Alaska R.Crim.P. 27(e); La. Code Crim.P. art. 792; Pa.R.Crim.P. 1120(a); Tex.Code Crim.P. art. 36.26. As to the description of the presiding juror's duties, this accords with La.Code Crim.P. art. 792. See Alaska R.Crim.P. 27(e). As to the admonition, see Alaska R.Crim.P. 27(c)(2).

- 1 (b) **Submission of instructions and verdict forms.** The court
2 shall submit to the jury one or more copies of the written in-
3 structions and appropriate written forms of verdict.

Comment

As to the instructions, this accords with Calif. Penal Code § 1137, Colo.R.Crim.P. 30, Nev.Rev. Stat. § 175.441(2), N.D.R.Crim.P. 30(a), and Tex.Code Crim.P. art. 36.18. See pages 119-20 of Commentary to ABA Standards, Trial by Jury 4.6(d) (Approved Draft, 1968). As to verdict forms, this accords with Colo.R. Crim.P. 31(a)(1) and 38 Ill.Stat. § 115-4(j). See La.Code Crim.P. art. 809. *Cf.* Fla.R.Crim.P. 3.400 (b); N.Y.Crim.P.Law § 310.20 (2). Compare F.R.Civ.P. 49(b).

- 1 (c) **Submission of exhibits.** The court shall submit to the jury
2 all exhibits, other than depositions, received in evidence, except
3 exhibits which:

- 4 (1) The parties agree shall not be submitted; or
5 (2) The court, upon motion of a party made any time be-
6 fore the jury retires, excludes from the submission. The
7 court may grant the motion if it appears (i) the submission
8 would unduly prejudice the party or (ii) the exhibit would
9 likely be improperly used by the jury.

Comment

This is to the same effect as ABA Standards, Trial by Jury 5.1 (Approved Draft, 1968), except that rather than having the court's discretion operate on the question whether to submit exhibits it has it operate on the question whether to exclude them from the submission. It seems that the general rule should be that all exhibits (other than depositions) should be submitted, because if the court picks and chooses among them the jury is likely to infer that the court deems those chosen more significant than those not chosen and is likely to place undue emphasis upon them.

Under clause (1), if the exhibits are voluminous the parties might agree that some of them need not be sent to the jury room.

The factors set forth in clause (2)'s last sentence derive from subdivision (b)(ii) and (iii) of the ABA Standard. Other provisions which give the court discretion as to which exhibits other than depositions should be submitted include Fla.R.Crim.P. 3.400 (a), Mont.Rev.Codes § 95-1913 (c), N.Y.Crim.P.Law § 310.20, and Pa.R.Crim.P. 1114. As stated in the Commentary to the ABA Standard, there is a split of authority on whether it is error to send written confessions or admissions to the jury room, and it would appear that they should normally be excluded under clause (2) as unduly prejudicial.

- 1 (d) Submission of other evidence. Upon agreement of the
- 2 parties, the court shall submit to the jury other evidence
- 3 which has been received, including any part of a deposition or
- 4 of a prepared transcript or recording of the testimony.

Comment

It seems that if the parties agree, depositions or parts of the transcript should be submitted to the jury. See Md.R.Proc. 558(d) (depositions with parties' agreement and court's consent).

Rule 532. [Jury Deliberations.]

- 1 The jurors shall be kept together for deliberations as the court
- 2 reasonably directs. If the court permits the jury to recess its
- 3 deliberations, it shall admonish the jurors not to discuss the case
- 4 until they reconvene in the jury room. If the deliberations are
- 5 recessed, the jurors shall be sequestered unless, upon consent of
- 6 the parties, the court otherwise orders.

Comment

The first sentence is subject to by Jury 5.4(b) (Approved Draft, 1968), which states, "The court

shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."

The second sentence derives from Alaska R.Crim.P. 27(c)(2);

(e)(2). *Cf.* Tex.Code Crim.P. art. 35.23.

The last sentence accords with Alaska R.Crim.P. 27(e)(2) and Tex.Code Crim.P. art. 35.23. *Cf.* Fla.R.Crim.P. 3.370(b).

Rule 533. [Jury Request to Review Evidence.]

- 1 If the jury, after retiring for deliberations, requests a review
- 2 of any evidence, the court, after notice to the parties, shall re-
- 3 call the jury to the courtroom. If the jury's request is reason-
- 4 able, the court shall have any requested portion of the testimony
- 5 read or played back to the jury and permit the jury to reexamine
- 6 any requested exhibit received in evidence. The court need not
- 7 submit evidence to the jury for review beyond that specifically
- 8 requested by the jury, but the court also may have the jury re-
- 9 view other evidence relating to the same factual issue in order
- 10 to avoid undue emphasis on the evidence requested. If it is likely
- 11 that the jury cannot otherwise adequately consider any evidence
- 12 reviewed, the court may permit the jury to take the evidence, in-
- 13 cluding any part of a deposition or of a prepared transcript or
- 14 recording of the testimony, to the jury room if it appears (1)
- 15 no party will be unduly prejudiced and (2) the evidence is not
- 16 likely to be improperly used by the jury.

Comment

The first three sentences hereof are to the same effect as ABA Standards, Trial by Jury 5.2 (Approved Draft, 1968). Compare Calif. Penal Code § 1138; Fla.R. Crim.P. 3.410; Mont.Rev.Codes § 95-1913(d); Nev.Rev.Stat. § 175-451; N.Y.Crim.P.Law § 310.30; Tex.Code Crim.P. art. 36.28.

Under the second sentence, if the jury's request is reasonable, the court must permit the jury to reexamine exhibits even though

they have been excluded from the submission under Rule 531(c), *supra*.

The last sentence is rather similar to provision in La.Code Crim. P. art. 793 and Tex.Code Crim.P. art. 36.25. The reference "any evidence reviewed" includes not only that requested but also any evidence submitted under the third sentence to avoid undue emphasis.

Rule 534. [Additional Instructions.]

- 1 (a) Upon request by jury. If the jury, after retiring for de-
- 2 liberations, requests additional information, the court, after no-
- 3 tice to the parties, shall recall the jury to the courtroom and give

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4 additional instructions necessary to respond properly to the re-
5 quest or direct the jury's attention to a portion of the original in-
6 structions.

Comment

This is quite similar to ABA Crim.P. 3.410; La.Code Crim.P. Standards, Trial by Jury 5.3(a) art. 808; Mont.Rev.Codes § 95- (Approved Draft, 1968). Cf. 1913(d); Nev.Rev.Stat § 175.451; Calif. Penal Code § 1138; Fla.R. N.Y.Crim.P.Law § 310.30.

1 **(b) For correction or clarification.** The court, after notice
2 to the parties, may recall the jury to the courtroom and give it
3 additional instructions in order to:

- 4 (1) Correct or withdraw an erroneous instruction;
5 (2) Clarify an ambiguous instruction; or
6 (3) Instruct the jury on any matter which should have
7 been covered in the original instructions.

Comment

This is substantively identical to the Trial Judge 5.11(b) (Ap- ABA Standards, Trial by Jury 5.3 proved Draft, 1972). Cf. Fla.R. (c) (Approved Draft, 1968) and Crim.P. 3.420; Pa.R.Crim.P. 1119 ABA Standards, The Function of (c).

1 **(c) Other instructions.** If the court gives additional instruc-
2 tions, it also may give or repeat other instructions in order to
3 avoid undue emphasis on the additional instructions.

Comment

This is to the same effect as
ABA Standards, Trial by Jury 5.3
(b) (Approved Draft, 1968).

1 **(d) Hearing; instructions; objections; failure to object.** Be-
2 fore giving additional instructions the court shall conduct a hear-
3 ing as provided in Rule 523(b). Rules 523(d), (e), and (f)
4 and 531(b) apply to additional instructions.

Comment

This is similar in effect to ABA the additional instructions must Standards, Trial by Jury 5.3(d) be submitted to the jury. See the (Approved Draft, 1968). Cf. Tex. Commentary to the ABA Stand- Code Crim.P. art. 36.27. Like the ard.
original instructions, a copy of

Rule 535. [Verdict.]

- 1 (a) **Form.** The verdict shall be in writing and be general [but
 2 if the defendant interposes a defense that cannot be reflected in
 3 a general verdict and evidence thereof is given at trial, the jury,
 4 if it so finds, shall declare the finding in its verdict]. [The ver-
 5 dict shall be accompanied by any special findings required by
 6 law.] With the consent of the parties, the court may authorize
 7 rendition of a sealed verdict under conditions it directs.

Comment

Requiring the verdict to be in writing is in line with many provisions. See, *e. g.*, Alaska R.Crim.P. 27(e); Colo.R.Crim.P. 31(a) (3); Fla.R.Crim.P. 3.440; La. Code Crim.P. art. 810; Mont.Rev. Codes § 95-1915(a); Tex.Code Crim.P. art. 37.04.

The requirement that the verdict be general derives from Mont. Rev.Codes § 95-1909(h) and Tex. Code Crim.P. art. 37.07(1). As pointed out in 2 Wright, Federal Practice & Procedure—Criminal § 512 (1969), "Special verdicts might be acceptable if the only duty of the jury were to find the facts, leaving it to the court to

apply the law," but "In criminal cases, however, it has always been the function of the jury to apply the law, as given by the court in its charge, to the facts."

Some states may deem it appropriate to include one or both of the bracketed references. The first derives from N.D.R.Crim.P. 31(e)(4). *Cf.* Alaska R.Crim.P. 31(e)(2).

The last sentence is rather similar to former Uniform Rule 40(a), Alaska R.Crim.P. 31(f), Colo.R. Crim.P. 31(a)(2), Fla.R.Crim.P. 3.470, 38 Ill.Stat. § 115-4(l), and Pa.R.Crim.P. 1121.

- 1 (b) **Return.** The verdict must be unanimous. It shall be re-
 2 turned by the jury in open court.

Comment

This is in accord with many provisions. See, *e. g.*, F.R.Crim.P. 31(a); Alaska R.Crim.P. 31(a); Colo.R.Crim.P. 31(a)(3); Maine R.Crim.P. 31(a); Mont.Rev.Codes § 95-1915(a); Nev.Rev.Stat. § 175.481; N.D.R.Crim.P. 31(b).

Jury unanimity is required in all criminal cases in almost all the states. *But see* La.Code Crim.P. art. 782 (9/12 where punishment not necessarily at hard labor); Ore.Const. art. 1, § 11 (10/12

except first degree murder). It is so required even in the states with constitutions permitting non-unanimous verdicts in misdemeanor cases. *Compare* Idaho Const. art. 1, § 7 *with* Idaho Crim.R. 31(a); Mont.Const. art. 3, § 23 *with* Mont.Rev.Codes §§ 95-1915(a), 95-2006(a); Okla. Const. art. 2, § 19 *with* 22 Okla. Stat. § 921; Tex.Const. art. 5, § 13 *with* Tex.Code Crim.P. arts. 37.02-37.05. It is interesting to note that the Montana stat-

utes were amended to substitute a unanimity requirement for the former allowance of 2/3 verdicts for misdemeanors and cases in and appeals from justice and police courts in 1973, *after* the Court in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) held that the Constitution does not require unanimous verdicts in state criminal trials.¹

Moreover, it should be noted that the five-man majority in *Apodaca* included one justice (Powell) who believed, with the four dissenters, that the Sixth Amendment requires unanimity, *id.* at 369-71 (concurring opinion) (he was the only justice to conclude that the Fourteenth Amendment requires less for juries than the Sixth) and one justice (Blackmun) who stated:

My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy. Our test here, however, is not to pursue and strike down what happens to impress us as undesirable legislative policy. [*Id.* at 366 (concurring opinion).]

Apodaca leaves it open for the states to dispense with the requirement of unanimous verdicts. For each of the reasons discussed below, it seems they should not do so.

Uniformity

It seems there should be uniformity as to defendants' entitlement to a unanimous jury. Under *Apodaca*, unanimity remains required in the federal courts by the Sixth Amendment, and it is still

required in almost all the states. According to the Commentary to ABA Standards, Trial by Jury 1.1 (d) (Approved Draft, 1968), "the great majority of states" would have to change their state constitutions to alter this. (Some state constitutions *expressly* require unanimity, and *Apodaca* should not impel courts to construe those which do not to allow non-unanimity, since only a minority of the *Apodaca* Court so construed the Sixth Amendment.) The *almost* "unanimous verdict" of the states that criminal juries should be unanimous deserves great respect.

Reliability

As stated in Holtzoff, *Modern Trends in Trial by Jury*, 16 Wash. & Lee L.Rev. 27 (1959), "Unanimity is important and vital, for two reasons: first, it leads to a more thorough consideration of the questions at issue and a more careful deliberation in the jury room than might otherwise be the case, since debate and discussion must continue until a unanimous verdict is reached; and second, the fact that the verdict is unanimous is in itself strong assurance of its fairness and justice." That continuation of the unanimity requirement is essential to the maintenance of the jury's reliability is shown in the *Apodaca* dissent of Mr. Justice Douglas (joined by Brennan and Marshall, JJ.):

[Abandoning unanimity] eliminates the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to

convict only on a lesser-included offense. * * *

The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required * * * even though the dissident jurors might, if given the chance, be able to convince the majority. Such persuasion does in fact occasionally occur in States where the unanimous requirement applies: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance." [Citing *Kalvin & Zeisel, The American Jury* 490 (1966).] * * *

It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity. * * * [I]n *Apodaca's* [10-2 verdict] case, whatever courtesy dialogue transpired could not have lasted more than 41 minutes. I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study. [*Id.* at 388-90 (dissenting opinion).]

The commentators agree that retaining unanimity is essential to maintain the jury's reliability. See 24 Case W.Res.L.Rev. 227, 230-31 (1972); 7 Ga.L.Rev. 339, 351-53, 357 (1973); 86 Harv.L.Rev. 148, 153n.38 (1972); 51 N.C.L.Rev. 134, 139 (1972). Moreover, contrary to Mr. Justice Douglas' implied admission, it seems that there is empirical evidence which indicates that majority jurors refuse to listen to dissenters whose votes are unneeded for conviction. As stated in 86 Harv.L.Rev. 148, 153 (1972):

Empirical evidence exists to indicate that, in nonunanimous verdict states, the jury often stops deliberating once the requisite majority is reached. One study found that in states requiring a unanimous verdict, only 2.4% of all juries are hung by one or two dissenters. Yet the number of ten or eleven man majority verdicts in Oregon constitutes 25% of all cases for which nonunanimous verdicts are possible.

Accord, 24 Case W.Res.L.Rev. 339, 353 (1973); 7 Ga.L.Rev. 339, 353 (1973); 7 Val.U.L.Rev. 249, 252-53 (1973).

Change would alter conviction-acquittal ratio

Nonunanimity "permits prosecutors * * * to enjoy a conviction-acquittal ratio substantially greater than that ordinarily returned by unanimous juries," whereas the Court in *Williams v. Florida*, 399 U.S. 78, 101-02, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) had indicated a change in criminal juries would be upheld only if not necessarily disadvantageous to de-

fendants. *Apodaca* at 388, 390 (Douglas, J., dissenting). Kalven and Zeisel's studies show that in cases that would otherwise be "hung" with one, 2, or 3 dissenters, "Louisiana wins 44 cases for every 12 that it loses," and that "by eliminating the one-and-two-dissenting juror cases, Oregon does even better, gaining 4.25 convictions for every acquittal." *Id.* at 391 (dissent). Other authorities agree that nonunanimity appears to disadvantage defendants. See Commentary to ABA Standards, Trial by Jury 1.1(d) (Approved Draft, 1968); 24 Case W.Res.L.Rev. 227, 239-40 (1972); 51 N.C.L.Rev. 134, 141-42 (1972); 18 Vill.L.Rev. 302, 308 (1972).

Effectuating proof beyond reasonable doubt requirement

Retaining unanimity is required to effectuate the defendant's right to be convicted only on proof beyond a reasonable doubt. As stated in the *Apodaca* dissent of Mr. Justice Marshall (joined by Brennan, J.):

The Court asserts that when a jury votes nine to three for conviction, the doubts of the three do not impeach the verdict of the nine. The argument seems to be that since, under *Williams*, nine jurors are enough to convict, the three dissenters are mere surplusage. But there is all the difference in the world between three jurors who are not there, and three jurors who entertain doubts after hearing all the evidence. In the first case we can never know, and it is senseless to ask, whether the prosecutor might have persuaded additional jurors had they

been present. But in the second case we know what has happened: the prosecutor has tried and failed to persuade those jurors of the defendant's guilt. In such circumstances, it does violence to language and logic to say that the government has proved the defendant's guilt beyond a reasonable doubt.

It is said that this argument is fallacious because a deadlocked jury does not, under our law, bring about an acquittal or bar a retrial. * * * But * * * the reasonable-doubt rule, properly viewed, simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury's reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so. That is a question to be answered with reference to a wholly different constitutional provision, the Fifth Amendment ban on double jeopardy * * *.

* * * The State is free, consistent with the ban on double jeopardy, to treat the verdict of a nonunanimous jury as a nullity rather than as an acquittal. * * * Because the second trial may vary substantially from the first, the doubts of the dissenting jurors at the first trial do not necessarily impeach the verdict of a new jury on retrial. But that conclusion is wholly consistent with the view that the doubts of dissenting jurors create a constitutional bar to conviction at the trial that produced those doubts. [*Id.* at 400-02 (dissent).]

See also *id.* at 391-93 (Douglas, J., dissenting). Other authorities, after carefully analyzing the question, also conclude that jury unanimity is needed to effectuate the proof beyond a reasonable doubt requirement. See 24 Case W.Res.L.Rev. 227, 230-32 (1972); 7 Ga.L.Rev. 339, 358-61 (1973); 86 Harv.L.Rev. 148, 154-55 (1972); 51 N.C.L.Rev. 134, 140 (1972); 7 Val.U.L.Rev. 249, 258-62 (1973); 18 Vill.L.Rev. 302, 312-13 (1972). As stated in 24 Case W.Res.L.Rev. 227, 232 (1972):

The function of the reasonable doubt standard to inspire community trust in criminal verdicts is * * * diminished by majority verdicts. Although the Court emphasized that a "substantial majority" was involved in the *Johnson* decision, the knowledge that one can be convicted while a substantial minority, 25 percent, remains unconvinced can only lessen community trust in the system. The potential for community distrust is especially great since, as pointed out by Mr. Justice Stewart, it is possible that a member of a minority group may be convicted by a jury split along identifiable group lines.

Function of jury as providing judgment of cross-section of community

Retaining unanimity is essential to effectuate the jury's function in providing the judgment of a cross-section of the community. As stated by Mr. Justice Stewart (joined by Brennan and Marshall, JJ.) in his dissent from *Apodaca's* companion case, *Johnson v. Louisi-*

ana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972):

[O]nly a unanimous jury [impartially] selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear.

* * * And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of criminal court jury. [*Id.* at 398 (dissent).]

See *id.* at 396 (Brennan, J., dissenting). Commentators agree that unanimity is needed to effectuate the jury's function in providing the judgment of a community cross-section. In 24 Case W.Res.L.Rev. 227, 241 (1972), it is pointed out:

[T]he cases holding that * * * exclusion violates the equal protection clause were decided in a context of unanimity. Their logical inference, then, is that representation on a jury includes the right to determine the outcome of a case. In deeming the right of a juror to extend only as far as discussion, *Apodaca* made a part of the jury merely advisory, not fact-determining.

* * * [O]nly where three (Oregon) or four (Louisiana) minority group members are on

the jury will the nonminority group members have to listen to minority views. The probability of such heavy representation of minorities on juries is statistically low and is made even lower by jury panel selection processes and *voir dire*.

In 8 New England L.Rev. 104, 106-07 (1972), it is observed:

Duncan [v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)] stipulated that the purpose of trial by jury * * * is to protect against the "overzealous prosecutor." [Now] a prosecutor, knowing that he must convince only nine (or ten) of the jurors, can simply concentrate upon the presentation of proof geared to the background and ethnical beliefs of the majority of jurors whom he knows to be represented on the jury. Although the minority faction may identify more closely with the defendant, the prosecution can choose to ignore that faction completely.

See 7 Ga.L.Rev. 339, 354-55 (1973); 86 Harv.L.Rev. 148, 154 (1972); 51 N.C.L.Rev. 134, 138 (1972); 7 Val.U.L.Rev. 249, 253-54 (1973).

Preventing hung juries is an insufficient reason

Some object to unanimity as allowing a jury to be "hung" by one or two "irrational" holdouts. Mr. Justice Marshall (joined by Brennan, J.) feels that "if the jury has been selected properly, and every juror is a competent and rational person, then the 'irrationality' that enters into the deliberation process is precisely the essence of

the right to a jury trial." *Apo-daca* at 402 (dissent). But beyond that, Kalven & Zeisel, *The American Jury* 462-63 (1966) has found:

[J]uries which begin with an overwhelming majority in either direction are not likely to hang. It requires a massive minority of 4 or 5 jurors at the first vote to develop the likelihood of a hung jury.

* * * [I]t follows that the case itself must be the primary cause of a hung jury.

* * * * *

* * * [F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations.

Accordingly, the "traditional portrayals depicting 11 frustrated jurors trying vainly to convince a twelfth that the defendant is guilty" and of "one stubborn lout who refuses to take the responsibility seriously and relishes the attention he receives by vying with the other 11" lack factual basis, so that "a provision permitting majority verdicts is not merely a device for pre-empting the veto of a single obstinate juror, but is a means whereby the jury is permitted to return a verdict where there was actual disagreement as to whether the defendant's guilt was proven beyond a reasonable doubt." 7 Val.U.L.Rev. 249, 254-55 (1973). See 7 Ga.L.Rev. 339, 362-63 (1973).

Nor is abandoning unanimity supportable on the ground of avoiding juror bribery:

A final reason given for employing the majority verdict is

that it prevents one or two corrupt jurors who have been bribed * * * from * * * hanging a jury * * *. [N]o one has yet offered any data to support such a contention. The Chicago jury study, on the other hand, has presented some evidence to refute this proposition. In approximately 200 cases of hung juries studied and reported, the trial judge did not even suggest that anything was suspicious about the result. Furthermore * * * most hung juries have a minority of four or five, at least on the first ballot. This implies either that there is no corruption of jurors, or that if there is, it is on such a wide scale that a statutory provision allowing nine or ten jurors to return a verdict would not solve the problem.

Even if a problem of this nature can be shown to exist, merely dispensing with the unanimous verdict requirement * * * will not necessarily resolve the problem. If such problem actually becomes a threat to our judicial system, a better solution would be to screen prospective jurors more exhaustively rather than to deprive a defendant of his claim to a unanimous verdict.

7 Val.U.L.Rev. 249, 257-58 (1973). See Kalven & Zeisel, *The American Jury: Notes for an English Controversy*, 48 Chi.Bar Rec. 195, 200-01 (1967); 7 Ga.L.Rev. 339, 362-63 (1973).

Some say unanimity should be abandoned to relieve the state of the economic burden of retrying cases that have resulted in hung juries. The savings would be limited, because of the approximately 5% of cases that produce hung juries, less than half have as few as two dissenters and only slightly over half (56%) as few as three, see Kalven & Zeisel, *The American Jury* 460 (1966), and, further, "unless the case involves a capital offense or has received some calibration of notoriety, most prosecutors will not retry a case where there has been a hung jury" so "while the potential exists for savings in slightly over two out of every 100 criminal trials, in reality the actual savings are only a fraction of that amount." 7 Val. U.L.Rev. 249, 252 (1973). See 7 Ga.L.Rev. 339, 364 (1973) ("trifling economics are not generally considered a sufficient reason to abandon constitutional safeguards aimed at protecting basic human rights").

¹ There is unanimity in the criticism of *Apodaca*—each of the 14 casenotes which has been written on the case is critical of its holding. See 24 Case W. Res.L.Rev. 227 (1972); 46 Conn.B.J. 700 (1972); 7 Ga.L.Rev. 339 (1973); 61 Geo.L.J. 223 (1972); 86 Harv.L.Rev. 148 (1972); 8 New England L.Rev. 104 (1972); 51 N.C.L.Rev. 134 (1972); 7 Suffolk L.Rev. 762 (1973); 40 Tenn. L.Rev. 91 (1972); 25 U.Fla.L.Rev. 388 (1973); 7 Val.U.L.Rev. 249 (1973); 18 Vill.L.Rev. 302 (1972); 8 Wake Forest L.Rev. 610 (1972); 9 Willamette L.J. 155 (1973).

- 1 (c) **Several defendants.** If there are two or more defendants,
- 2 the jury may return a verdict with respect to any defendant as
- 3 to whom it agrees.

Comment

This accords with Fla.R.Crim.P. P. 31(b); Colo.R.Crim.P. 31(b); 3.520. See Calif. Penal Code § Maine R.Crim.P. 31(b); Mont.Rev. 1160; N.J.Rules of Court 3:19-1; Codes § 95-1915(b); Nev.Rev. Pa.R.Crim.P. 1120(c); Tex.Code Stat. § 175.491; N.D.R.Crim.P. 31 Crim.P. art. 37.11. *Cf.* former (b). Compare N.Y.Crim.P.Law § Uniform Rule 40(c); F.R.Crim. 310.70.

- 1 **(d) Several offenses.** If there are two or more offenses for
- 2 which the jury could return a verdict, it may return a verdict
- 3 with respect to any offense, including a lesser included offense
- 4 for which verdict forms are submitted, as to which it agrees.

Comment

With respect to multiple charg- See, *e. g.*, former Uniform Rule es, this is in line with Calif. Penal 40(d); F.R.Crim.P. 31(c); Alas- Code § 1160, N.J.Rules of Court ka R.Crim.P. 31(c); Calif. Penal 3:19-1, and Pa.R.Crim.P. 1120(d), Code § 1159; Colo.R.Crim.P. 31 (e). Compare N.Y.Crim.P.Law § (c); Maine R.Crim.P. 31(c); 310.70. As to included offenses, Mont.Rev.Codes § 95-1915(c); Nev.Rev.Stat. § 175.501; N.D.R. except for specifying submission Crim.P. 31(c); Tex.Code Crim.P. of verdict forms, *cf.* N.Y.Crim.P. art. 37.08. Law § 300.50, this is similar in effect to numerous provisions.

- 1 **(e) Poll of jury.** Unless waived by the parties, the jury shall
- 2 be polled upon the return of a verdict. The poll shall be con-
- 3 ducted by the court or clerk of court asking each juror individual-
- 4 ly whether the verdict announced is his verdict. If any juror
- 5 does not respond in the affirmative, the court may direct the
- 6 jury to retire for further deliberations or declare a mistrial.

Comment

This is to the same effect as Rule 40(e); F.R.Crim.P. 31(d); many provisions except that it Alaska R.Crim.P. 31(d); Colo.R. makes the poll automatic unless Crim.P. 31(d); Maine R.Crim.P. waived rather than upon request 31(d); Mont.Rev.Codes § 95-1915 (d); Nev.Rev.Stat. § 175.531; N. D.R.Crim.P. 31(d). As pointed out in the Commentary to the ABA Standard, the generally pre- vailing requirement that the "re- quest" be made before the verdict is recorded "has proved to be an unduly severe limitation, particu- larly when the practice is to 'im-

mediately' record the verdict." The ABA Standard attempts to avoid this problem by providing that the request be made "before the jury has dispersed" rather than before the verdict is re-

corded, but it seems a much more effective way to avoid this and other "waiver" problems is to make the polling automatic unless waived.

PART 4

MISTRIAL

Rule 541. [Mistrial.]

- 1 (a) For prejudice to defendant. Upon motion of a defendant,
- 2 the court may declare a mistrial at any time during the trial.
- 3 The court shall declare a mistrial upon the defendant's motion if
- 4 there occurs during the trial an error or legal defect in the pro-
- 5 ceedings, or conduct inside or outside the courtroom, resulting
- 6 in substantial and irreparable prejudice to the defendant's case.
- 7 If there are two or more defendants, the mistrial shall not be
- 8 declared as to a defendant who does not make or join in the mo-
- 9 tion.

Comment

This Rule as a whole is generally similar to Idaho Crim.R. 29.1 and N.Y.Crim.P.Law § 280.10. Cf. La.Code Crim.P. art. 775; Pa.R.Crim.P. 1118.

The first sentence makes clear that the defendant may not assert error in the court's *granting* his mistrial motion. See La.Code

Crim.P. art. 775(1); 23A C.J.S., Criminal Law § 1384(a).

The second sentence derives from Idaho Crim.R. 29.1(a), La. Code Crim.P. art. 775, and N.Y. Crim.P.Law § 280.10(1).

The last sentence is to the same effect as that of Idaho Crim.R. 29.1(a) and N.Y.Crim.P.Law § 280.10(1).

- 1 (b) For prejudice to State. Upon motion of the State, the
- 2 court may declare a mistrial if there occurs during the trial,
- 3 either inside or outside the courtroom, misconduct by the de-
- 4 fendant, his lawyer, or someone acting at the behest of the de-
- 5 fendant or his lawyer, resulting in substantial and irreparable
- 6 prejudice to the State's case. If there are two or more defend-
- 7 ants, the mistrial shall not be declared as to a defendant if neither
- 8 he, his lawyer, nor a person acting at the behest of him or his
- 9 lawyer participated in the misconduct, or if the State's case is
- 10 not substantially and irreparably prejudiced as to him.

Comment

The first sentence is very similar to Idaho Crim.R. 29.1(b). *Cf.* N.Y.Crim.P.Law § 280.10(2). The use of the word "may" (as opposed to "must," as in the New York provision) is to make clear that the defendant may not assert

error in the court's refusing to grant the *State's* motion.

The last sentence is rather similar to that of Idaho Crim.R. 29.1(b) and N.Y.Crim.P.Law § 280.10(2).

(c) **For impossibility of proceeding.** Upon motion of a party or its own motion, the court may declare a mistrial if:

(1) The trial cannot proceed in conformity with law;

(2) It appears there is no reasonable probability of the jury's agreement upon a verdict; or

(3) Upon a poll of the jury there is not unanimous concurrence with the verdict returned.

Comment

The introductory portion and clause (1) accord with Idaho Crim.R. 29.1(c). *Cf.* La.Code Crim.P. art. 775(5); N.Y.Crim.P.Law § 280.10(3). Clause (1) is broad enough to include situations specifically designated by some states' provisions, *e. g.*, discharge of a juror under Rule 513(f) (absent stipulation under Rule 511(b) or additional juror under Rule 511(c)), see Alaska R.Crim.P. 27(d); Calif. Penal Code § 1123; Nev.Rev.Stat. § 175.071; N.Y.Crim.P.Law § 270.35; Tex.Code Crim.P. arts. 36.29, 36.30. See Calif. Penal Code § 1147 (all jurors do not appear in court to give verdict); La.Code Crim.P. art. 775(3), (4) (legal defect in proceedings would make any judgment entered upon a verdict reversible as a matter of law;

defendant lacks mental capacity to proceed); Nev.Rev.Stat. § 175.081 (after retirement of jury, accident or cause occurs to prevent their being kept for deliberation); Tex.Code Crim.P. art. 36.29, 36.30 (similar).

Clause (2) derives from ABA Standards, Trial by Jury 5.4(c) (Approved Draft, 1968). See Calif. Penal Code § 1140; Fla.R. Crim.P. 3.560(b); Nev.Rev.Stat. § 175.461. *Cf.* La.Code Crim.P. art. 775(2); N.Y.Crim.P.Law § 310.60(1)(a); Tex.Code Crim.P. art. 36.31.

Clause (3) ties in with the last sentence of Rule 535(e), *supra*, which specifies that the court may direct the jury to retire for further deliberations or declare a mistrial.

PART 5

POST-TRIAL MOTIONS

Rule 551. [Post-Trial Motion for Acquittal.]

- 1 (a) Upon mistrial. If a mistrial is declared anytime after
2 the close of the State's case in chief, the court, upon motion of
3 the defendant or its own motion, may order the entry of a judg-
4 ment of acquittal as to any offense charged, or lesser included
5 offense, for which the evidence would not reasonably permit a
6 finding of guilty beyond a reasonable doubt. The acquittal does
7 not bar prosecution for any offense as to which the court does
8 not direct an acquittal.

Comment

Except for applying only where a mistrial is declared sometime after the close of the State's case in chief and providing that the court "may" (rather than "shall") order an acquittal, the first sentence tracks Rule 522(a), *supra* (trial motion for acquittal).

Making the acquittal motion available in mistrial situations is supported by the many provisions which provide it "if the jury * * * is discharged without having returned a verdict," see ABA Standards, Trial by Jury 4.5(c) (Approved Draft, 1968); F.R.Crim.P. 29(c); Colo.R.Crim.P. 29(c); Fla.R.Crim.P. 3.380(c); Idaho Crim.R. 29(c); Maine R. Crim.P. 29(b); N.J.Rules of Court 3:18-2; N.D.R.Crim.P. 29(c), although the wording of those provisions indicates their framers may have had in mind only mistrials *for* inability to reach a verdict, see former Uniform Rule 38(b); Alaska R. Crim.P. 29(b). No reason appears why other mistrials occur-

ing after the close of the State's case in chief should not be covered.

The reason the first sentence does not provide that the court "shall" order a mistrial is that in some circumstances it would be inappropriate. For example, if a mistrial is declared during a defendant's case in chief in which he has presented enough evidence so that *at that point* the whole evidence would not reasonably permit a finding of guilty beyond a reasonable doubt, it would be unfair to order an acquittal if (but for the mistrial) the State might have presented evidence to rebut the defendant's case in chief. It would seem especially unfair to order an acquittal in those circumstances if the mistrial was occasioned by the defendant's own misconduct. But in other circumstances, *e. g.*, where the mistrial occurs immediately at the close of the State's case in chief or at any time after the close of all the evidence, the

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court would be obligated to order an acquittal if the requirements hereof are met. The last sentence parallels Rule 481(d)(2), *supra* (effect of pre-trial acquittal).

- 1 **(b) Upon verdict of guilty.** If the jury returns a verdict of
- 2 guilty, the court, upon motion of the defendant or its own mo-
- 3 tion, shall order the entry of a judgment of acquittal¹ as to any
- 4 offense specified in the verdict, or lesser included offense, for
- 5 which the evidence does not or would not reasonably permit a
- 6 finding of guilty beyond a reasonable doubt. If the court directs
- 7 an acquittal for the offense specified in the verdict, but not for
- 8 a lesser included offense, it may either:
- 9 (1) Modify the verdict accordingly, or
- 10 (2) Grant the defendant a new trial as to the lesser in-
- 11 cluded offense.

Comment

Except for focussing upon of-
fenses *specified in the verdict*,
the first sentence hereof tracks
Rule 522(a), *supra* (trial motion
for acquittal). Compare ABA
Standards, Trial by Jury 4.5(c)
(Approved Draft, 1968); F.R.
Crim.P. 29(c); Colo.R.Crim.P. 29
(c); Fla.R.Crim.P. 3.380(c);
Idaho R.Crim. 29(c); Maine R.
Crim.P. 29(b); N.J. Rules of
Court 3:18-2; N.D.R.Crim.P. 29
(c).

The last sentence is to the same
effect as Calif. Penal Code § 1181
(6), Fla.R.Crim.P. 3.620, and
Mont.Rev.Codes § 95-2101(c).
In the situation specified, the
court should grant the defendant
a new trial rather than merely
modifying the verdict if the er-
ror in finding the defendant
guilty of the higher offense might
have infected the jury's presumed
finding of guilt as to the included
offense.

- 1 **(c) Time for motion.** Unless the court otherwise permits in
- 2 the interest of justice, a motion for acquittal shall be made
- 3 within [ten] days after mistrial or verdict or within any fur-
- 4 ther time the court allows during the [ten]-day period.

Comment

Except for the "unless" clause, and N.J.Rules of Court 3:18-2.
this accords with provision in See F.R.Crim.P. 29(c) (seven
Colo.R.Crim.P. 29(c), Idaho Crim. days); N.D.R.Crim.P. 29(c)
R. 29(c), Maine R.Crim.P. 29(b), (same).

Rule 552. **[New Trial.]**

- 1 **(a) Motion.** Upon motion of the defendant, the court may
- 2 grant him a new trial if required in the interest of justice.

3 Unless the defendant's noncompliance with these Rules bars his
4 asserting the error, the court shall grant the motion:

5 (1) For an error by reason of which the defendant is
6 constitutionally entitled to a new trial; or

7 (2) For any other error unless it appears beyond a rea-
8 sonable doubt that the same verdict or finding would have
9 resulted absent the error.

10 If the trial was by the court without a jury, the court, with
11 the defendant's consent and in lieu of granting a new trial, may
12 vacate any judgment entered, receive additional evidence, and
13 direct the entry of a new judgment.

Comment

The first sentence is substantially identical to that of former Uniform Rule 41(a), F.R.Crim.P. 33, Idaho Crim.R. 33, Maine R. Crim.P. 33, Mont.Rev.Codes § 95-2101(b)(1), N.J.Rules of Court 3:20-1, and N.D.R.Crim.P. 33.

The introductory portion of the second sentence has reference to such matters as those included in Rules 451(c), *supra* (certain matters may be asserted only by pretrial motion), 523(b), (e), (f), *supra* (objections regarding instructions), and 755, *infra* (manner of preserving objection).

Clause (1) refers to the "automatic reversal" class of constitutional errors—deprivation of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." See 3 Wright, Federal Practice & Procedure § 855 at 369-70 (1969); Love v. State, 457 P.2d 622, 632 (Alaska 1969).

Clause (2) relates to constitutional errors other than those requiring automatic reversal and to errors not of constitutional dimensions. The standard is that required by the United States Su-

preme Court for constitutional errors other than those requiring automatic reversal. See Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). It seems appropriate to apply the same standard to nonconstitutional errors, at least at the trial court level where the court has more than just a cold record upon which to base its decision and where there would not be the lapse of time there would with an appellate court raising the possibility that an ordered new trial could not in fact be had. A lesser standard would often produce the prospect that the defendant was in fact *convicted* upon a standard less than proof beyond a reasonable doubt. And it would seem counterproductive to rehabilitation to in effect tell a defendant that although there was error in his conviction, the error does not matter, unless this standard is used. A state might wish to use a different standard *on appeal*. See, e. g., Love v. State,

457 P.2d 622, 634 (Alaska 1969) ("whether we can fairly say that the error did not appreciably affect the jury's verdict"). *But see* Saltzburg, *The Harm of Harmless Error*, 59 Va.L.Rev. 988, 989 (1973) ("reversal where it is 'reasonably possible' that a trial mistake has affected the verdict"). Compare the many provisions which specify, "Any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded." See, *e. g.*, former Uniform Rule 57(a);

F.R.Crim.P. 52(a); Alaska R. Crim.P. 47(a); Colo.R.Crim.P. 52(a); Idaho Crim.R. 52; Maine R.Crim.P. 52(a); Mont.Rev. Codes § 95-2425; Nev.Rev.Stat. § 178.598; N.D.R.Crim.P. 52(a).

Except for requiring the defendant's consent, the last sentence is to the same effect as provision in former Uniform Rule 41 (a), F.R.Crim.P. 33, Alaska R. Crim.P. 33, Idaho Crim.R. 33, Maine R. Crim.P. 33, Nev.Rev. Stat. § 176.515(2), and N.J.Rules of Court 3:20-1.

- 1 (b) Time for motion based on newly-discovered evidence. A
- 2 motion for a new trial based on the ground of newly-discovered
- 3 evidence shall be made with reasonable diligence, considering
- 4 the nature of the allegations therein. The court may grant it
- 5 even though an appeal is pending.

Comment

The first sentence uses the same timeliness standard as is provided for withdrawal of plea by Rule 444(e), *supra* and by ABA Standards, Pleas of Guilty 2.1(a)(i) (Approved Draft, 1968). See Colo.R.Crim.P. 33 (as soon as facts become known to defendant); Pa.R.Crim.P. 1123(d) (promptly after discovery). *Cf.* former Uniform Rule 41(a) (at any time); N.J.Rules of Court 3:20-2 (same). Some provisions follow F.R.Crim.P. 33 in specifying that the motion may be made only within 2 years, but there

seems "no reason, in logic, in justice, or in expediency" for that type of limitation. See 2 Wright, *Federal Practice & Procedure—Criminal* § 558 (1969) and authorities cited; Comment to former Uniform Rule 41(a) and authorities cited.

The second sentence rejects the approach of provisions which follow F.R.Crim.P. 33 in providing that if an appeal is pending the court may grant the motion only on remand of the case.

- 1 (c) Time for motion based on other ground. Unless otherwise
- 2 permitted by the court in the interest of justice, a motion for
- 3 a new trial based upon any ground other than newly-discovered
- 4 evidence shall be made within [ten] days after verdict or find-
- 5 ing of guilty or within any further time the court allows during
- 6 the [ten]-day period.

Comment

Except for the "unless" clause. Rev.Stat. § 176.515(4), and N.D. this accords with Colo.R.Crim.P. R.Crim.P. 33. Compare 38 Ill. 33, Idaho Crim.R. 33, Maine R. Stat. § 116-1 (30 days); Mont. Crim. P. 33, and N.J.Rules of Rev.Codes § 95-2101(b)(2) Court 3:20-2, and, except for (same); Wis.Stat. § 974.02(1) specifying ten rather than seven (90 days). days, with F.R.Crim.P. 33, Nev.

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ARTICLE VI

SENTENCING AND JUDGMENT

PART 1. SENTENCING

Rule

- 611. Commitment or Release Pending Sentencing.
- 612. Presentence Investigation.
- 613. Disposition Hearing.

PART 2. JUDGMENT

- 621. Judgment.

PART 3. CORRECTION OR REDUCTION OF DISPOSITION

- 631. Correction of Illegal Disposition.
- 632. Correction of Disposition Illegally Made.
- 633. Reduction of Sentence.

PART 4. REVOCATION OF PROBATION

- 641. Revocation of Probation [or Deferred Imposition of Sentence].
 - (a) Order for revocation hearing.
 - (b) Appearance of defendant.
 - (c) Detention hearing.
 - (d) Revocation hearing.

PART 1

SENTENCING

Rule 611. [Commitment or Release Pending Sentencing.]

- 1 Upon acceptance of a plea to, or a verdict or finding of guilty
- 2 of, an offense punishable by incarceration, the court pending sen-
- 3 tencing may continue or alter terms of release or commit the
- 4 defendant with or without terms of release.

Comment

Rules 611 through 641 generally permit the fixing of minimum sentences or the fixing of maximum sentences of imprisonment shorter than the term fixed by statute, concurrent versus consecutive sentences, and the types

of correctional institutions and programs available, can be dealt with only by legislation since they involve matters of substantive, as distinguished from procedural, law. Rules 611 through 641 are directed to those aspects of sentencing which involve the court's duties—imposition of sentence or other disposition, correction of disposition, reduction of sentence, and revocation of probation, and are drafted broadly enough to implement whatever correctional system a state may have.

Rule 611

This is similar in effect to the many provisions which specify, "Pending sentence, the court may commit the defendant or continue or alter the bail." See, *e. g.*, former Uniform Rule 42(a); Alaska R.Crim.P. 32(a); Idaho Crim.R. 32(a)(1); Maine R.Crim.P. 32(a); Nev.Rev.Stat. § 176.015(1); N.J.Rules of Court 3:21-4(a). See Colo.R.Crim.P. 32(b); N.D. R.Crim.P. 32(a)(1). *Cf.* Calif. Penal Code § 1166; Fla.R.Crim. P. 3.550.

Rule 612. [Presentence Investigation.]

- 1 Upon acceptance of a plea or upon a verdict or finding of
- 2 guilty, the court [may] [shall] direct the [probation service] to
- 3 make a presentence investigation and report [and shall do
- 4 so]. Copies of the report shall be made available to the
- 5 parties.

Comment

In making clear that a presentence investigation should normally be initiated only upon a determination of guilt, the first sentence accords with ABA Standards, Sentencing Alternatives & Procedures 4.2(a) (Approved Draft, 1968), ABA Standards, Probation 2.4(a) (Approved Draft, 1970), Fla.R.Crim.P. 3.711(a), and Wis.Stat. § 972.15(1). (Rule 443(b), *supra*, authorizes the court to direct the making of a presentence investigation and report to aid it in determining whether to concur in a plea agreement.)

In providing that a presentence investigation and report *may* be used in *any* case, the first sentence accords with many provi-

sions. See, *e. g.*, ABA Standards, Sentencing Alternatives & Procedures 4.1(b); ABA Standards, Probation 2.1(b); former Uniform Rule 42(d); F.R.Crim.P. 32(c)(1); Alaska R.Crim.P. 32(c)(1); Maine R.Crim.P. 32(c)(1); Mont.Rev.Codes § 95-2203; N.J. Rules of Court 3:21-2; N.Y. Crim.P.Law § 390.20(3); N.D.R. Crim.P. 32(c); Wis.Stat. § 972.15(1). *Cf.* Colo.R.Crim.P. 32(a)(1); Fla.R.Crim.P. 3.710; La. Code Crim.P. art. 875.

Some states may wish to use the bracketed "shall," rather than "may," to require the presentence investigation and report in every case. See Nev.Rev.Stat. § 176.315. *Cf.* F.R.Crim.P. 32(c)(1) (report shall be made

less the court otherwise directs for reasons stated on the record"); N.J. Rules of Court 3:21-2 ("unless otherwise provided by rule or court order").

Other states may wish to use the bracketed language at the end of the first sentence to specify certain types of cases where the presentence investigation and report is mandatory. See Calif. Penal Code § 1203(a) (felony where defendant eligible for probation); Colo.R.Crim.P. 32(a)(1) (felony where court has discretion as to punishment); N.Y. Crim.P.Law § 390.20(1) (felony). Cf. ABA Standards, Probation 2.1(b) (where incarceration one year or more is possible or where defendant minor or first offender "unless the court specifically orders to the contrary in a particular case"); ABA Standards, Sentencing Alternatives & Procedures 4.1(b) (same); Mont.Rev.

Codes § 95-2203 (offense punishable by one year or more "unless the court deems such report unnecessary"). Compare Fla.R. Crim.P. 3.710 (report precondition to sentence other than probation if first felony or defendant under 18); N.Y.Crim.P.Law § 390.20(2) (for misdemeanor, report precondition for probation, reformatory, or imprisonment over 90 days).

The last sentence is in line with Calif. Penal Code § 1203(a), Colo. R.Crim.P. 32(a)(2), and Idaho Crim.R. 32(c)(1). See Fla.R. Crim.P. 3.713(b) (all factual material and reports of physical or mental evaluations). Cf. ABA Standards, Sentencing Alternatives & Procedures 4.4; F.R. Crim.P. 32(c)(3); Alaska R. Crim.P. 32(c)(2); Maine R.Crim.P. 32(c)(2); Nev.Rev.Stat. § 176-156; N.D.R.Crim.P. 32(c)(3); Wis.Stat. § 972.15(2), (3).

Rule 613. [Disposition Hearing.]

1 Before imposing sentence or making any other disposition up-
2 on acceptance of a plea or upon a verdict or finding of guilty, the
3 court shall conduct a disposition hearing without unreasonable
4 delay, as follows:

5 (1) The court shall afford the parties an opportunity to
6 be heard on any matter relevant to the disposition.

7 (2) Except as provided in Rule 713, the court shall ad-
8 dress the defendant personally to ascertain whether he
9 wishes to make a statement in his own behalf and to present
10 any information in mitigation of punishment or reason why
11 he should not be sentenced and, if he does, afford him a
12 reasonable opportunity to do so.

13 (3) The court shall impose sentence or make any other
14 disposition authorized by law.

15 (4) Except as provided in Rule 713, the court shall in-
16 form the defendant personally of any right he has to appeal
17 and his right to appointment of a lawyer, upon request,
18 under the conditions specified in Rule 321(b).

Comment

In requiring sentencing "without unreasonable delay," the opening language hereof accords with many provisions. See, *e. g.*, former Uniform Rule 42(a); F.R.Crim.P. 32(a)(1); Alaska R.Crim.P. 32(a); Colo.R.Crim.P. 32(b); La.Code Crim.P. art. 874; Maine R.Crim.P. 32(a); Nev. Rev.Stat. § 176.015(1); N.J.Rules of Court 3:21-4(a); N.Y.Crim. P.Law § 380.30(1); N.D.R.Crim. P. 32(a)(1). *Cf.* ABA Standards, Sentencing Alternatives & Procedures 5.4(a) (Approved Draft, 1968); Calif. Penal Code § 1191; Fla.R.Crim.P. 3.720; Mont.Rev. Codes § 95-2007(b).

Clause (1) is to the same effect as ABA Standard 5.4(a)(i), Colo. R.Crim.P. 32(b), Fla.R.Crim.P. 3.720(b), N.Y.Crim.P.Law § 380.50, N.D.R.Crim.P. 32(a)(1), and Wis.Stat. § 972.14. Some provisions specify affording "counsel an opportunity to speak on behalf of the defendant." See F.R.Crim. P. 32(a)(1); Idaho Crim.R. 32(a)(1); Nev.Rev.Stat. § 176.015(2).

Clause (2) goes beyond the many provisions which refer only to the defendant's making a statement and presenting information in mitigation of punishment, see, *e. g.*, former Uniform Rule 42(a); F.R.Crim.P. 32(a)(1); Alaska R.Crim.P. 32(a) Colo. R.Crim.P. 32(b); Idaho Crim.R. 32(a)(1); Nev.Rev.Stat. § 176.

015(2); N.J.Rules of Court 3:21-4(b), to refer to his presenting any reason why he should not be sentenced, see Calif. Penal Code § 1200; Fla.R.Crim.P. 3.720(a); N.D.R.Crim.P. 32(a)(1); Tex. Code Crim.P. art. 42.07; Wis. Stat. § 972.14. See ABA Standard 5.4(a)(ii) (court to afford defendant his right of allocution). *Cf.* Maine R.Crim.P. 32(a); N.Y. Crim.P.Law § 380.50.

Clause (3) provides not only for imposition of sentence but for any other disposition authorized by law, *e. g.*, probation or conditional deferred imposition of sentence. See ABA Standard 2.1(b); Mont.Rev.Codes § 95-2206. As to deferred imposition of sentence, see ABA Standard 2.3(b)(iii), 2.4(b)(iii); Calif. Penal Code § 1203.1; Fla.R.Crim.P. 3.790(a); La.Code Crim.P. art. 893; Minn.Stat. § 609.135; Mont.Rev.Codes § 95-2206(2); Tex.Code Crim.P. art. 42.12(2)(b), (3); Wis.Stat. § 973.09(1).

Clause (4) is rather similar to Alaska R.Crim.P. 32.1, Colo.R. Crim.P. 32(c), and N.D.R.Crim. P. 32(a)(2). *Cf.* F.R.Crim.P. 32(a)(2); Fla.R.Crim.P. 3.670; Idaho Crim.R. 32(a)(3). Regarding applicability to conviction upon a plea, see Rule 444(d) and Comment, *supra*. Clause (4) is broad enough to refer to appeal merely of sentence in states which provide such a procedure.

PART 2

JUDGMENT

Rule 621. [Judgment.]

- 1 The judgment shall set forth the plea, verdict, or finding and
- 2 the adjudication. If the defendant is convicted, it shall set forth
- 3 the sentence or other disposition. It shall be signed by a judge
- 4 of the court and entered of record.

Comment

This is to the same effect as N.D.R.Crim.P. 32(b). *Cf.* former numerous provisions. See, *e. g.*, Uniform Rule 42(b); Alaska R. F.R.Crim.P. 32(b)(1); Idaho Crim.P. 32(b); Colo.R.Crim.P. Crim.R. 32(b); Maine R.Crim.P. 32(c); Fla.R.Crim.P. 3.670; 32(b); Nev.Rev.Stat. § 176.105; Tex.Code Crim.P. art. 42.01; Wis. N.J.Rules of Court 3:21-5; Stat. § 972.13.

PART 3

CORRECTION OR REDUCTION OF DISPOSITION

Rule 631. [Correction of Illegal Disposition.]

- 1 The court may correct an illegal sentence or other disposition
- 2 at any time.

Comment

This is to the same effect as 35, and N.D.R.Crim.P. 35. *Cf.* provision in F.R.Crim.P. 35, Colo. Alaska R.Crim.P. 35(a); Fla.R. R.Crim.P. 35(a), Idaho Crim.R. Crim.P. 3.800.

Rule 632. [Correction of Disposition Illegally Made.]

- 1 The court may correct a sentence imposed, or other disposition
- 2 made, in an illegal manner, within [four months] after (1) the
- 3 sentence is imposed or other disposition is made or (2) remand
- 4 from an appellate court.

Comment

This is to the same effect as Crim.R. 35, and N.D.R.Crim.P. provision in F.R.Crim.P. 35, 35. Colo.R.Crim.P. 35(a), Idaho

Rule 633. [Reduction of Sentence.]

1 The court may reduce a sentence within [four months] after
2 (1) the sentence is imposed or (2) remand from an appellate
3 court.

Comment

This is to the same effect as only to sentences and not to other dispositions; a state may desire to give the court continuing jurisdiction to ameliorate conditions of probation or conditions of deferred imposition of sentence. Rules 631 and 632, *supra*, applies

PART 4

REVOCATION OF PROBATION

Rule 641. [Revocation of Probation [or Deferred Imposition of Sentence].]

1 (a) Order for revocation hearing. If affidavit or testimony
2 shows probable cause to believe that the defendant has violated
3 a condition of probation [or a condition of deferred imposition
4 of sentence], the court may issue an order for hearing on revocation thereof. The order shall state the essential facts constituting the violation, order the defendant to appear at a specified time and place for the hearing, and be served by delivering a copy to the defendant personally. If affidavit or testimony shows probable cause to believe that the defendant would not appear in response to the order, the court by order may direct a [law enforcement officer] to bring the defendant forthwith before the
12 court.

Comment

The first and last sentences hereof are rather similar in effect to La.Code Crim.P. art. 899(A). Cf. N.Y.Crim.P.Law §§ 410.30, 410.40. Some states may wish, in their statutes on the authority of probation officers or law enforcement officers, to provide for taking alleged probation violators into custody without prior court approval, but ABA Standards, Probation 5.2 (Approved Draft, 1970), is opposed to this:

(a) * * * Arrests without a warrant should be permitted only when the violation involves the commission of another crime and when the nor-

mal standard for arrests without a warrant have otherwise been met.

(b) Probation officers should not be authorized to arrest probationers.

The bracketed language in the Rule's heading and in subdivision (a)'s first sentence may be included by states which have deferred imposition of sentence as an available disposition. Reference to any other revocable type of disposition a state may have could also be included.

The second sentence seems required in light of the fact that the Court in *Morrissey v. Brewer*,

408 U.S. 471, 486-87, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), made applicable to probation revocation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), held notice of hearing, stating the violations alleged, necessary for parole revocation. Some provisions specify, "The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed." See, *e. g.*, F.R.Crim.P. 32(f); Colo.R.Crim.P. 32(g); Idaho Crim.R. 32(f); Maine R. Crim.P. 32(f).

1 **(b) Appearance of defendant.** When the defendant appears,
2 the court shall proceed in conformity with Rule 321(a) and (b)
3 and inform the defendant that the State must prove the viola-
4 tion unless he admits it and that he is entitled to present evidence
5 and to have the court's aid in securing the attendance of witnesses
6 in his behalf. The court shall set a time for the revocation hear-
7 ing unless:

8 (1) The defendant does not desire time to obtain evidence
9 or witnesses, and either has a lawyer or makes a waiver of
10 counsel which is accepted under Rule 711; and

11 (2) The defendant admits the violation or the State is
12 ready to proceed with its evidence.

13 If the court sets a time for a revocation hearing and the defend-
14 ant is in custody pursuant to an order under subdivision (a), the
15 court may prescribe terms and conditions of release. If the court
16 does not prescribe terms and conditions of release or, if pre-
17 scribed, they result in detention of the defendant, and the revoca-
18 tion hearing is not set for a time within [five] days after the
19 appearance, the court shall inform the defendant of his right to
20 a detention hearing and shall set the time for the detention
21 hearing.

Comment

The first sentence is rather similar in effect to provision in *Crim.P.Law* § 410.70(2), (4); *N.D.R.Crim.P.* 32(f)(2). *Pro-Fla.R.Crim.P.* 3.790(b). *Cf. N.Y.* preceding in conformity with Rule

321(a) and (b), *supra*, the court will inform the defendant of his rights and provide for his representation by counsel, including appointed counsel if the defendant is unable to retain counsel. See ABA Standards, Probation 5.4(a) (ii) and Commentary (Approved Draft, 1970); N.D.R.Crim.P. 32 (f)(2). Compare *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (appointed counsel only if sentence not yet imposed or if, in light of all the circumstances, required by fundamental fairness).

The second sentence leaves to the court's discretion whether to prescribe terms and conditions of release. It is to the same effect as the common provision, "The defendant may be admitted to bail pending such hearing." See F.R.Crim.P. 32(f); Colo.R.Crim.P. 32(g); Idaho Crim.R. 32(f). Cf. Fla.R.Crim.P. 3.790; La.Code Crim.P. art. 899(C); N.Y.Crim.P.Law § 410.60.

The last sentence seems necessary in light of *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756,

36 L.Ed.2d 656 (1973), making applicable to probation revocation proceedings the requirements of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). See the discussion of *Morrissey* in the Comment to Rule 344(a), *supra*. Although the *Gagnon* Court stated broadly, "we hold that a probationer * * * is entitled to a preliminary and a final hearing, under the conditions specified in *Morrissey*," *id.* at 782, it seems that a preliminary hearing should not be necessary if the defendant is not in custody (*Scarpelli* was, and the Court said, "Probation revocation * * * does result in a loss of liberty," *ibid.*) See Comment to Rule 344(a), *supra*. Nor should a preliminary hearing be necessary even for a defendant in custody if the (final) revocation hearing is held within five days, the time limit set by Rule 344(c), *supra*, for a detention hearing, which time is much shorter than the average time limit specified for a preliminary hearing (F.R.Crim.P. 5(c) specifies ten days). See Comment to Rule 344(c), *supra*.

- 1 (c) **Detention hearing.** Rule 344 governs the detention hear-
- 2 ing in those cases where one is required, as if the defendant were
- 3 detained pending trial and the violation for which the revoca-
- 4 tion hearing is ordered under subdivision (a) were an offense.

Comment

Detention hearings in revocation proceedings will be quite rare because, as indicated in the immediately preceding Comment, a detention hearing need not be held if the defendant is not in custody

or if the main revocation hearing is held within five days. As to the nature and scope of and proceedings at the detention hearing, see Rule 344, *supra*.

- 1 (d) **Revocation hearing.** At the revocation hearing the State
- 2 and the defendant may offer evidence and cross-examine wit-

3 nesses. If the defendant admits the violation or the court finds
4 from the evidence that he committed it, the court may make any
5 disposition authorized by law.

Comment

This is rather similar to provisions in N.Y.Crim.P.Law § 410.70(3), (5) and N.D.R.Crim.P. 32(f)(2). Cf. ABA Standards, Probation 5.4 (Approved Draft, 1970); Fla.R.Crim.P. 3.790(b). Compare La.Code Crim.P. art. 900; Mont.Rev.Codes § 95-2206. See generally *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (relevant part quoted in footnote 2 of Comment to Rule 344(a), *supra*), made applicable to probation revocation proceedings by *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct.

1756, 36 L.Ed.2d 656 (1973). As mentioned in the Comment to subdivision (a), *supra*, a number of provisions specify, "The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed." If the court does not find that the defendant committed the violation, the pre-existing conditions of probation or of deferred imposition of sentence would, of course, continue.

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ARTICLE VII

GENERAL PROVISIONS

PART 1. RIGHTS OF DEFENDANT

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- 711. Right to Counsel.
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Rule

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765. Uniformity of Application and Construction.

766. Short Title.

767. Severability.

768. Effect on Existing Laws and Rules.

769. Time of Taking Effect.

PART 1

RIGHTS OF DEFENDANT

Rule 711. [Right to Counsel.]

1 A defendant is not deemed to have waived his right to legal
2 counsel at any stage of the proceedings unless the court at that
3 stage accepts a waiver of counsel. A waiver of counsel may not
4 be accepted unless it is made expressly and voluntarily and the
5 court is satisfied that the defendant fully understands:

6 (1) The nature of the charge against him and the range
7 of possible penalties therefor;

8 (2) That a defense lawyer can render important as-
9 sistance in determining the existence of possible defenses
10 to the charge and in preparing for and representing a defend-
11 ant at trial or, in the event of a plea, in consulting with
12 the prosecuting attorney as to possible reduced charges or
13 lesser penalties, and in presenting to the court matters which
14 might lead to a lesser penalty;

15 (3) If the defendant is in custody, that a defense lawyer
16 can render important assistance in presenting to the court
17 matters respecting terms of release; and

18 (4) The nature of the particular stage of the proceedings
19 and his rights at that stage.

20 The court may refuse to accept a waiver of counsel until the de-
21 fendant has first consulted with a lawyer. Notwithstanding
22 acceptance of a waiver the court may appoint standby counsel
23 to assist when called upon by the defendant, to call the court's
24 attention to matters favorable to the defendant upon which the
25 court should rule upon its own motion, and, should it become
26 necessary for a fair trial, to conduct the defense.

Comment

The first sentence hereof is to the same effect as ABA Standards, Providing Defense Services 7.3 (Approved Draft, 1968) which states, "If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the defendant appears without counsel." See

Fla.R.Crim.P. 3.111(d)(5) (substantially identical). As stated in the Commentary to the ABA Standard, "The value and need for legal assistance may become clear to the defendant only at a stage of the proceedings subsequent to the initial offer."

In precluding acceptance of a waiver unless the court finds it to be made with full understanding, the introductory portion of the second sentence hereof accords with a number of current provisions. See ABA Standards, Providing Defense Services 7.2; ABA Standards, The Function of the Trial Judge 6.6 (Approved Draft, 1971); ALI Model Code of Pre-Arrestment Procedure § 310.1(5) (T.D. # 5, 1972); Alaska R.Crim.P. 39(b)(3); Colo.R. Crim.P. 44; Fla.R.Crim.P. 3.111 (d)(2), (3); N.J.Rules of Court 3:4-2; N.Y.Crim.P.Law §§ 170.10(6), 180.10(5), 210.15(5); Pa. R.Crim.P. 317(c). This contemplates more than leading questions eliciting merely "yes" or "no" responses. In *von Moltke v. Gillies*, 332 U.S. 708, 723-24, 68 S.Ct. 316, 92 L.Ed. 309 (1948), the plurality opinion (Black, J., joined by Douglas, Murphy and Rutledge, JJ.) states:

The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may

tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Clause (1) hereof accords with ABA Standards, The Function of the Trial Judge 6.6(iii) (Approved Draft, 1972) and the plurality opinion in *von Moltke*.

Clause (2) corresponds to that part of ALI § 310.1(5) which requires that the defendant be "advised by the court of the significance of counsel for someone in his position" and to Alaska R. Crim.P. 39(b)(3) which requires the defendant to demonstrate "that he understands the benefits of counsel and knowingly waives the same." Unlike the last sentence quoted above from the *von Moltke* plurality opinion, this does not require the defendant to *know* the included offenses, possible defenses, and circumstances in mitigation. Although some courts have adopted the *von Moltke* formulation, see Commentary to ABA Standards, Providing Defense Services 7.2, it is patent that literal compliance therewith would be extremely time consuming and burdensome; arguably it would require the court to give the defendant a course in law. Instead

of requiring the defendant to *know* each of the included offenses, possible defenses, and circumstances in mitigation, clause (2) requires him to understand that a defense lawyer might discover such matters and use them to the defendant's advantage. This would appear to afford sufficient protection, particularly in light of the penultimate sentence of this Rule authorizing the court to refuse to accept a waiver until the defendant has first consulted with a lawyer, and in light of the fact that the plea provisions of these Rules require a determination of factual basis which will uncover the existence of possible defenses, circumstances in mitigation and situations where the defendant may be guilty only of a lesser included offense.

With regard to clause (3), see Note to ALI § 310.1(5), which reflects the view that the assistance of counsel is of crucial importance on the issue of pretrial release, so that the judge's advice to the defendant should "include the significance of counsel with respect to securing the defendant's release from custody."

Clause (4) corresponds to that part of ABA Standards, The Function of the Trial Judge 6.6(iii) which requires the court to be satisfied that the defendant "comprehends the nature of the * * * proceedings * * * and any additional facts essential to a broad understanding of the case," and to that part of the *von Moltke* formulation requiring an "apprehension of * * * all other facts essential to a broad understanding of the whole matter."

The penultimate sentence hereof is similar in concept to ABA Standards, Providing Defense Services 7.3. As pointed out in Note, 22 U.Fla.L.Rev. 453, 468-69 (1970), some states, including Alabama, Iowa, and Virginia, by statute require that before accepting a plea of guilty to a felony, the court must appoint counsel to advise the defendant; appointing counsel merely to consult with the defendant is not inconsistent with any state or other constitutional guarantee of a right to proceed pro se; and "adoption of a rule disallowing a waiver of counsel until the defendant has conferred with an attorney would alleviate the criticism that it is unrealistic to expect the trial court to act, in effect as defense counsel."

The final sentence hereof is quite similar to ABA Standards, The Function of the Trial Judge 6.7. It is not inconsistent with any state or other constitutional right to proceed pro se.¹ As long as the standby counsel only assists when called upon by the defendant and calls the court's attention to matters favorable to the defendant upon which the court should rule upon its own motion, as provided by the ABA Standard, there is no interference with the defendant's representing himself. Having the standby counsel take over the defense should this become necessary for a fair trial is justifiable upon either of two grounds: (1) the federal constitutional due process requirement of a fair trial predominates over any right to proceed pro se, and (2) any right to proceed pro se is waived by conduct by the defendant which precludes a fair

trial without defense counsel. Such a takeover occurred in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), even before Allen was excluded from the courtroom; although this was not in issue Mr. Justice Douglas observed that notwithstanding Allen's refusal of counsel "the trial judge properly insisted that a member of the bar be present to represent him." *Id.* at 352 (concurring opinion). Similarly, Mr. Chief Justice Burger has referred to the wisdom of appointing counsel "even in the lim-

ited role of a consultant" and to the propriety, in appropriate circumstances, of having such counsel perform all services ordinarily performed by counsel because, "A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." *Mayberry v. Pennsylvania*, 400 U.S. 455, 467, 468, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (concurring opinion).

¹ The federal Constitution confers no such right, unless it is hidden in the Due Process Clause (the Sixth Amendment confers the right to counsel, but the existence of a right does not imply a right to insist upon the opposite thereof, see *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965) (jury)). It has been assumed that 38 state constitutions confer such a right, see *United States v. Dougherty*, 473 F.2d 1113, 1123 n. 11 (D.C.Cir. 1972) but the recent case of *People v. Sharp*, 7 Cal.3d 448, 499 P.2d 489, 103 Cal.Rptr. 233 (1972), throws considerable question upon that assumption, indicating that state constitutions which provide, as did Calif.Const. art. 1, § 13, the right to proceed in person *and* with counsel, confer no such right. Twenty-eight other state constitutions have this type of provision. See *Ariz.Const.* Art. 2, § 24; *Ark.Const.* Art. 2, § 10; *Colo.Const.* Art. 2, § 16; *Conn.Const.* Art. 1, § 8; *Del.Const.* Art. 1, § 7; *Idaho Const.* Art. 1, § 13; *Ill.Const.* Art. 1, § 8; *Ind.Const.* Art. 1, § 13; *Ky.Const.* Bill of Rights § 11; *La.Const.* Art. 1, § 9; *Mo.Const.* Art. 1, § 18(a); *Mont.Const.* Art. 3, § 16; *Nev.Const.* Art. 1, § 8; *N.H.Const.* pt. 1, Art. 15; *N.M.Const.* Art. 2, § 14; *N.Y.Const.* Art. 1, § 6; *N.D.Const.* Art. 1, § 13; *Ohio Const.* Art. 1, § 10; *Okla.Const.* Art. 2, § 20; *Ore.Const.* Art. 1, § 11; *Tenn.Const.* Art. 1, § 9; *Pa.Const.* Art. 1, § 9; *S.D.Const.* Art. 6, § 7; *Utah Const.* Art. 1, § 12; *Vt.Const.* ch. 1, Art. 10; *Wash. Const.* Art. 1, § 22; *Wis.Const.* Art. 1, § 7; *Wyo.Const.* Art. 1, § 10. Only nine utilize the disjunctive. See *Ala.Const.* Art. 1, § 6; *Fla.Const.* Art. 1, § 16; *Kan.Const.* Bill of Rights § 10; *Maine Const.* Art. 1, § 6; *Mass.Const.* pt. 1, Art. 12; *Miss.Const.* Art. 3, § 26; *Neb.Const.* Art. 1, § 11; *S.C.Const.* Art. 1, § 18; *Tex.Const.* Art. 1, § 10. It has been argued that no state constitutional provisions should be construed to accord a right to proceed pro se. See *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 *Minn. L.Rev.* 1175, 1193-94 (1970).

Rule 712. [Place of Trial.]

- 1 Except as otherwise permitted by law or in Rule 462, the
- 2 case shall be tried in the [county] in which the offense was com-
- 3 mitted.

Comment

This is quite similar to former Uniform Rule 32 and Maine R. Crim.P. 18. Like those provisions and others, *e. g.*, La.Code Crim.P. art. 611; Mont.Rev.Codes § 95-401; Wis.Stat. § 971.19, this restricts only the place of trial, and not other procedures in the prosecution. Rule 231(f), *supra*,

requires the information to be filed in the county where the offense was allegedly committed, but it seems desirable not to restrict other proceedings in the case short of trial to that county. This is especially true in rural areas where a judicial district comprises several counties.

Rule 713. [Presence at Trial and Disposition Hearing.]

- 1 (a) **Right of presence.** The defendant has a right to be pre-
- 2 sent at every stage of the trial, including all proceedings specified
- 3 in Rules 512(b) through 531 and 533 through 535, and at the dis-
- 4 position hearing under Rule 613.

Comment

This Rule deals only with the defendant's presence at trial proceedings and at the disposition hearing. Presence at other proceedings is covered by the Rules dealing with those proceedings. See, *e. g.*, Rules 431(f) (deposition), 437(e)(1) (nontestimonial evidence procedure), 444 (plea), 511(a) (waiver of jury). The trial proceedings extend from the selection of the jury to the return of the verdict. The scope of the disposition hearing is described in Rule 613. The right of the defendant to be present during such proceedings is universally recognized. While defendant's presence at trial is supported by his right to confront witnesses,

see *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the right to be present exists apart from that constitutional guarantee. See *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Most states have provisions recognizing that right, both with respect to trial and dispositional proceedings, although the provisions are frequently stated in terms of a requirement that the defendant be present. See, *e. g.*, F.R.Crim.P. 43; Tex.Code Crim. P. art. 33.03. But compare Ill. Const., Art. 1, § 8; Cal.Const. Art. 1, § 13; Idaho Const. Art. 1, § 13 (all phrased in term of a right to be present).

- 1 (b) **Required presence.** The defendant must be present at
- 2 every stage of the trial and at the disposition hearing, but if he
- 3 will be represented by counsel at the trial or hearing, the court
- 4 may:
- 5 (1) Excuse him from being present at the trial or part
- 6 thereof or the disposition hearing if he in open court under-
- 7 standingly and voluntarily waives the right to be present;

(2) Direct that the trial or part thereof or disposition hearing be conducted in his absence if the court determines that he understandingly and voluntarily failed to be present after personally having been informed by the court of:

(i) His right to be present at the trial or hearing;

(ii) When the trial or hearing would commence; and

(iii) The authority of the court to direct that the trial or hearing be conducted in his absence; or

(3) Direct that the trial or part thereof be conducted in his absence if the court has justifiably excluded him from the courtroom because of his disruptive conduct.

Comment

This subdivision imposes an obligation upon the defendant to be present at the trial and dispositional proceeding, but also recognizes that (1) the defendant can be excused from fulfilling that obligation when he waives his right to be present, and (2) the trial may proceed, under certain circumstances, notwithstanding the defendant's failure to fulfill that obligation. Provisions imposing an obligation to be present are found in most jurisdictions. See, *e. g.*, F.R.Crim.P. 43(a); Wis.Stat. § 971.04(1). Although the obligation probably was based initially on the concept that presence was necessary to have jurisdiction to try the case, see Goldin, *Presence of Defendant at Rendition of Verdict in Felony Cases*, 16 Colum.L.Rev. 18 (1916) it is justified today on other grounds, particularly that (1) the defendant's presence is often necessary to allow the jury to examine his physical characteristics in connection with evidence relating to those characteristics and (2) the defendant's presence is desirable to promote the appearance of justice—a factor of

significance to the public at large as well as to the court and jury in the particular case. See Cohen, *Trial in Absentia Re-examined*, 40 Tenn.L.Rev. 153, 176-80 (1973). Although accepting these grounds, this subdivision recognizes that there may be situations in which the first does not apply and the second is offset by other considerations. Accordingly, it recognizes three situations in which all or part of the trial may proceed in the defendant's absence. In all three situations, a prerequisite to permitting trial in the defendant's absence is the presence of an attorney representing him.

Express waiver

Clause (1) permits the trial and disposition hearing to be held in the defendant's absence upon a voluntary waiver accepted by the court. Many jurisdictions have provisions authorizing acceptance of express waivers in misdemeanor cases. See, *e. g.*, F.R.Crim.P. 43(c)(2); La.Code Crim.P. art. 833; Wis.Stat. § 971.04(2). Most jurisdictions do not provide for acceptance of express waivers in felony cases.

However, the same end may be achieved through provisions authorizing the court to conduct a trial without the defendant when he has voluntarily absented himself. Some of these provisions are applicable only to voluntary absence following an initial appearance at trial. Others apply to situations in which the defendant fails to appear for the start of the trial. The court's authority to proceed with the trial under a "voluntary absence" provision has often been based on the premise that the absence constitutes a "waiver", which has been accepted by the court. See, *e. g.*, *People v. De Simone*, 9 Ill.2d 522, 138 N.E.2d 556 (1956). *Cf.* F.R. Crim.P. 43(b) (defendant who voluntarily absents himself "shall be considered to have waived his right to be present"). Whether voluntary absences necessarily constitute true waivers is a matter of some dispute. But it is clear that the defendant in a felony case who voluntarily and understandingly desires to waive his right to be present may be able to achieve that result in most jurisdictions — notwithstanding the lack of any provision authorizing acceptance of an express waiver—by voluntarily absenting himself from the trial in accordance with the state provision on that subject. Recognizing that the defendant may be allowed to do directly what he can do indirectly, several courts have upheld acceptance of express waivers of presence at a particular portion of a felony trial. See, *e. g.*, *People v. La Barbera*, 274 N.Y. 339, 8 N.E.2d 884 (1937); *Davidson v. State*, 108 Ark. 191, 158

S.W. 1103 (1913). Moreover, a few states have adopted provisions specifically authorizing judicial acceptance of the defendant's express waiver of his presence throughout a felony trial. See 38 Ill.Stat. §§ 115-3, 115-4(h) (defendant may waive his right to be present in any trial); Miss. Code § 2519 ("The presence of the prisoner may be waived * * * if he be in custody and consenting thereto"). Thus, at least with respect to non-capital cases,¹ this Rule is consistent with the substance, if not necessarily the form, of current law in allowing express waiver in felony cases. See *Cohen, supra*, at 157-65.

The standards for waiver are essentially those required under these Rules for waiver of other constitutional rights. See, *e. g.*, Rules 444 (acceptance of plea), 511(a) (jury trial), 711 (right to counsel). The requirement that the waiver be made in open court also provides an opportunity for the defendant to waive his right to jury trial, if he so desires. When the defendant appears for the purpose of waiving his right to be present, the court should personally examine the defendant to determine that the waiver is made understandingly and voluntarily. The requirement that the defendant personally appear to waive his right is inconsistent with current provisions relating to the acceptance of a written waiver in misdemeanor cases. See, *e. g.*, F.R.Crim.P. 43(c)(2); Wis.Stat. § 971.04(2). If a jurisdiction adopts special rules governing minor offenses (*cf.* Rule 111, *supra* (scope)), a departure

from this subdivision by permitting written waiver without personal appearance may be desirable in cases in which conviction will not result in incarceration.

Acceptance of a voluntary waiver rests in the discretion of the court, except that a waiver may not be accepted if the defendant is not represented by counsel who will represent the defendant in his absence. This limitation is found in several current provisions, see, *e. g.*, La.Code Crim.P. art. 833; Wis.Stat. § 971.04(2), and is ordinarily imposed as a condition for acceptance of a waiver even when not explicitly required by the state provision.

Clause (1) does not require that the prosecutor consent to the acceptance of the waiver. Compare Tex.Code Crim.P. art. 33.04. It is generally accepted, without specific legislative direction, that the defendant will not be allowed to waive his presence when the jury must observe his physical characteristics in connection with prosecution evidence relating to those characteristics (*e. g.*, testimony relating to identification). See *United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970); *State v. Super*, 281 Minn. 451, 161 N.W.2d 832, 837 (1968); *State v. Vincent*, 222 N.C. 543, 23 S.E.2d 832 (1943). Similarly, the prosecution may, in a particular case, have a right to have prospective jurors view the defendant so as to be sure that he is not known to them. Where the defendant's presence is not required on such grounds, the primary interest in insisting that he be present relates to the appearance of justice. The prosecutor's view should be

heard on this point, but need not be controlling. There may be instances where the defendant's physical appearance would be so prejudicial to him that the court may find that the interests of justice favor excusing him from his obligation to appear. In some cases, less significant grounds for requesting an excuse (*e. g.*, the defendant's convenience) may be acceptable, depending upon other factors (*e. g.*, the significance of the crime, whether the trial is to a judge or jury, and whether the defendant desires to be excused from attending only a portion of the proceedings). If the case is to be tried to a jury and the prosecuting attorney believes that the jury will hesitate to convict the defendant because of their concerns relating to trial "in absentia," the prosecutor may request that the judge inform the jury that the trial is proceeding without the defendant at his own request. The court also may inform the jury that no adverse significance should be attached to the defendant's waiver of his right to be present. See *Cohen, supra*, at 193.

Voluntary absence

Most jurisdictions recognize the authority of the court to proceed with the trial in the absence of the defendant, at least in non-capital cases, when the defendant has voluntarily absented himself. The majority of such provisions apply only when the defendant voluntarily absents himself after the trial commences. See, *e. g.*, Fla. R.Crim.P. 3.181; N.J.Rules of Court 3:16. Several jurisdictions

have broader provisions permitting the trial to commence when the defendant voluntarily fails to appear at the time set for trial. See, *e. g.*, Ariz.R.Crim.P. 231(B); Pa.R.Crim.P. 1117; Tex.Code Crim.P. art. 33.03 (voluntary absence after pleading). The provisions in both categories do not require that the trial proceed in the defendant's absence, but grant the court discretion to continue the trial.

Although courts frequently describe voluntary-absence provisions as based upon a waiver concept, the provisions are difficult to sustain in terms of traditional waiver principles. For example, most do not require that the defendant have been informed of the consequences of his failure to be present at trial. See, *e. g.*, F.R. Crim.P. 43(b)(1). It seems likely that the term "waiver" in this context has frequently been utilized to describe what more accurately can be characterized as a procedural "forfeiture." The Supreme Court has recognized that certain constitutional rights can be lost, notwithstanding lack of intent to waive those rights, by simply failing to raise the constitutional claim in accordance with valid procedural Rules. See, *e. g.*, *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Provisions relating to voluntary-absence may often be viewed in the same light. Indeed, these provisions often are framed in terms of a forfeiture concept—*e. g.*, they state that "the further progress of the trial shall not be prevented" by the voluntary absence. See *People v. Evans*, 21 Ill.2d 403, 172 N.E.2d 799, 800 (1961) (speaking in terms of a

"forfeiture" of rights). *Cf. Illinois v. Allen*, 397 U.S. 337, 346, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). From the viewpoint of a forfeiture justification, the distinction between failure to appear at all and voluntary absence after the trial has started may be supported on the ground that absence in the latter situation tends to be far more disruptive of the administration of criminal justice. Similarly, continuation of the trial might be distinguished from continuation of the disposition hearing, which often is comparatively brief and does not involve a jury. But from the viewpoint of determining whether waiver exists, these distinctions seem far less important than whether the defendant had been informed of his obligation to appear and was aware of the consequences of his failure to appear. Consider, *e. g.*, *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (dissenting opinion); *United States v. McPherson*, 137 U.S.App. D.C. 192, 421 F.2d 1127 (D.C.Cir. 1969).

Clause (2) is based upon the premise that the controlling feature in application of the voluntary-absence provision should be the likelihood of waiver. Accordingly, the provision requires that the defendant have been personally told by the court when the trial or hearing will commence and what may result from his failure to attend. Even then, it is possible that the court, despite inquiry as to the defendant's whereabouts, may conclude that he has voluntarily waived when he has in fact been prevented from attending. But the determination on

this point is not conclusive. A conviction obtained in the defendant's absence could, of course, later be set aside if it were shown that the defendant's absence was not voluntary. See, *e. g.*, *Fleming v. Commonwealth*, 280 S.W.2d 148 (Ky.Ct.App.1955). It should be noted in this regard that the concept of voluntariness as used in this subdivision excludes those situations in which the defendant was unable to attend for good cause. Cf. *Tacon v. Arizona*, *supra* (where the dissenting opinion found that there was no voluntary waiver when the defendant lacked funds to return to the jurisdiction). Of course, before determining that the defendant voluntarily absented himself, the trial court must make careful inquiry. See *Cureton v. United States*, 130 U.S.App.D.C. 22, 396 F.2d 671 (D.C.Cir. 1968), affirmed 134 U.S.App.D.C. 144, 413 F.2d 418; *People v. Semecal*, 69 Cal. Rptr. 761, 264 C.A.2d Supp. 985 (App.Div.Super.Ct.1969).

While clause (2) applies to the disposition hearing, there usually is little value in imposing a sentence of imprisonment on a defendant whose whereabouts are currently unknown, even if he is voluntarily absent and appreciates the consequences of his absence. Accordingly, it seems likely that the clause (2) authority to proceed with the dispositional hearing will be utilized primarily in cases in which the court desires to impose a fine.

It should be noted that even though the court proceeds with a trial or hearing in the defendant's

absence, under subdivision (c), *infra*, it may still direct that all efforts be made to find the defendant so that he can at least be present during a part of the trial or hearing.

Disruptive conduct

Clause (3) is based upon F.R. Crim.P. 43(b)(2) and N.D.R. Crim.P. 43(b)(2). Like those provisions, it does not attempt to define that behavior that is so disruptive as to justify exclusion, those warnings that should be advanced before exclusion is ordered, or the appropriate conditions or length of the exclusion. Compare Calif.Penal Code § 1043(b), (c); N.Y.Crim.P.Law §§ 260.20, 340.50. These are matters that are best left to case law development in light of *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Clause (3) does not extend to the disposition hearing since the use of alternative means for dealing with the disruptive defendant, *e. g.*, binding him, often present less difficulties in the setting of a disposition hearing than a trial. Also it imposes less burden on the administration of justice to temporarily continue a disposition proceeding than to declare a mistrial.

Corporations

This subdivision does not treat the separate problems presented by the failure of a corporation to appear for trial. Compare, *e. g.*, N.Y.Gen.Bus.Law § 681(2) (providing for summary default) with *Ariz.R.Crim.P. 12* (providing for trial in absentia).

¹ Various decisions have held that no form of waiver—including voluntary absence—would be permitted in capital cases. See, *e. g.*, *Hopt v. Utah*, 110

U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); *People v. La Barbera, supra*. This exception was incorporated in the Federal Rules and various state provisions patterned after the Federal Rules. See, e. g., N.D.R.Crim.P. 43(b)(1). However, the recently approved amendment of F.R.Crim.P. 43 (transmitted to Congress in April, 1974) would eliminate the exception. Accepting arguendo that the significance of the penalty justifies an exception with respect to a rule based upon forfeiture due to voluntary absence (see Comment on clause (2), *infra*), a waiver that meets constitutional standards (i. e., made understandingly and voluntarily) should be applicable to capital cases, as are other waiver provisions.

- 1 **(c) Obtaining presence of unexcused defendant.** If the de-
2 fendant is not present at the trial or part thereof or the disposi-
3 tion hearing and his absence has not been excused, the court by
4 order may direct a [law enforcement officer] to bring the defend-
5 ant forthwith before the court for the trial or hearing.

Comment

This applies to all situations in the immediately preceding other than that in which the de- Comment, it may be used either defendant's absence has been ex- together with or in lieu of the cused under subdivision (b)(1), action authorized by subdivision *supra*. Accordingly, as indicated (b)(2), *supra*.

Rule 714. [Public Right of Access.]

- 1 **(a) Courtroom open to public.** The trial and other courtroom
2 proceedings shall be open to the public, except as provided in
3 this Rule.

Comment

This recognizes "the value of continuing public scrutiny of the judicial process" and "the educational value of open courts," Commentary to ABA Standards, Fair Trial & Free Press 3.1 (Approved Draft, 1968), as well as the defendant's Sixth Amendment right to a public trial.

- 1 **(b) Grounds for temporary deferral of public access.** The
2 court may order temporary deferral of public access to all or part
3 of a trial or other courtroom proceeding only if:
4 (1) The defendant has moved therefor and the court is
5 satisfied that there is a reasonable likelihood that the de-
6 fendant's constitutional right to a fair trial or an impartial
7 jury cannot be preserved unless the deferral is granted;
8 or
9 (2) The parties have agreed thereto, and the court is
10 satisfied that the deferral is necessary in the interest of jus-
11 tice.

Comment

Except for not being limited to trial proceedings outside the jury's presence and except for the inclusion of clause (2), this is quite similar to provisions in ABA Standards, Fair Trial & Free Press 3.1 (pretrial proceedings) and 3.5(d) (trial) (Approved Draft, 1968).

This is not limited to trial proceedings outside the jury's presence because in some circumstances reporting of proceedings in the jury's presence may inflame the community in such a way as to deprive the defendant of a fair trial.

There appears to be no serious problem as to the constitutionality of this type of provision. See Commentary to ABA Standard 3.1.

This provision is clearly consistent with the Sixth Amendment and similar State constitutional provisions. The Sixth Amendment provides that "*the accused* shall enjoy the right to a * * * public trial," and by moving to exclude the public the defendant

would be waiving his right. Even if the Sixth Amendment were read to imply a right on the part of the public, as opposed to the defendant, it is clear that any such right would be a qualified one which would not extend to *immediate* access to matters the reporting of which would likely deprive the defendant of a fair and impartial trial *expressly* guaranteed by due process.

As far as the First Amendment is concerned, denial of access to information is at most an indirect abridgement, see *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), and the fact that the denial here is only temporary would make any abridgement all the more "indirect." A merely indirect abridgement is constitutional to the extent that it is necessary to serve a compelling governmental interest. See *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed.2d 672 (1968).

- 1 (c) Duration of deferral. The court may not continue the
- 2 deferral longer than the grounds therefor exist.

Comment

This ensures that the deferral interests specified in subdivision (b), *supra*. will persist only to the extent necessary to protect the important in-

- 1 (d) Means of deferral. The deferral shall be by means of ex-
- 2 cluding the public from the courtroom, making at public expense
- 3 a full transcript or sound recording of all parts of the trial or
- 4 courtroom proceeding which the public would have heard had it
- 5 not been excluded, and opening the transcript or sound recording
- 6 to public inspection as soon as the grounds for deferral cease to

- 7 exist and in any case not later than immediately after disposition
8 of the case at the trial court level.

Comment

This is quite similar to provision in ABA Standards, Fair Trial & Free Press 3.1, 3.5(d) (Approved Draft, 1968).

- 1 **(e) Sound and visual recording.** The court may also order that
2 all parts of the trial or courtroom proceeding which the public
3 would have heard had it not been excluded be recorded by sound
4 and visual recording means. If the court so orders, the sound
5 and visual recording shall be shown once, in courtroom-type cir-
6 cumstances, not later than shortly after disposition of the case
7 at the trial court level, at a time and place set by the court and
8 open to the public.

Comment

This authorizes the court to order audio-video or sound motion picture recording, to provide the public with the best-possible equivalent to being present at the trial. The reference to "courtroom-type circumstances" is to make it clear that the same restrictions regarding such matters as photographing or broadcasting as apply to courtroom proceedings, see, *e. g.*, ABA Code of Judicial Conduct, Canon 3(A)(7), apply to the showing.

- 1 **(f) Relief not precluded.** The court may order deferral under
2 this Rule, although the defendant has not moved for a transfer
3 of the prosecution to another [county] or for sequestration of the
4 jury.

Comment

This reflects the view that the relief provided by this Rule should not be conditioned upon the defendant's forfeiting his right to trial at the place the offense was committed, upon restricting the jurors' liberty, or upon the defendant's risking the possible effects of juror displeasure which may attend sequestration.

PART 2

SCHEDULING TRIALS

Rule 721. [The Trial Calendar.]

- 1 **(a) Court control; duty to report.** The court shall provide
2 for the assignment of cases upon the calendar in accordance with
3 this Rule, and may provide by general or special rule for the ef-

4 fective administration of the calendar. The [appropriate of-
5 ficial] shall file a written report with the court periodically, as
6 directed by the court, indicating the status of each case not set
7 for trial, including whether the defendant is being held in custody
8 pending trial and, if so, how long he has been in custody.

Comment

This subdivision is in some respects similar to ABA Standards, Speedy Trial 1.2 (Approved Draft, 1968). As noted in the Commentary thereto, in most jurisdictions control over the calendar is given by statute to the court or the clerk of the court. Note, 48 Colum.L.Rev. 613 (1948). The assumption here, as with the comparable ABA Standard, is that a court possesses inherent residual power over its own calendar and that prosecutor control may result in the prosecutor having an unfair advantage over the defendant. *Id.* at 620.

One argument which is sometimes made in favor of prosecutor control is that he "is more familiar than the court with the complexities of each case." *Id.* at 618. To the extent that this is so, the prosecutor may bring those facts (and other relevant facts, such as the public interest in a very prompt trial in certain cases) to the attention of the court. In current practice, it is not uncommon, for example, for prosecutors to take an active role in ensuring that the public is protected by the prompt disposition of cases involving defendants whose pretrial liberty is believed to present unusual risks. See Freed & Wald, *Bail in the United States: 1964*, p. 83 (1964); National Conference on Bail and Criminal Justice, *Proceedings* 208 (1965). The

first sentence of this subdivision recognizes that the court by rule may provide for the receipt of such information.

The last sentence of this subdivision recognizes the authority of the court to direct one or more appropriate officials (*e. g.*, the prosecutor, the sheriff, or the court administrator), to be identified by office in each jurisdiction adopting this Rule, to file written reports periodically concerning cases which have not yet been set for trial. This will help to ensure that cases do not become "lost" in the system due to the oversight or disinterest of the prosecutor and defense counsel. Reporting requirements of this kind are currently to be found in some states; see Commentary to ABA Standard 1.2. Similarly, the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971) provide:

The United States Attorney of each district shall file every two weeks with the chief judge of the circuit, and the chief judge of his district, a report of all persons held in jail prior to trial, the period of detention, and the reason for such detention or delay in the disposition of charges pending against them. As to all other criminal cases the United States Attorney shall make a similar report monthly regarding each case in

which the trial has not commenced within six months of the date of arrest, service of summons, detention, or the filing of

the charge for which the defendant is to be tried, whichever is earliest.

1 **(b) Priorities in scheduling criminal cases.** Insofar as is practicable, trials of criminal cases shall have priority over civil cases.
 2
 3 In determining priority among criminal cases, the court shall consider, among others, the following factors:

5 (1) The right of a defendant to a prompt trial under Rule
 6 722;

7 (2) Whether the defendant is in custody;

8 (3) The relative gravity of the offense charged; and

9 (4) The relative complexity of the case.

Comment

This is rather similar to ABA Standards, Speedy Trial 1.1 (Approved Draft, 1968). As noted in the Commentary thereto, the pressure of the trial docket need not unduly delay criminal cases if the calendar is "governed by two policies—trial of criminal cases before civil cases * * * and, in general, trial of jailed defendants before defendants on bail." See Note 57 Colum.L.Rev. 846, 866 (1957). The policy of giving priority to criminal cases is found in F.R.Crim.P. 50 and in the statutes or rules of some states. Some jurisdictions also give priority to cases where the defendant is in custody. See Commentary to ABA Standard 1.1.

Subject to such provisions, the common practice is to docket cases in the order in which the indict-

ments or informations are filed, which is sometimes required by rule or statute. Although this is generally a fair way to proceed, it is sometimes desirable to obtain a prompt adjudication of certain cases, such as those of bailed defendants who are thought likely to intimidate witnesses or commit other crimes. See National Conference on Bail and Criminal Justice, Proceedings 151-55 (1965). Clause (3) is directed to this and similar situations.

Clause (4) gives express recognition to the fact that the relative complexity of the case is also a legitimate consideration in determining whether there should be a departure from the order of the cases on the basis of the date of the filing of the information or indictment.

1 **(c) Motion to advance.** Upon motion of a party and a showing
 2 of cause, the court may advance the case on the calendar.

Comment

Illustrative of appropriate situations for advancement are where it would minimize the risk that

evidence would be lost or the amount of inconvenience to witnesses or the parties.

Rule 721 RULES OF CRIMINAL PROCEDURE Art. 7

- 1 (d) **Motion for continuance.** The court may grant a continu-
2 ance only upon motion of a party and a showing of cause and only
3 for so long as necessary.

Comment

This is similar to ABA Standards, Speedy Trial 1.3 (Approved Draft, 1968). In some courts the practice has developed whereby continuances in criminal cases are routinely granted upon motion of either the prosecuting attorney or the defendant if the other party consents. See Project, 35 U.Chi. L.Rev. 259 (1968). This subdivision emphasizes that it is the re-

sponsibility of the court to make an independent determination as to whether there is in fact good cause for the continuance and to grant a continuance only for so long as is necessary under the circumstances. The need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings.

Rule 722. [Limits on Time Before Trial.]

- 1 (a) **Discharge for lack of prompt trial.** If the trial of the de-
2 fendant is not commenced within [four months] after the ap-
3 plicable date specified in subdivision (d), excluding only the pe-
4 riods specified in subdivision (f), the court, upon motion of the
5 defendant, shall dismiss the information [or indictment] with
6 prejudice and discharge the defendant.

Comment

Rule 722 generally

This Rule is supportive of the constitutional right to a speedy trial, which is applicable to the states through the due process clause of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L. Ed.2d 1 (1967). As the Supreme Court has noted, "the right to speedy trial is a more vague concept than other procedural rights," in that a determination as to whether the right has been denied in an individual case requires an ad hoc weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the de-

fendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

For this reason, as the Court acknowledged in *Barker*, there is merit to a more rigid approach which requires that a defendant be offered a trial within a specified time period. Such an approach will foreclose, except under the most unusual of circumstances, any necessity for applying the amorphous balancing test of *Barker*. Thus, while the Court noted in *Barker* that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months," it was also

emphasized that the decision should not "be interpreted as disapproving a presumptive rule * * * which establishes a fixed time period within which cases must normally be brought." *Barker* cites with approval ABA Standards, Speedy Trial (Approved Draft, 1968), upon which this Rule is based.

As noted in the Commentary to ABA Standard 2.1, most states have by statute or rule of court established time limitations respecting how promptly the trial of a criminal case must be commenced. Most of these provisions express the limitation as being so many terms of court; that approach may have been appropriate in circuit-riding days, but now often results in lack of uniformity within a jurisdiction and in confusion as to precisely when certain trials must be commenced. In the few states which currently express the time in days or months rather than terms of court, the times range from seventy-five days to six months. Sometimes shorter time limits are set for defendants in custody.

Subdivision (a)

This subdivision sets forth the time limit of four months in brackets. This time should be viewed as an upper limit; jurisdictions adopting these Rules may well want to adopt an even shorter period of time. The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 155 (1967) proposes "that the period from arrest to trial of felony cases be not more than 4 months." National Institute of

Law Enforcement and Criminal Justice, *Analysis of Pretrial Delay in Felony Cases—A Summary Report* 11 (1972) recommends 60 days for defendants in custody and 120 days for defendants free on bail. National Advisory Comm'n on Criminal Justice Standards and Goals, Ct.-65 (1973) asserts that the "norm or average" (as opposed to outside limit) should be 60 days for felonies and 30 days for misdemeanors.

If a jurisdiction adopts a shorter period than four months, it is preferable that the period be expressed in terms of months whenever possible. For example, a three-month period is preferable to a 90-day period, as it is then easier to determine whether the time has elapsed. Although all months do not have an equal number of days, this does not mean that expressing the speedy trial time limits in terms of months is a denial of equal protection. *People v. Walker*, 34 Ill.2d 23, 213 N.E.2d 552 (1966).

Existing statutes and rules concerning the consequences of a discharge for failure to try the defendant within a specified time reflect a variety of approaches. In some jurisdictions discharge is never a bar to prosecution, in some it is always a bar, in yet some others it is a bar only in misdemeanor cases, and in still others subsequent prosecution is allowed only upon order of the court. See Commentary to ABA Standard 4.1. In many states the rules and statutes are far from clear on this matter, and these ambiguous provisions have received a variety of interpretations. See Annot., 50 A.L.R.2d 943 (1956).

Rule 722 RULES OF CRIMINAL PROCEDURE

Art. 7

This subdivision, like ABA Standard 4.1, is based upon the premise that the only effective remedy for denial of a prompt trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. See, *e. g.*, *Brummitt v. Higgins*, 80 Okl.Cr. 183, 157 P. 2d 922 (1945).

It is true, of course, that a delay in trial beyond that permitted under this Rule does not necessarily

constitute a violation of the *constitutional* right to a speedy trial. Yet it must be kept in mind that one important reason for having rather specific rules on time for trial is to avoid the necessity of litigating the far more complex question, on a case-by-case basis, of whether a balancing of all relevant factors requires the conclusion that the constitutional right has been violated. See *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). This being the case, it is most significant that nothing less than absolute discharge will suffice as a remedy for violation of the constitutional right to speedy trial. *Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

- 1 (b) Release for lack of prompt trial. If the defendant has
- 2 been in custody for [two months] following the applicable date
- 3 specified in subdivision (d), excluding only the periods specified
- 4 in subdivision (f), and his trial has not yet commenced, the court,
- 5 upon motion of the defendant, shall order the defendant released
- 6 on his promise to appear.

Comment

Under this subdivision, if the shorter time for defendants in custody has run, the effect is merely that the defendant is entitled to release on his own recognizance. Only if the time specified in subdivision (a) also runs is dismissal with prejudice required. For example, assuming no excluded periods under subdivision (f), *infra*, the defendant in custody would be entitled to release on his own recognizance after two months without trial,

and if he were not tried within two more months (four in all) he would be entitled to dismissal with prejudice. Thus, this subdivision conforms to the policy underlying ABA Standards, Speedy Trial 4.2 (Approved Draft, 1968), which is that the shorter time limitations for defendants in custody should serve only to terminate custody and thereby put such defendants in approximately the same position as other defendants.

1 (c) **Time for motion.** A motion under subdivision (a) or (b)
2 may be made only before commencement of trial, unless:

3 (1) The defendant was not represented by counsel and
4 was not personally informed by the court of his rights un-
5 der this Rule; or

6 (2) The court otherwise permits the motion in the interest
7 of justice.

Comment

Speedy trial is a personal right of the defendant which is deemed forfeited if not properly asserted. The requirement that the defendant move for dismissal prior to trial is apparently followed in all jurisdictions. See Annot., 57 A.L.R.2d 302, 336, 343 (1958). The exception stated in clause (1) for

the unrepresented defendant who is unaware of his speedy trial rights is based upon Rule 8 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971). Clause (2) permits the court to allow a late motion under other compelling circumstances.

1 (d) **When time begins to run.** The time for trial shall com-
2 mence running, without demand by the defendant, from the date
3 an information charging the offense is first filed under Rule 231
4 (f) [or, if the prosecution is initiated by indictment, from the
5 date an indictment charging the offense is first returned], unless:

6 (1) The information [or indictment] was dismissed upon
7 motion of the defendant, in which case the time shall com-
8 mence running from the date a subsequent information
9 charging the offense is filed under Rule 231(f) [or, if the
10 prosecution is subsequently initiated by indictment, from
11 the date an indictment charging the offense is returned];
12 or

13 (2) The defendant is to be retried following a mistrial, an
14 order for a new trial, or an appeal or collateral attack, in
15 which case the time shall commence running from the date
16 the order occasioning the retrial becomes final.

Comment

Most speedy trial rules and statutes are silent on the question of whether the defendant must demand trial to commence the time running. However, the majority of the appellate cases—at least up until the time of the decision in *Barker v. Wingo*, 407 U.S. 514, 92

S.Ct. 2182, 33 L.Ed. 101 (1972), holding demand is not essential to trigger the constitutional right to speedy trial—require that a demand be made. Annot., 57 A.L.R.2d 302, 326 (1958); Annot., 129 A.L.R. 572, 587 (1940). In support of the majority rule, it is

argued that requiring demand will prevent "technical evasion of the charge." Note, 57 Colum.L.Rev. 846, 853 (1957).

A strong minority rejects the demand doctrine and requires only that a motion to dismiss be filed before trial. This view attributes "significance to the fact that only the state is empowered to bring the charge to trial" and that the demand rule enables "the state to do nothing until the defendant acts, and then, if he acts too late, to claim waiver." *Id.* at 853. Consistent with ABA Standards, Speedy Trial 2.2 (Approved Draft, 1968), the latter view is adopted in this subdivision. Apart from the fact that a demand requirement applicable to all cases appears to be inconsistent with the *Barker* holding, the position taken in this subdivision is supported by a number of other considerations. For one, there are a number of situations, such as where the defendant is unaware of the charge or where he is without counsel, in which it is unfair to require a demand. Note, 57 Colum.L.Rev. 846, 854-55 (1957). Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity. *Id.* at 864-65. More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. The trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge.

As to when the time normally begins to run, this subdivision identifies the critical date as that when an information charging the offense was filed under Rule 231 (f), *supra*. This is fully consistent with the present prevailing view that whenever the required charge (be it indictment, complaint, affidavit, or information) is filed before the defendant is taken into custody, the time runs from the date of filing. Annot., 85 A.L.R.2d 980, 981 (1962). That view is fully supported by the fact that delay following charge can operate to the disadvantage of the defendant even if he is not under arrest or otherwise restrained: (1) if he is not arrested or otherwise notified of the charge, he is not prompted to seek out witnesses on his behalf when they might be available; (2) even though not arrested, if the defendant is notified of the charge his period of anxiety over the pending prosecution has begun; and (3) if the public is notified of the charge, the defendant is from that time forward an object of public suspicion.

In current practice, the more common case is that in which the defendant is arrested and thereafter held in custody or released on bail or recognizance until the time the charge is filed. Under these circumstances, existing statutes "typically cover the period between the holding of the defendant to answer, or his commitment, and the commencement of trial." Note, 57 Colum.L.Rev. 846, 847 (1957). But because, under these Rules, the filing of an information in such a case is required by the time of the defendant's appear-

ance before a magistrate or promptly thereafter, see Rule 231 (f), it is appropriate to settle upon the event of filing as that which triggers the time limits in all cases, subject only to the exceptions specifically noted.

It is true, of course, that unnecessary delay in the filing of an information can be just as detrimental to a defendant as post-information delay. Indeed, it can be more detrimental because the defendant is not prompted to preserve his defense. That problem, which is *not* a problem of speedy trial, is not dealt with in this Rule. It nonetheless remains open to a defendant to raise the objection that an extended pre-information delay violates due process, as recognized in *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). If such an objection is raised, then, as noted in *Marion*, the defendant will be required to show that he has been prejudiced by the delay. By contrast, a showing of prejudice is not required under this Rule regarding post-information delay.

The bracketed language in this subdivision will be required only in those jurisdictions which permit prosecution by indictment. If the prosecution is initiated by indictment (*i. e.*, the defendant is indicted before an information is filed, which per Rule 321(f) will not likely be the case if the defendant is first cited, summoned or arrested), then the speedy trial time runs from the date the indictment is returned. This is consistent with the present prevailing rule. See Annot., 85 A.L.R.2d 980, 981 (1962).

A number of appellate courts have been faced with the problem of how to count the speedy trial limitations in a case where the original charge was dismissed and later the same offense was brought forth in another charge. Some courts begin counting anew from the time of the second charge on the ground that the first charge became a nullity upon dismissal, while others continue counting from the time of the first charge on the theory that such action is necessary to prevent the state from depriving a person of his rights by the simple device of dismissal and recharge. Although no clear-cut pattern is discernible, the latter result is more likely if the dismissal was not at the instance of the defendant or if the time had not already run when the first charge was dismissed. See Annot., 30 A.L.R.2d 462 (1953).

This Rule follows ABA Standard 2.2 in recognizing as the critical distinction whether the dismissal was at the instance of the prosecutor the defendant. It is provided in subdivision (f)(10) of this Rule that dismissal on motion of the prosecutor merely tolls the running of the time. Dismissal at the instance of the defendant calls for different treatment. As noted in *People v. Hamby*, 27 Ill.2d 493, 496, 190 N.E.2d 289, 290 (1963): "Were it otherwise the People would be obligated to either successfully defend all such motions or incur the risk of the accused being discharged under the statute. Such perfection cannot be demanded, even of the People, nor should such a weapon to permit potential abuse be placed in the hands of an

accused." Thus, clause (1) provides that if the information was dismissed upon motion of the defendant, then the time commences running from the date of a new information charging that offense is filed.

If the defendant moves for dismissal on the ground that the time for trial has already run, this is an absolute bar to prosecution for that offense, as provided in subdivision (a) of this Rule. More difficult is the question of what the result should be when the time for trial has already run and the defendant fails to raise this issue but instead obtains a dismissal on some other ground which in itself does not bar a new charge. Although arguments can be marshaled on both sides of this question, on balance it seems pre-

ferable to start the time running again from the subsequent charge, as provided in ABA Standard 2.2. Thus, failure to raise the speedy trial issue prior to a motion for dismissal is dealt with in the same way as failure to raise the issue prior to trial under subdivision (c) of this Rule.

Clause (2) is generally consistent with the doctrine which has been developed by the appellate courts, see Note, 57 Colum.L.Rev. 846, 850 (1957). It is based upon a provision in the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971), which, unlike ABA Standard 2.2 (c), makes it clear that the critical date is the day when the order occasioning the retrial becomes final.

- 1 (e) When trial begins. For purposes of this Rule, the trial
- 2 commences at the time of the beginning of the first proceeding
- 3 under Rule 521.

Comment

For the purpose of determining the required time for trial, the trial commences at the beginning of the first proceeding set forth in Rule 521, *supra*. Normally, this will be the opening statement by the prosecuting attorney. The time of jury selection thus does not constitute the beginning of the trial under this Rule—such a

starting point seems inappropriate here because of the practice in some jurisdictions of selecting juries prior to the time set for commencing trial. However, it should be noted that subdivision (f)(4), *infra*, excludes the period of jury selection in computing the time for commencing trial.

- 1 (f) Excluded time periods. The following periods of time are
- 2 excluded in computing the time for trial:

- 3 (1) The period of proceedings for the determination of
- 4 competency and the period during which the defendant is in-
- 5 competent to stand trial.

- 6 (2) Any period of delay resulting from a pretrial motion
- 7 involving matters of unusual complexity, including the time

8 needed to prepare for a hearing on the motion, the time of
9 the hearing, the time not exceeding [15 days] while the mat-
10 ter is under advisement, and the time needed to comply with
11 the court's ruling on the motion.

12 (3) Any period of delay resulting from an interlocutory
13 appeal, but not to exceed [two months] if the appeal was
14 taken by the prosecuting attorney and the time being deter-
15 mined is that for release under subdivision (b).

16 (4) The period of jury selection.

17 (5) Any period during which proceedings in the instant
18 case are delayed because of proceedings relating to the prose-
19 cution of the defendant on other charges.

20 (6) The period of a continuance granted at the request or
21 with the consent of the defendant. A defendant without
22 counsel may not consent to a continuance unless he has been
23 advised by the court of his rights under this Rule and the ef-
24 fect of his consent.

25 (7) The period of a continuance granted at the request of
26 the prosecuting attorney, if (i) the continuance is granted
27 because of the unavailability of evidence material to the
28 State's case, where the prosecuting attorney has exercised
29 reasonable diligence to obtain the evidence and there are
30 reasonable grounds to believe that the evidence will become
31 available within a reasonable time; or (ii) the continuance is
32 granted to allow the prosecuting attorney additional time to
33 prepare the State's case and the additional time is justified
34 by exceptional circumstances of the case.

35 (8) Any period of delay resulting from the absence or un-
36 availability of the defendant. A defendant is absent when-
37 ever (i) he fails to appear at a proceeding for which notice
38 has been given under these Rules; (ii) his whereabouts are
39 unknown and he is attempting to avoid apprehension or
40 prosecution; or (iii) his whereabouts cannot be ascertained
41 by reasonable diligence. A defendant is unavailable when-
42 ever his whereabouts are known but his presence for trial
43 cannot be obtained by reasonable diligence.

44 (9) With respect to a defendant incarcerated under a
45 sentence of imprisonment, the period of time commencing
46 under subdivision (d) and until his presence for trial has
47 been obtained, provided the prosecuting attorney has exer-
48 cised reasonable diligence (i) in seeking to obtain the de-
49 fendant's presence for trial upon receipt of a demand from

the defendant for trial, and (ii) if the defendant has not theretofore demanded trial, in filing a detainer with the official having custody of the defendant requesting that official to advise the defendant of his right to demand trial.

(10) If an information [or indictment] was dismissed by the prosecuting attorney and an information charging the same offense is subsequently filed under Rule 231(f) [or, if the prosecution is subsequently initiated by indictment, an indictment charging the same offense is returned], the period from dismissal of the first information [or indictment] to the filing of the subsequent information [or the return of the subsequent indictment].

(11) Other periods of delay occasioned by exceptional circumstances.

Comment

As noted in the Commentary to ABA Standards, Speedy Trial 2.1 (Approved Draft, 1968), only a few jurisdictions have attempted to enumerate by rule or statute the circumstances which justify an extension of the usual time limits within which a defendant must be tried. Rather, most states merely provide for additional time upon a showing of "good cause." Some other states have identified only a few legitimate causes of delay, the most common being delay "upon application of the defendant" and delay because of the absence of material evidence. In states with only a general "good cause" provision or with a far-from-complete listing of proper bases for delay, courts have found the task of determining what events justify extension of the statutory limits a most difficult one. See Annot., 57 A.L.R.2d 302 (1958); Annot., 129 A.L.R. 572 (1940). Thus, this subdivision is based upon the premise underlying ABA Standard 2.1: "that insofar as

is possible the basic policy considerations involved in such determinations should be set forth by statute or rule of court."

This subdivision states that the designated periods are "excluded in computing the time for trial." This language is intended to clarify precisely what impact the listed events should have on the running of the time, a matter which has caused the courts some difficulty under existing statutes. Illustrative is the holding in *People v. Stillman*, 391 Ill. 227, 62 N. E.2d 698 (1945), that when the defendant obtains a continuance the four-month statutory limit begins running anew from the end of the period for which the continuance was obtained. The intent of this subdivision is that all appropriate delays be excluded in computing compliance with the time limit, not merely those excusable periods during which the date for trial would otherwise have arrived. The wording of many statutes leaves this matter unclear.

Paragraph (1) is based upon ABA Standard 2.3(a).

As for paragraph (2), it must be emphasized that account is taken only of a period of *delay which results* from a pretrial motion, and only when the motion involves matters of unusual complexity. Routine motions (*e. g.*, for discovery) which are handled as a matter of course under these Rules should not be deemed to have caused delay, for they have been taken into account in setting the time limits in subdivision (a). See, *e. g.*, *People v. Scott*, 13 Ill. App.3d 620, 301 N.E.2d 118, 125 (1973):

All discovery motions are not intrinsically dilatory, therefore not every such motion automatically extends the period in which the defendant must be tried. * * * A motion may be simple and easily answered or it may be detailed and difficult to answer. The information requested may be presently known or it may be reasonable and supplied without objection or it may call forth objections which must be heard and resolved. A discovery motion which the State can answer quickly would cause little or no delay; the State should not be permitted to use such a motion as an excuse to toll the statute implementing the constitutional right to a speedy trial. On the other hand, a discovery motion that calls for answers which are not quickly available or requests answers replete in detail would cause a legitimate delay * * *. Whether a motion falls into the former or the latter category would de-

pend on the facts of each case. This calls for the trial court's appraisal of the motion, its need, timeliness and complexity; it calls for the court's appraisal of the State's ability to answer the motion immediately and the merit of the State's reasons for not doing so.

Paragraph (3) excludes the period of delay resulting from an interlocutory appeal. However, for purposes of subdivision (b), *supra*, which concerns *release* for lack of a prompt trial, a two-month limit is imposed. The assumption is that a defendant should not be incarcerated an undue length of time merely because there is not a prompt disposition of an appeal taken by the prosecuting attorney.

As for paragraph (4), it is necessary to exclude the period of jury selection because under subdivision (e) of this Rule the trial does not begin for speedy trial purposes at the time jury selection commences.

Paragraph (5), dealing with delay resulting from proceedings relating to the prosecution of the defendant on other charges, is based upon ABA Standard 2.3(a).

Paragraph (6) is based upon ABA Standard 2.3(c). Delay attributable to a continuance requested or consented to by the defendant is sometimes excepted by statute or rule from the speedy trial limitations. The last sentence of paragraph (6), concerning the unrepresented defendant, is modeled after Calif. Penal Code § 1382 as well as the ABA Standard. It will protect a defendant without counsel from forfeiting

a prompt trial because of ignorance of his rights.

Paragraph (7) is largely based upon ABA Standard 2.3(d), although in requiring that there be reasonable grounds to believe that evidence will become available "within a reasonable time" (rather than "at the later date") it follows Rule 5(c) of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971). What constitutes a reasonable time will depend upon all the circumstances, including the reason for the unavailability of the evidence. For example, a rather substantial period of time may be justified where the delay is attributable to the defendant's conduct in preventing the appearance of a prosecution witness.

With respect to clause (ii) of paragraph (7), it should be noted that failure of the prosecutor to be prepared to go to trial should not ordinarily be recognized as grounds for extending the speedy trial time limitations. Were it otherwise, the prosecutor could deny a defendant a speedy disposition of his case by merely delaying preparation of the case. However, occasionally an extremely complex case, such as one involving a large conspiracy, cannot be adequately prepared in the time which would be sufficient in other cases. If an extension of time were not permitted in these few special cases, there would be pressure to set a general time-for-trial limit applicable to all cases long enough to cover these exceptional cases.

Paragraph (8) is in most respects the same as ABA Stand-

ard 2.3(e) and Second Circuit Rule 5(d). Under the second sentence, when the defendant's whereabouts are unknown the time is tolled if *either* he is attempting to avoid apprehension or prosecution *or* due diligence was employed in an attempt to find him. Thus, it is not deemed necessary that the defendant attempt to avoid arrest or prosecution; the granting of additional time is not based upon the fault of the defendant, but on the fact that he cannot be found. (The theory is the same as that underlying the Model Penal Code statute of limitations tolling provision, which was changed so as not to require a "purpose [by the defendant] to avoid detection, apprehension or prosecution" to interrupt the period of limitation during a defendant's absence. Model Penal Code § 1.06, Status of Section (Proposed Official Draft, 1962).) The "reasonable diligence" required of the state includes the usual investigative procedures for determining the whereabouts of a person. See, *e. g.*, *People v. Serio*, 13 Misc.2d 973, 181 N.Y.S. 2d 340 (1958), holding the state had not used due diligence where the defendant lived openly in the jurisdiction, had his name listed in the telephone directory, was employed by a well-known firm, and had appeared in the local courts on other matters. But, because the second sentence sets forth alternative grounds, a defendant who was attempting to avoid apprehension or prosecution may not raise the question of lack of due diligence. Moreover, if the defendant failed to appear at proceedings in the case as to which he

had notice, he is for that reason alone absent.

By virtue of the last sentence of paragraph (8), the running of the time for trial is tolled during that period when the defendant's presence for trial cannot be obtained by due diligence. This does not excuse the prosecuting attorney from the obligation of seeking interstate rendition of the defendant known to be in another jurisdiction. (The Uniform Criminal Extradition Act is now the law in almost all states.) However, the running of the time will be tolled if the attempt at rendition is unsuccessful, as where the executive in the state where the defendant is found denies rendition. This may happen when the governor concludes that the accused has not been charged with a crime, that he is not a fugitive from the demanding state, or that "on the merits" he should not be returned (as where the defendant raises an equitable plea, substantive defenses to the alleged crime, or due process violations in the demanding state). Comment, 66 Yale L.J. 97 (1956).

Paragraph (9) is based upon ABA Standards 3.1 and 3.2. The Standards also deal with certain related matters, such as the responsibilities of persons having custody of a person against whom a detainer is lodged, which are not covered here on the ground that they are inappropriate matters for court rules. For appropriate legislation on those matters, consult the Uniform Mandatory Disposition of Detainers Act, prepared by the National Conference of Commissioners on Uniform State Laws, and the Suggested Legisla-

tion and Agreement on Detainers, prepared by the Council of State Governments, which appear as Appendix A and B of the ABA Standards.

The thrust of paragraph (9) is that the prosecutor is not required to seek a prompt trial of a defendant serving a term of imprisonment absent a demand for trial from that defendant, provided the prosecutor has given the defendant adequate notice of his right to demand trial. If a demand is made, then the prosecutor must use due diligence to obtain the presence of the defendant for trial. If the prisoner is incarcerated within the jurisdiction, this means that the prosecutor must resort to a writ of habeas corpus ad prosequendum or similar device to obtain custody of the prisoner from the prison authorities. If the prisoner is incarcerated outside the jurisdiction, then the prosecutor must undertake whatever legal steps are necessary to obtain the prisoner from the incarcerating jurisdiction. For the prisoner held by federal authorities, this will mean requesting that the executive make the appropriate request of the Attorney General, as provided for in 18 U. S.C. § 4085. If the prisoner is held in a state which has enacted the Uniform Criminal Extradition Act, then extradition proceedings should be commenced. Or, if the incarcerating state is also a party to the Interstate Agreement on Detainers, a written request in compliance with Article IV(a) of the Agreement would be in order.

It must be emphasized that such action is required only in those instances in which the pris-

oner has demanded trial. In this respect, paragraph (9) conforms to the provisions of the Uniform Mandatory Disposition of Detainers Act and the Interstate Agreement. While it has sometimes been argued that the prosecutor should be required to proceed even absent a demand by the prisoner, Comment, 31 U.Chi.L.Rev. 353, 554-55 (1964), most of the cases—particularly with respect to the prisoner incarcerated outside the jurisdiction—have held that the prisoner must make a demand. See, *e. g.*, *United States v. Fouts*, 166 F.Supp. 38 (S.D. Ohio), *aff'd*, 258 F.2d 402 (6th Cir. 1958) (federal prosecution, prisoner in state custody); *Kirby v. State*, 222 Md. 421, 160 A.2d 786 (1960) (state prosecution, prisoner in federal custody); *Pellegrini v. Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955) (state prosecution, prisoner in another state). Cases not requiring demand have often involved a situation in which the prisoner had not been adequately apprised of the fact that charges were outstanding against him and that he could demand a prompt trial. See, *e. g.*, *People v. Bryarly*, 23 Ill.2d 313, 178 N.E.2d 326 (1961).

In view of the fact that paragraph (9) requires notice to the prisoner of the charges and his right to demand trial, it is appropriate to limit the prosecutor's responsibility for proceeding to those cases in which a demand is made. Absent a desire by the prosecutor to go to trial, the prisoner then retains the option of demanding trial in order to overcome whatever disadvantages may flow from the fact that a detainer

has been lodged against him or of not making the demand in the hope that the charges will be dropped before or at the time he completes his sentence. Were the rule otherwise, the prosecutor would often undertake a prosecution, in order to prevent it from being barred, so as to guard against the possibility that the prisoner would gain an untimely release (*e. g.*, by habeas corpus) from his present sentence, which would otherwise be deemed sufficient.

Because it is now clear that the constitutional right to a speedy trial protects those who are serving a sentence on a prior conviction, even in another jurisdiction, *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), and that the right is not limited to those cases in which the accused has demanded a speedy trial, *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), it might be thought that the demand provision of paragraph (9) is patently unconstitutional. This is not the case, as the Court in *Barker* emphasized that "failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial," *id.* at 532, and concluded that *Barker's* right to a speedy trial was not violated because he did not want a speedy trial, as he was gambling on the prospect that codefendant Manning would be acquitted and that the charges against him would then be dropped. From this, it would seem to follow that if a prisoner has been fully advised of his right to demand trial

but does not make such a demand in order to enhance his chances that he will never be tried, then his right to a speedy trial has not been denied.

Paragraph (10), which is based upon ABA Standard 2.3(f), must be considered in connection with subdivision (b), *supra*. Under that subdivision, the time for trial ordinarily runs from "the date an information charging the offense was first filed." However, if that information is dismissed on motion of the defendant, then, as provided in subdivision (d)(1), the time runs from the date a subsequent information charging the offense is filed. By contrast, paragraph (10) provides that dismissal of the information on motion of the prosecutor only tolls the running of the time for trial until another information charging the same offense is filed. If dismissal by the prosecutor were to operate so as to begin the time running anew upon a subsequent charge of the same offense, this "would open a way for the complete evasion" of the speedy trial guarantee. *Brooks v. People*, 88 Ill. 327, 330 (1878).

Paragraph (10) applies only when the action of the prosecutor amounts to outright dismissal of the information. If some other step is taken which keeps the charge outstanding and thus keeps the statute of limitations tolled, as

with the *nolle prosequi* with leave procedure found in some jurisdictions, see *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), then the time limits are not tolled.

The bracketed language in paragraph (10) will be required only in those jurisdictions which permit prosecution by indictment.

Paragraph (11) has been added to this subdivision on the ground that occasionally there will arise a unique situation not covered by paragraphs (1) through (10) in either a permissive or prohibitive sense, so that it is necessary to recognize expressly a residual discretionary power in the trial judge to deal with such a situation. This paragraph is based upon Second Circuit Rule 5(h), which is deemed preferable to the "other periods of delay for good cause" language of ABA Standard 2.3(h), in that it emphasizes that the reasons must be especially compelling. Thus, while some existing "good cause" provisions have been interpreted as justifying delay arising out of chronic congestion of the trial docket, Note, 77 Colum.L.Rev. 846, 857-59 (1957), such a result would not be warranted under paragraph (11). Rather, it is intended to deal with such unusual situations as illness or death of the prosecutor who was scheduled to try the case.

PART 3

WITNESSES

Rule 731. [Subpoena.]

1 (a) For attendance of witnesses; issuance; form. The clerk
 2 or, as to a proceeding before him, the [magistrate] shall issue
 3 a subpoena, signed but otherwise in blank, to a party requesting
 4 it, who shall fill in the blanks before it is served. The subpoena
 5 shall state the name of the court and the title, if any, of the pro-
 6 ceeding, and shall command each person to whom it is directed
 7 to attend and give testimony at a specified time and place.

Comment

Except for not requiring subpoenas issued by clerks to be "under the seal of the court," this subdivision, although organized differently, is to precisely the same effect as F.R.Crim.P. 17(a).

The significance of a subpoena should be sufficiently apparent to those subpoenaed even if it has no seal. No seal is required for clerk-issued subpoenas by former Uniform Rule 29(a), Calif. Penal Code § 1326, Mont.Rev.Codes § 95-1801(a), N.Y.Crim.P.Law § 610-10(2), or Tex.Code Crim.P. art. 24.01.

Because some magistrate's courts do not have clerks, this subdivision provides for issuance by "the clerk or, as to a proceeding before him, the [magistrate]." Cf. F.R.Crim.P. 17(a); Alaska R.Crim.P. 17(a)(3); Calif. Penal Code § 1326(1), (3); Maine R.Crim.P. 17(a); Nev. Rev.Stat. § 174.305(2).

In requiring issuance of a signed blank subpoena to a party requesting it, this subdivision ac-

cords with F.R.Crim.P. 17(a), Alaska R.Crim.P. 17(a)(1), Calif. Penal Code § 1326(3), Colo.R.Crim.P. 17(a), Idaho Crim.R. 17(a), and Nev.Rev.Stat. § 174-035.

This subdivision requires the subpoena to state the title "if any" of the proceeding because subpoenas may be used in criminal proceedings which do not yet have a title, *e. g.*, grand jury proceedings, Rule 432 investigatory depositions, and proceedings under Rule 221(c), *supra*, wherein "before ruling on a request for an arrest warrant, the [magistrate] may require any person, other than the defendant, who appears likely to have knowledge relevant to the offense charged to appear personally and give testimony relative to the offense charged." "Title, if any" is used in F.R.Crim.P. 17(a), Alaska R.Crim.P. 17(a)(2)(i), Colo.R.Crim.P. 17(a), Maine R.Crim.P. 17(a), Mont.Rev.Codes § 95-1801(a), and Nev.Rev.Stat. § 174.305.

1 (b) Costs and fees of witnesses for defendant. The costs of
 2 service and regular witness fees for up to [eight] witnesses sub-
 3 poenaed in behalf of the defendant from within the State shall
 4 be paid in the same manner as similar costs and fees of witnesses
 5 subpoenaed in behalf of the State. The costs of service and wit-
 6 ness fees, including reasonable expert witness fees, if any, of any
 7 other witness subpoenaed in behalf of the defendant shall be so
 8 paid if the court, upon motion of the defendant heard *ex parte*,
 9 finds that the testimony of the witness could contribute to an ade-
 10 quate defense. All records respecting defense subpoenas shall be
 11 sealed until after disposition of the case.

Comment

This subdivision covers only initial payment of the expenses specified, and does not speak to the question whether the expenses should be made "costs" assessable against the defendant if he is convicted.

The first sentence adopts the approach of, *e. g.*, Idaho Code § 19-3008 (five witnesses), La. Code Crim.P. art. 738 (six in misdemeanor and 12 in felony case), and Mont.Rev.Codes § 95-1801(b) (six). Many provisions produce a similar result by providing for defense witness fees to be paid by the government and not requiring them to be advanced upon service of the subpoena. See, *e. g.*, Ala. Code, tit. 11, § 104, tit. 15, § 296; Minn.Stat. §§ 357.32, 596.02; Nev.Rev.Stat. §§ 50.235, 174.345; N.C.Gen.Stat. §§ 7A-316, 8-59, or by providing that defense witnesses are not entitled to witness fees unless the court, in its discretion, directs the government to pay them, see, *e. g.*, Calif. Penal Code § 1329; N.Y.Crim.P.Law § 610.50 (2).

The second sentence is very similar to provision in Idaho Code § 19-3008. Compare Tex.Code

Crim.P. art. 24.03 (sworn application stating materiality for *any* subpoena). La.Code Crim.P. art. 739 and Mont.Rev.Codes § 95-1801 (b) are similar except that they require indigency as well as a showing for additional witnesses. Some provisions require both indigency and a showing for *any* of these expenses to be paid in the same manner as for prosecution witnesses. See, *e. g.*, F.R.Crim.P. 17(b); Maine R.Crim.P. 17(b). The words "including reasonable expert witness fees, if any" are included to make explicit what many courts have found implicit in F.R.Crim.P. 17(b). See 1 Wright, Federal Practice & Procedure—Criminal § 272, at 539-40 (1969).

The last sentence is to the same effect as provision in Maine R. Crim.P. 17(b). Referring to F.R. Crim.P. 17(b)'s provision for *ex parte* defense application, 1 Wright, Federal Practice & Procedure—Criminal § 272, at 544 (1969) observes that "it would seem that the secrecy of the application should be maintained after it is granted."

Rule 731 **RULES OF CRIMINAL PROCEDURE** **Art. 7**

1 **(c) For production of documentary evidence and of objects.**
2 A subpoena may also command the person to whom it is directed
3 to produce the books, papers, documents, photographs or other
4 objects designated therein. The court on motion made promptly
5 may quash or modify the subpoena if compliance would be un-
6 reasonable or oppressive. The court may direct the matters
7 designated in the subpoena be produced before the court at a
8 time before the trial or before the time when they are to be of-
9 fered in evidence and upon their production may permit the
10 matters or portions thereof to be inspected, photographed, and
11 copied by the parties.

Comment

This is to the same effect as F. Maine R.Crim.P. 17(c). Compare
R.Crim.P. 17(c), Colo.R.Crim.P. former Uniform Rule 29(a), (c);
17(c), and Nev.Rev.Stat. § 174- F.R.Civ.P. 45(b); La.Code Crim.
335. Cf. Alaska R.Crim.P. 17(c); P. art. 732.

1 **(d) Service.** A subpoena may be served as provided in civil
2 actions.

Comment

This accords with former Uni- same effect as N.Y.Crim.P.Law §
form Rule 29(a), and is to the 610.40.

1 **(e) Witnesses from without the State.** Attendance of witness-
2 es from without the State shall be secured as provided by law.

Comment

This is to the same effect as several current provisions. See F.R.Crim.P. 17(e)(2) ("A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783") (identical to F.R.Civ.P. 45(e)(2)); Idaho Crim.R. 17(d)(2) ("A subpoena directed to a witness outside the state of Idaho shall be issued under the circumstances and in the manner and be served as provided by law"); Maine R. Crim.P. 17(e)(2) ("A subpoena directed to a witness outside the state of Maine shall issue under the circumstances and in the manner and be served as provided in the Uniform Act to Secure Attendance of Witnesses from Without the State"). Cf. Colo.R.Crim.P. 17(e)(2) ("Service on a witness outside this State shall be made only as provided by law").

The Conference has promulgated a Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (1931, revised 1936), which has been enacted by virtually all the states (the 1973 Reference Book lists all jurisdictions

except Alabama, Alaska, and Georgia.) It has also promulgated Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (1957), which according to the same source has

been adopted in eleven states—Arkansas, Delaware, Idaho, Illinois, Maine, Michigan, Nebraska, New Hampshire, Pennsylvania, Rhode Island, and Wisconsin.

- 1 (f) For taking deposition; place of examination. Upon a
- 2 party's filing proof of service of notice to take a deposition in
- 3 conformity with Rule 431, the clerk or a [magistrate] of the court
- 4 before which trial is to be had shall issue to the party subpoenas
- 5 for the persons named or described therein. Unless the court
- 6 otherwise permits, a subpoena may command a person to attend
- 7 a deposition only at a place within the [county], or within [50]
- 8 miles of the place, in which he resides, is employed, or transacts
- 9 his business in person.

Comment

The first sentence hereof is to the same effect as Vt.R.Crim.P. 17(f)(1) and the first sentence of F.R.Civ.P. 45(d)(1). Compare F.R.Crim.P. 17(f)(1); Alaska R.Crim.P. 17(f)(1); Colo.R.Crim.P. 17(f); Idaho Crim.R. 17(e); Nev.Rev.Stat. § 174.375(1).

The last sentence hereof is to the same effect as Maine R.Crim.P. 17(f)(2). The county of

residence, employment, or business limitation also appears in F.R.Civ.P. 45(d)(2), Fla.R.Crim.P. 3.220(d), Idaho Crim.R. 17(e) and Nev.Rev.Stat. § 174.375(2). The 50 mile limitation also appears in Vt.R.Crim.P. 17(f)(2). Cf. F.R.Civ.P. 45(d)(2). Compare F.R.Crim.P. 17(f)(2); Alaska R.Crim.P. 17(f)(2).

- 1 (g) Contempt. Failure by any person without lawful ex-
- 2 cuse to obey a subpoena served upon him is a contempt of the
- 3 court from which the subpoena issued.

Comment

This is substantially identical to former Uniform Rule 29(d), F.R.Civ.P. 45(f), Alaska R.Crim.P. 17(g), Colo.R.Crim.P. 17(g), and Idaho Crim.R. 17(f). See F.R.Crim.P. 17(g); Maine R.

Crim.P. 17(g); Nev.Rev.Stat. § 174.385. Compare Calif. Penal Code § 1331; La.Code Crim.P. art. 737; Tex.Code Crim.P. arts. 24.05 through 24.10, 24.22.

Rule 732. [Immunity.]

- 1 (a) Compelling production of information despite assertion of
- 2 privilege. In any proceeding under these Rules, if a witness re-

fuses to answer or produce information on the basis of his privilege against self-incrimination, the [district] court, unless it finds that to do so would not further the administration of justice, shall compel him to answer or produce information if:

(1) The prosecuting attorney makes a written request to the [district] court to order the witness to answer or produce information, notwithstanding his claim of privilege; and

(2) The [district] court informs the witness that by so doing he will receive immunity under subdivision (b).

Comment

Requiring claim of privilege as precondition

This subdivision requires, as do the Model State Witness Immunity Act (1952), the Organized Crime Control Act of 1970, 18 U.S.C. § 6002, and most recent immunity statutes, that as a precondition of immunity a witness claim his privilege against compulsory self-incrimination. This avoids the possibility of gratuitous grants of immunity. Immunity should be used only when necessary to overcome refusal to produce information, only to obtain evidence not otherwise available. It should not be granted for evidence given without objection. Moreover, the requirement of an assertion of the privilege gives the prosecution some notice of matters the witness deems incriminating and thus affords the prosecutor a better basis for considering the advisability of a grant in a given situation. See Commentary to Model Act at 11-12; Dixon, Comment on Immunity Provisions, in 2 Working Papers of the Nat'l Comm'n on Reform of Federal Criminal Laws 1405, 1422 (1970).

Court approval of immunity

As does the Model Act, see Commentary at 12-13, this subdivision operates on the basis that immunity is essentially a law enforcement instrument and the enforcement authorities constitute the proper agency to exercise the principal control over immunity grants. No grant may be made except on the prosecutor's written request; the court has no power to initiate. But the court retains authority to prevent abuses.

In his memorandum for the National Crime Commission, Professor G. Robert Blakey favors a court order requirement in addition to approval power by the Attorney General. Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime at 80, 87 (1967).

The Model Act proposes *either* that the prosecuting attorney's request for an immunity order be approved by the attorney general, in which event the court would have no discretion with regard to

issuance of the order, or, absent any requirement of approval by a central law enforcement agency, that the court have a "limited discretion" to refuse to issue an order if it finds that to do so would be "clearly contrary to the public interest."

This subdivision does not require that the attorney general approve a prosecutor's request for an immunity order. Whatever may be said for the U.S. Attorney General and federal criminal laws, it can hardly be said that the state attorney general is the central supervisory and coordinating officer for the enforcement of state criminal laws. Unlike a

U.S. attorney, a state prosecutor is an elected official and, especially if he is in a large metropolitan area, may well be a powerful political figure in his own right. In addition, the local prosecutor, of course, is often of a different political party than the attorney general—and even his political rival. Moreover, it is not uncommon for the governor to be of a different political party than the attorney general and, by the governor's use of his staff, establishment of state crime commissions, etc., to further weaken the attorney general's position as the state's central law enforcement officer.

- 1 (b) **Nature and scope of immunity.** If, but for this Rule, the
- 2 witness would have been privileged to withhold the answer or
- 3 information given, and he complies with an order under subdivi-
- 4 sion (a) compelling him to answer or produce information, he
- 5 may not be prosecuted or subjected to criminal penalty in the
- 6 courts of this State for or on account of any transaction or matter
- 7 concerning which, in compliance with the order, he gave answer
- 8 or produced information.

Comment

A. Background

This is substantially identical to provision in the Model State Witness Immunity Act, and very similar to provision in the Compulsory Testimony Act of 1893, 27 Stat. 443, which became the prototype for numerous federal immunity statutes enacted by Congress up until the 1970 Crime Control Act.¹

The 1970 Act abandoned the "transactional" immunity standard, which had been the federal legislation model for some 80 years in favor of what is variously called "testimonial," "use and derivative use" or "use-plus-

fruits" immunity, providing (with exceptions for perjury and contempt) that when a witness is granted immunity and compelled to answer, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony of other information) may be used against the witness in any criminal case." 18 U.S.C. § 6002.

In *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L. Ed.2d 212 (1972), a 5-2 majority sustained the provisions of the Act against constitutional chal-

lenge, spelling an end, at least for the near future, to a lengthy debate over the constitutionally required scope of immunity provisions, a controversy sown by the Court's somewhat ambivalent opinion in *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892) (ambivalent because the invalidated statute did not even protect the immunized witness against the use of evidence derived from his compelled testimony) and renewed by the variously interpreted opinion in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L. Ed.2d 678 (1964) (variously interpreted because, on its facts, the case applied only to subsequent prosecutions by the federal government after a state has granted immunity). *Counselman*, *Murphy* and other cases are dissected by Justice Powell, for the majority, and Justice Douglas, dissenting in *Kastigar*, as well as by Justice Brennan, joined by Marshall, J., dissenting from the per curiam dismissal of certiorari in *Piccirillo v. New York*, 400 U.S. 548, 552, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971), and will not be redissected here. Rather, this Comment will deal only with the policy reasons favoring "transactional" immunity.

B. The case for "transactional" immunity

If the case for "transactional" immunity had to be summed up in one sentence, it would probably be that in a later criminal prosecution a defendant granted immunity should be in precisely the same position *vis-a-vis* the government that has compelled his

testimony as he would have been in had he relied on his privilege—and he will not be unless he is granted full transactional immunity. See *Kastigar* at 468 (Marshall, J., dissenting); *Piccirillo* at 567-70 (Brennan, J., joined by Marshall, J., dissenting); *United States ex rel. Catena v. Elias*, 449 F.2d 40, 43-44 (3d Cir. 1971) (Hastie, J.); *id.* at 45 (Seitz, C. J., concurring).

1. Difficulties of proof under a "use and derivative use" immunity

As a practical matter, it will be extraordinarily difficult to determine whether the government's evidence was obtained independently of the compelled disclosure:

[A]fter the witness testifies the government may not only know who committed the crime but also how it was accomplished, thereby reducing its burden of gathering evidence. The compelled testimony may yield specific details of the crime for which the independent source required by use immunity statutes can later be created. It is one thing to develop untainted evidence while working toward an unknown end, and quite another to construct [an independent] source when the prosecution already knows what it is looking for. [Note, *The Unconstitutionality of Use Immunity: Half a Loaf Is Not Enough*, 46 So. Calif. L. Rev. 202, 208 (1972).]

See also Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for*

Information, 1966 Sup.Ct.Rev. 103, 165.

Although theoretically the burden of proof is on the government to prove that the evidence it seeks to use is derived from an "independent" source, this protection is largely illusory:

[T]he prosecuting authorities * * * alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. [*Kastigar, supra* at 469 (Marshall, J., dissenting).]

Moreover, even a prosecutor acting in the best of faith may be unable to cope fully with "the bureaucracy involved in the investigation and prosecution of crime [which] usually consists of many persons":

It will often be difficult, sometimes impossible, to determine satisfactorily whether anyone used the coerced testimony, or how, or with what consequence. Recollection of details of the investigative

process and of administrative decisionmaking that preceded indictment or trial can become unintentionally, occasionally conveniently, vague. [*Catena, supra* at 44 (Hastie, J.)]

2. *Difficulties confronting a person granted use immunity when he testifies, or considers testifying, in a subsequent prosecution*

Cross-examination raises a special problem or may be viewed as a specific application of the general "difficulties of proof" discussion above. As pointed out by Chief Judge Seitz, concurring in *Catena, supra* at 45, if a person, after being granted use immunity, is subsequently prosecuted for the same or a related transaction and chooses to take the stand in his own defense, the prosecutor has a significant advantage:

[On cross-examination], the prosecutor is obviously in a position to tailor his questions, consciously or otherwise, on the basis of his knowledge of the defendant's prior [compelled] testimony and can do so without any overt reference to the testimony given under immunity. In these circumstances, could defense counsel effectively object on the ground that the immunity grant was thereby violated? I think not. Indeed, how could a trial judge do other than accept the prosecutor's representation, which might well be in good faith, that the questions were not inspired by the testimony given by the defendant under immunity? Furthermore, this same possibility may adversely influ-

ence a defendant to forego entirely his right to testify in his own behalf even though he is advised that his prior disclosures cannot be used against him.

May information obtained under a grant of "use and derivative use" immunity be used for *impeachment* purposes in a subsequent prosecution? In holding that a confession inadmissible under *Miranda* may nevertheless be used in a subsequent prosecution to impeach the testimony of the individual from whom it was obtained, the Court noted that defendant "makes no claim that the statements made to the police were coerced or involuntary." *Harris v. New York*, 401 U.S. 222, 224, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) (emphasis added). But in the context of confessions, "involuntary" or "coerced" are "short-hands" for complex concepts, often connoting "untrustworthiness" or obtained under circumstances raising a significant risk or likelihood of unreliability. See generally Kamisar, *What is an "Involuntary" Confession?*, 17 Rutgers L.Rev. 728 (1963). In this sense, testimony compelled under an immunity grant might well not be regarded as "coerced" or "involuntary." Indeed, in the paragraph immediately following the language quoted above, the *Harris* Court observed: "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case is barred for all purposes, provided of course that the *trustworthiness* of the evidence satisfies legal standards." (Emphasis added.)

Thus, the authors of the leading article on the meaning of *Harris* suggest that there is a real possibility that an incriminating statement obtained as the result of a grant of "use" immunity—or at least physical or documentary evidence produced or discovered as a result of such immunity—may be used to discredit a defendant's testimony. See Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198, 1223 (1971).

The *Harris* majority peremptorily rejects the "right to perjury" and underscores the government's interest in challenging the defendant's credibility:

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. [401 U.S. at 226.]

As Professors Dershowitz and Ely point out (at 80 Yale L.J. 223), it is only a short step from *Harris* to say that "the shield provided by the grant of immunity should not be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent statements." See also Comment, *Impeachment, Use Immunity, and the Perjurious Defendant*, 77 Dick.L.Rev. 23, 46 (1972).

If this is so, then plainly "use and derivative use" immunity would not be coterminous with

the privilege against compulsory self-incrimination.

3. Does "use and derivative use" immunity prevent the government from intensifying or "focusing" its investigation against a person granted immunity as a result of the information he has been compelled to produce?

Another special problem, or specific application of the general "difficulties of proof" discussion above, is whether the government can use information compelled under an immunity grant to focus its investigation or concentrate all available resources on the person granted immunity. In *Kastigar*, the Court analogized "use and derivative use" immunity to the ban against the use of the "fruits" of coerced confessions and, presumably, the fruits of illegally seized evidence generally, 406 U.S. at 461. But the prevailing view is that the "fruit of the poisonous tree" doctrine does not prevent the government from using the tainted evidence to press an investigation it might otherwise have dropped or to disregard other suspects it might otherwise have considered and pursued. See *United States v. Friedland*, 441 F.2d 855 (2d Cir. 1971) (Friendly, J.) certiorari denied 404 U.S. 867, 92 S.Ct. 143, 30 L. Ed.2d 111 and 404 U.S. 914, 92 S.Ct. 239, 30 L. Ed.2d 188. Thus, under certain circumstances the prosecutor may make real "use" of the compelled testimony, utilizing it to concentrate all investigatory resources on one suspect rather than subject many to scrutiny, or even to initiate an investigation he might otherwise not

have considered at all. See Note, 46 So. Cal. L. Rev. 202, 207-08 (1972). To be sure, mere assertion of the privilege against self-incrimination may stimulate or intensify prosecutorial scrutiny, see Note, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 187n.37 (1972), but there undoubtedly will be instances where compelled disclosure of detailed information will subject the witness to greater scrutiny than would have occurred if he had simply refused to testify.

4. Other inadequacies of the "fruit of the poisonous tree" doctrine

Although opinion is divided on the issue, there is substantial authority for the view that a witness may be allowed to testify for the prosecution even though his existence, identity and whereabouts have been revealed only by means of an inadmissible confession or other illegally seized evidence. See, e. g., *Smith v. United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (D.C. Cir. 1963) (Burger, J.), certiorari denied 377 U.S. 954, 84 S.Ct. 1632, 12 L. Ed.2d 498 and 379 U.S. 954, 84 S.Ct. 1632, 12 L. Ed.2d 498; *People v. Mendez*, 28 N.Y.2d 94, 320 N.Y.S.2d 39, 268 N.E.2d 778 (1971), certiorari denied 404 U.S. 911, 92 S.Ct. 237, 30 L. Ed.2d 183. But cf. *Smith v. United States*, 344 F.2d 545 (D.C. Cir. 1965); *Commonwealth v. Cephas*, 447 Pa. 500, 291 A.2d 106 (1972). See generally Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L. Rev. 570, 621-24 (1968). The general reluctance of the court to exclude reliable evidence

and unhappiness with, and doubts about the efficacy of, the exclusionary rules have led some courts to carve out this "tainted witness" exception to the "fruit of the poisonous tree" doctrine. See Pitler, *supra*. Whether or not this exception is defensible in the context of coerced confessions and illegal searches and seizures, and it may well be (see discussion below), it is plain that the ability of the government to use "leads" from testimony compelled under a "use and derivative use" immunity grant to locate prosecution witnesses whose very existence might otherwise have been unknown puts a defendant in a significantly worse position than if he had not been compelled to testify under immunity.

As indicated above, the plight of the defendant who had earlier been compelled to incriminate himself under an immunity grant is difficult enough when the government claims the evidence it seeks to use is derived from an "independent source." But the defendant's position may be still worse if he is prosecuted in a jurisdiction which requires only the government establish that the proffered evidence *would* have been or *could* have been acquired lawfully. See Pitler, *supra* at 627-30; Note, 46 So.Cal.L.Rev. 202, 212 (1972). "The ability of police scientists, laboratory technicians and investigators to discover, analyze, and develop substantial leads from minute materials appears to make even the most implausible discovery virtually inevitable." Pitler, *supra* at 630. Nevertheless, despite sharp criticism of this approach,

the American Law Institute has recently proposed that the "fruits" of an illegal search and seizure shall be inadmissible "unless the prosecution establishes that such evidence *would probably have been discovered* by law enforcement authorities irrespective of such [police illegality] and the court finds that exclusion of such evidence is not necessary to deter violations of this Code." ALI Model Code of Pre-Arrestment Procedure § SS 290.2(3) (Official Draft #1, 1972) (emphasis added).

5. *Unsoundness of the analogy to the exclusionary rules of evidence and the "fruit of the poisonous tree" doctrine*

The genesis of the "taint" or "fruit of the poisonous tree" doctrine, as it was later called, was advanced in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), a search and seizure case. The phrase "fruit of the poisonous tree" was first used in *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), a wiretapping case, and extensively discussed in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), which involved an unlawful entry and illegal arrest. Thus, the "fruit of the poisonous tree" doctrine developed, and was most frequently applied, in Fourth Amendment cases. Only recently did the Court explicitly apply it to confession cases, see *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968), apparently "transplant[ing] intact to coerced confession cases" the exclusionary rule which had evolved in

the *Silverthorne-Nardone-Wong Sun* line of cases. Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 Yale L.J. 171, 176 (1972).

Persuasive arguments have been made that in *Harrison* the Court failed to consider the interests protected by the Fourth and Fifth Amendment exclusionary rules. Although the exclusionary rule as originally conceived in the search and seizure cases was a means of deterring future police misconduct, the constitutional wrong under the Fifth is the use against him of a defendant's compelled testimony, not the mere act of compelling him to speak (otherwise no immunity statute would be constitutional); the Fifth Amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing this right. See *e. g.*, Pitler, *supra* at 620; Note, 82 Yale L.J. 171, 177-78 (1972); Note, *The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63, 221-22 (1968).

Despite the foregoing, it is quite understandable, if analytically questionable, that the Court would apply the same exclusionary rule to the coerced confession cases it had in the search and seizure area because in both instances the initial factor is police misconduct and for many years a major concern of the Court in the confession cases was to disapprove and deter offensive police interrogation methods. See, *e. g.*, *Watts v. Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; 69 S.Ct. 1357 (1949); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202,

3 L.Ed.2d 1265 (1959); *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1969); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DePaul L.Rev. 213, 235 (1959); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan.L.Rev. 411, 413-19 (1954).

Not until *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) did the Court, per Brennan, J., by way of dictum, perform "what might have seemed to some a shotgun wedding of the privilege [against self-incrimination] to the confessions rule." Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio State L.J. 449, 465 (1965). In none of the thirty-odd state confession cases decided by the Supreme Court until *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) had the privilege against self-incrimination as it applied to judicial proceedings—even any concept of "hard core" self-incrimination—been the controlling standard. See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Time* 1, 46-48 (Howard ed. 1965).

Now, however, the trend toward "use and derivative use" immunity causes attention to focus on the special considerations applicable to the use of compelled testimony *outside the police misconduct context*. Assuming *arguendo* that the "fruit of the poisonous tree" doctrine is appropriate for inadmissible confessions, it would still be inadequate for

immunity grants for the following reasons:

(a) The exclusionary rules deal with illegal police conduct which has already occurred and "provide a partial and inadequate remedy to some victims of [such misconduct] and a similarly partial and inadequate deterrent to police officers":

[T]he exclusion of evidence does not purport to purge the conduct of its unconstitutional character. The constitutional violation remains, and may provide the bases for other relief, such as a civil action for damages * * * or a criminal prosecution of the responsible officers. [*Kastigar*, *supra* at 470-71 (Marshall, J., dissenting).]

On the other hand:

An immunity statute operates in advance of the event, and it authorizes—even encourages—interrogation that would otherwise be prohibited by the Fifth Amendment * * *. Before the government puts its seal of approval on such an interrogation, it must provide an absolutely reliable guarantee that it will not use the testimony in any way at all in aid of prosecution of the witness. [*Ibid.*]

(b) A closely related but somewhat different point is that:

[W]here the legislature has authorized compulsion of testimony despite the privilege against self-incrimination, the decision is properly viewed as one made by the society, the

full cost of which it should bear. A local policeman who coerces a confession on the other hand, is probably acting contrary to established rules. It is much less clear that society as a whole should be held as strictly accountable for this sort of unauthorized action by one of its lower level officials. [Note, 82 Yale L.J. 171, 180n.48 (1972).]

See also Note, *Kastigar v. United States: The Required Scope of Immunity*, 58 Va.L.Rev. 1099, 1114 (1972).

(c) In defining the reach of the exclusionary rules, one should consider whether it is *necessary* to exclude distant "fruits" of illegality in order to deter future police misconduct. As the link between the illegality and the derivative evidence becomes strained, it becomes doubtful whether excluding that attenuated evidence will have any significant impact on the police. At the time they are called upon to act, the police are not likely to be thinking about the long, winding intricate roads from the illegal source to the "tainted" witness or other "fruits" which are the subject of law professors' hypotheticals.

If it is true, as Chief Justice Burger maintained, dissenting in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411, 417, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that "policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to fol-

low," then *a fortiori* they do not have the time, inclination or training to grasp the nuances of the "fruit of the poisonous tree" doctrine.

In defining the reach of immunity statutes, however, one must focus not on whether it is needed to influence future police or prosecutor behavior but rather on whether it is needed to afford the witness sufficient protection from a present choice between perjury and disclosure of his guilt. The relevant inquiry is not for the point at which the immunity has "no motivational effect on prosecutorial behavior" but the point at which the possibilities of the use of the compelled testimony in a subsequent prosecution are sufficiently eliminated to remove any "reasonable anxiety" the witness might have about testifying or providing other information. See Note, *The Supreme Court*, 1971 Term, 86 Harv.L.Rev. 1, 186 (1972).

A policeman may not have the time, inclination, or training to grasp the nuances of the "fruits" doctrine, but a witness being compelled to testify under an immunity grant will have the time and inclination and his lawyer, presumably, will have the training.

(d) Unlike the exclusionary rules, which are *ex post facto* correctional measures, an immunity statute operates in advance of the event. Thus, "there is room to require a broad grant of transactional immunity without imperiling large numbers of otherwise valid convictions." *Kasti-*

gar, supra at 471 (Marshall, J., dissenting).

[T]he decision to question or to search is often made in haste, under pressure, by an officer who is not a lawyer. If an unconstitutional interrogation or search were held to create transactional immunity, that might well be regarded as an excessively high price to pay for the "constable's blunder." An immunity statute, on the other hand, creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban on prosecution, or to forego the testimony. [*Ibid.*]

As pointed out in Note, 82 Yale L.J. 171, 180 (1972):

[P]resumably [the prosecutor] will grant [or seek] immunity only when he is sure the information is worth more to society than the reduced chance of the witness' conviction. In addition, a prosecutor can be expected to take all steps necessary prior to granting immunity to insure that the cost is at a minimum. For example, he may compel only specifically required information in order to keep the resulting exclusion or immunity as narrow as possible. A policeman, on the other hand, is less likely to realize the impact of his actions on the government's case in a subsequent trial, and is therefore not in as good a position to consider whether an individual's information is worth more to society than his conviction. He is less

likely to take steps before and during coercion of a confession to minimize its cost.

See also Note, 6 Indiana L.Rev. 356, 363 (1972); Note, 25 Vand. L.Rev. 1207, 1235 (1972); Note 38 Va.L.Rev. 1099, 1114 (1972).

Moreover, while it is often unclear what constitutes a coerced confession or waiver of rights under *Miranda* or the appropriate circumstances when *Miranda* warnings should be given, "there can be no mistaking the act of granting immunity." Note, 82 Yale L.J. 171, 179 (1972).

(e) There is considerable force to Chief Justice Burger's point, dissenting in *Bivens*, *supra*, 403 U.S. at 416-17, that a significant weakness of the exclusionary rule is that it erroneously assumes that "law enforcement is a monolithic governmental enterprise"; that although designed to influence future police conduct:

[T]he immediate sanction triggered by the application of the rule is visited upon the prosecutor * * * [who] is not an official in the police department [and who] can rarely set in motion any corrective action or administrative penalties. [Emphasis added.]

Thus, even if deterrence were the controlling fact in both the immunity grant and police misconduct areas, a stricter rule against derivative use still would be more appropriate in the immunity case.

6. "Transactional" immunity, rather than the less protective "use" immunity, will improve the

quality and increase the quantity of information the government receives

It would appear that some prosecutors would prefer "transactional" immunity over the less protective "use" immunity because the witness who is only granted the latter is likely to tell less (and what he tells is less likely to be the truth) than one testifying under a transactional grant.

In this connection, it is interesting to note that the Chairman of the Federal Deposit Insurance Corporation opposed what became the "use" immunity provisions of the Organized Crime Control Act of 1970, 18 U.S.C. § 6002, because it might be construed as replacing the "transactional" immunity provision of the Federal Deposit Insurance Act and thus "make it more difficult for the Corporation to obtain information from individuals that relates to the risks being assumed by the Corporation in insuring bank deposits." S. Rep.No.91-617, 91st Cong., 1st Sess. 132-34 (1969).²

Transactional immunity "affords the [government] greater bargaining power in its investigative function":

A knowledgeable witness is not likely to provide extensive or useful testimony unless he receives a [transactional immunity] grant * * *. Although a witness may be forced to answer under a grant of testimonial [or "use"] immunity, his answer will probably contain no more information than is absolutely necessary. In other words, to be useful, a witness must not only answer, but he

must answer freely. The federal agencies that so vocally opposed the enactment of [the Crime Control Act immunity provisions] did so to prevent the dilution of their investigative power that the testimonial immunity standard necessarily implies. [Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 Vand.L.Rev. 1207, 1229 (1972).]

See also Note, 46 So.Cal.L.Rev. 202, 219-20 (1972):

Once use immunity is conferred the witness has three choices: he can insist on remaining silent and face an indeterminate jail sentence for contempt; he can tell the truth and implicate himself in a crime, thereby encouraging the prosecutor to look for independent evidence for a later indictment and prosecution; or he can lie and take his chances that the government will not discover it, allowing him to escape punishment for perjury. The risk of perjury is a more attractive alternative for many witnesses than a certain contempt conviction or a probable criminal prosecution. Thus, in the use immunity context the government tends to foster a new crime, perjury, and does not necessarily get the reliable information it needs from the witness.

In addition to the inferior reliability of information which a witness will give under use immunity, the quantity of information given will also be

less than under full immunity. A witness will not be affirmatively motivated to disclose all he knows so he can get the maximum immunity "bath" as he does under a transactional statute. Instead, he will want to give the government as little information as possible since in the future they may be adversaries in a criminal proceeding.

Thus, in comparison to transactional immunity, the information derived under a use immunity system is of inferior quality and quantity. * * * Transactional immunity * * provides the government with better information and the witness with better protection.

C. "If, but for this Rule, the witness would have been privileged to withhold the answer or information given"

This limitation seeks to prevent gratuitous grants of immunity to an unprivileged witness. Immunity grants are designed to neutralize the privilege against compulsory self-incrimination. Where there is no privilege (as, for example, when official records or records required to be kept by law are sought), there is no need to grant immunity—at the expense of the state's interest in prosecuting and convicting criminals. See Commentary to Model Act at 16-18.

D. Responsiveness requirement

This subdivision specifies that a witness who "complies with an order * * * to answer or to produce information" not be prosecuted for any transaction which

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"in compliance with the order, he gave answer or produced information."

An answer or the production of information not responsive to the court's order would not "comply" or be "in compliance with" the order and should earn no immunity. Thus, this language provides another brake against unnecessary grants of immunity. See Commentary to Model Act at 16, 18-19.

In *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed. 2d 234 (1972), a companion case to *Kastigar*, the Court upheld a New Jersey statute which provides that after a witness testifies under an immunity grant, he shall be immune from use of "such re-

sponsive answer given by him or such responsive evidence produced by him." N.J.Rev.Stat. § 52:9M-17(b) (1970). (Emphasis added.) The Court rejected the argument that the immunity statute was unconstitutionally vague for failure to provide guidelines for determining what is a "responsive" answer, noting that the state supreme court had fairly and sensibly construed the statute as protecting the witness "against answers and evidence he in good faith believed were demanded." 406 U.S. at 476. "The responsiveness limitation," concluded the Court, "is not a trap for the unwary; rather it is a barrier to those who would intentionally tender information not sought in an effort to frustrate and prevent criminal prosecution." *Id.* at 477.

¹ The Model Act and many pre-1970 federal acts provide that a person granted immunity "shall not be prosecuted or subjected to penalty or forfeiture." The Fifth Amendment contains no "or forfeiture" language and the derivation of the phrase is unclear. As stated in Dixon, Comment on Immunity Provisions, in 2 Working Papers of the Nat'l Comm'n on Reform of Federal Criminal Laws 1405 (1970):

[B]ecause of the major public interest considerations involved in the various fields of licensing, particularly in the areas of health and safety, there should be an effort to avoid immunity statute clauses which may be construed not only to bar punitive action, but also to bar remedial actions to protect the public * * *. It would seem to be sufficient for an immunity statute to be formulated, as in the fifth amendment itself * * * in terms of protection against "incriminatory" consequences of compelled disclosures. [*Id.* at 1432-33.]

It would then be left to the process of constitutional interpretation to determine what kinds of penalties, forfeitures, or other harms falling short of conventional criminal prosecutions are included within the scope of the constitutional privilege. [*Id.* at 1414.]

² Several other federal agencies are reported to have expressed alarm at the immunity provisions of the Crime Control Act for the same reason. See Note, 25 Vand.L.Rev. 1207, 1228n.97 (1972).

- 1 (c) Exception for perjury and contempt. A witness granted
- 2 immunity under this Rule may nevertheless be subjected to
- 3 criminal penalty for any perjury, false swearing, or contempt
- 4 committed in answering, failing to answer, or failing to pro-
- 5 duce information in compliance with the order.

Comment

It may be excess of caution to add a provision such as this subdivision, taken from the Model State Witness Immunity Act (1952), because this exception to immunity is well established, even absent an express provision. See Commentary to Model Act at 190.

Penalties for contempt and perjury are not only consistent with schemes of immunity, they are necessary to them. It is the purpose of immunity legislation to make it possible for a witness

to be compelled to speak when questioned * * *; if the penalties of contempt were not available, no grant of immunity could have that effect on a witness who remained recalcitrant. If the penalties of perjury were not available, an immunized witness would be free even to deceive the grand jury, and thus to side-track its investigations. [Note, *Immunity Statutes and the Constitution*, 68 Colum.L. Rev. 959, 972-73 (1968).]

PART 4

SUBSTITUTION OF JUDGE

Rule 741. [Substitution of Judge.]

- 1 (a) On demand. A defendant may obtain a substitution of the
- 2 judge before whom a trial or other proceeding is to be conducted
- 3 by filing a demand therefor, but if trial has commenced before a
- 4 judge no demand may be filed as to him. A defendant may not
- 5 file more than one demand in a case. If there are two or more
- 6 defendants, a defendant may not file a demand, if another de-
- 7 fendant has filed a demand, unless a motion for severance of de-
- 8 fendants has been denied. The demand shall be signed by the
- 9 defendant or his counsel, and shall be filed at least [ten days] be-
- 10 fore the time set for commencement of trial and at least [three
- 11 days] before the time set for any other proceeding, but it may be
- 12 filed within [one day] after the defendant ascertains or should
- 13 have ascertained the judge who is to preside at the trial or pro-
- 14 ceeding.

Comment

In allowing a party to obtain a change of judge without alleging or proving the precise facts which lead him to think he could not get a fair trial before the judge, this accords with provisions of 16 of the 29 states which have provi-

sions on disqualification of judges. See Staff Report, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 Ore.L.Rev. 311, 347 (1969) (table of states). After

exhaustively considering the matter, the Report cited concludes:

[T]he staff heartily endorses relatively accessible procedures for the disqualification of trial judges for bias and prejudice. * * * [B]ased upon the empirical study of the Oregon performance, the staff is led to conclude that the price paid in terms of delay, interruption, and possible abuse need not be too high under a quite liberal procedure. * * * [I]nstances of marked reliance on the liberal Oregon affidavit of prejudice procedure are relatively rare. With precious few exceptions, those attorneys who do invoke the statute do so sparingly and, it may be assumed, appropriately. Further, such a system has several advantages over those which are more demanding. Of prime importance, [it] avoids the airing of and quibbling over allegations of specific acts of a judge which are thought to demonstrate bias or prejudice. Imbroglios over whether a judge did, in fact, make certain statements, or whether specific behavior is legally sufficient to demonstrate bias, do not add to the dignity and public image of the bench, may put a severe strain on the relationship between the judge and the participating attorneys, and in all probability often arouse resentments in the minds of judges which make an impartial trial more difficult to achieve should the disqualification attempt fail. Whatever their merits may be, procedures which require the proof of prejudice as a fact, and to a

lesser extent, procedures which require the allegation of facts from which prejudice may be inferred, seem destined to guarantee a prejudiced judge by the time the hearing on the motion for change of judge is terminated. The party or attorney moving for a change of judge under either of the latter procedures is torn between a vigorous prosecution of his motion on the one hand, and a keen appreciation of the consequences on the other. Moreover, a procedure which invites contested hearings most likely precipitates greater delays. [*Id.* at 401.]

Many of the provisions which do not require allegation or proof of precise facts nevertheless retain the form of an "affidavit of prejudice," typically required to state only that the affiant believes he cannot obtain a fair trial before the judge because of the judge's prejudice. *Id.* at 343. But "there is some evidence that judges may resent the allegation of prejudice in an affidavit and would prefer a peremptory challenge procedure." *Id.* at 346. This subdivision follows provisions which have completely abandoned the "affidavit of prejudice" form. See 38 Ill.Stat. § 114-5(a) (motion); Ind.R.Crim.P. 12 (application); Mont.Rev.Codes § 95-1709(a) (motion); N.D.Century Code § 29-15-21 (demand); Wis.Stat. § 971.20 (request); Wyo.R.Crim.P. 23(d) (motion).

In limiting use of this procedure to defendants, this subdivision accords with 38 Ill.Stat. § 114-5(a), S.D.Code § 23-28-8, and Wis.Stat. § 971.20. This reflects

the view that extending it to prosecutors, who are constantly before the court, would present a danger of its being used to exert improper influence on judges.

The first sentence's exception makes it clear that a demand cannot be used to prevent the judge who presided over trial from sentencing or hearing post-trial motions (although it can be used if for any reason a different judge is called in to conduct any proceeding after trial has commenced). It seems that the same judge should be able to conduct all proceedings in a case which occur after trial commences.

However, the idea of prohibiting use of a demand after a judge has ruled upon a contested matter in *pretrial* proceedings has been rejected. Only five of the 16 provisions of this type produce that effect.¹ Although such a prohibition would probably reduce judge shopping, its disadvantages seem to outweigh this benefit. It would increase the frequency of demands because a party who did not want the judge to preside *at trial* would have to use the demand at the outset of the prosecution even though it (like the vast majority of prosecutions) is ultimately disposed of without trial, or even though the judge in question may not end up with the trial anyway. Requiring the demand to be made at the prosecution's outset would cause unnecessary inconvenience in areas where the substitute judge would have to be brought in from another area. It would seem to put young and non-local lawyers at a disadvantage as compared to lawyers with more experience with the area's judges. On bal-

ance, it seems preferable to allow the demand to be deferred before trial until the case reaches the stage (which it probably will never reach) at which a party deems the demand essential.

The second and third sentences provide for one demand in the case per defendant, except where defendants are voluntarily tried together. It seems that where defendants are tried together against their wishes each defendant should have a separate right to file a demand. Only two of the 16 similar provisions allow a party more than one automatic substitution.²

The first part of the last sentence provides that the demand be signed by the defendant or his counsel. This is in line with six of the 16 similar provisions.³ Six others require the *party* to make the document calling for substitution without indicating whether counsel may act for the party.⁴ Only the remaining four states expressly require the defendant to sign.⁵

The last sentence's ten-day provision accords with N.D. Century Code § 29-15-21(2). Cf. Calif. Code Civ.P. 170.6(2) (five days); Idaho Code § R 1-1801(4) (five days); Mont.Rev.Codes § 95-1709 (a) (15 days); Mo.R.Crim.P. 30-12 (five days); Wyo.R.Crim.P. 23 (a), (d) (15 days).

The last sentence's three day provision is similar to N.D. Century Code § 29-15-21(2). Cf. Calif. Code Civ.P. § 170.6(2) (five days); Idaho Code § R 1-1801(4) (five days); Minn.Stat. § 542.16 (five days).

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The last sentence's exception is similar to provision in Minn.Stat. § 542.16. *Cf.* Alaska Stat. § 22-20.022(c) (five days after assignment unless good cause shown); Calif.Code Civ.P. § 170.6(2) (if master calendar, by time for commencement of trial or hearing); Idaho Code § R 1-1801(4) (if party did not have notice for at least five days, "immediately upon receiving such notice"); Mo.R.Crim.P. 30.12 (if judge not as-

signed five days before trial, before trial commences); S.D.Code § 23-28-8.2 (five days after knowledge or notice).

The remedy provided hereby is in addition to that provided by Rule 443(b), *supra*, which provides that a judge who has examined a presentence investigation report to determine whether to concur in a plea may not over the defendant's objection preside at the trial of the case.

¹ Compare Idaho Code § R 1-1801(4); N.D.Century Code § 29-15-21(2); Ore.Rev.Stat. §§ 14.260, 14.270; Wash.Rev.Code § 4.12.050; Wis.Stat. § 971.20(1) with Alaska Stat. § 22.20.022; Ariz.R.Crim.P. 196-200; 38 Ill.Stat. § 114-5(a), (b); Ind.R.Crim.P. 12 (see Ind.Stat. § 35-1-25-1); Minn.Stat. § 542.16; Mo.R.Crim.P. 30.12; Mont.Rev. Codes § 95-1709(a); N.M.Stat. § 21-5-8; S.D.Code §§ 23-28-8 to 23-28-8.2; Wyo.R.Crim.P. 23(d). *Cf.* Calif.Code Civ.P. § 170.6(2) (no bar if proceeding did not involve "a determination of contested fact issues relating to the merits").

² See 38 Ill.Stat. § 114-5(a), (b) (single defendant two but multiple defendants one each); Ore.Rev.Stat. §§ 14.260, 14.270 (two substitutions per side). Although some of the provisions are not completely clear on the point, it appears that nine would allow each defendant in a multiple defendant case one substitution, while four would allow only one to the defendants collectively. Compare Alaska Stat. § 22.20.022; Ariz.R.Crim.P. 198; Ind.R.Crim.P. 12; Minn.Stat. § 542.16; Mo.R.Crim.P. 30.12; N.M.Stat. § 21-5-8; S.D.Code § 23-28-8; Wash.Rev.Code § 4.12.050; Wyo.R.Crim.P. 23(d), with Calif.Code Civ.P. § 170.6(3); Idaho Code § R 1-1801(4); Mont.Rev.Codes § 95-1709(a); Wis.Stat. § 971.20(2). *Cf.* N.D.Century Code § 29-15-21(6) (assigning court may deny demand by party with interests not adverse to those of party whose demand was granted).

³ See Alaska Stat. § 22.20.022; Calif.Code Civ.P. § 170.6(2); Minn.Stat. § 542.16; Ore.Rev.Stat. § 14.260; Wash.Rev.Code § 4.12.050.

⁴ See 38 Ill.Stat. § 114-5(a); Ind.R.Crim.P. 12; Mo.R.Crim.P. 30.12; Mont.Rev.Codes § 95-1709(a); N.M.Stat. § 21-5-8; Wyo.R.Crim.P. 23(d).

⁵ See Ariz.R.Crim.P. 197; N.D.Century Code § 29-15-21; S.D.Code § 23-28-8; Wis.Stat. § 971.20(1).

- 1 (b) **On own motion.** A judge on his own motion may disquali-
- 2 fy himself from presiding over a trial or other proceeding.

Comment

See ABA Standards, The Function of the Trial Judge 1.7 (Approved Draft, 1972), which states, "The trial judge should recuse himself whenever he has any doubt

as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned."

- 1 (c) **For cause.** A judge may not preside over a trial or other
- 2 proceeding if upon motion of a party it appears that he is dis-
- 3 qualified for a cause provided [by law or by the Code of Judicial

4 Conduct]. The motion to disqualify shall be heard before another
5 judge regularly sitting in the same court or a judge designated by
6 [the appropriate assigning authority], and, unless otherwise or-
7 dered by that judge for cause, shall be made at least [ten days]
8 before the time set for commencement of trial and at least [three
9 days] before the time set for any other proceeding, but it may be
10 made within [one day] after the party ascertains or should have
11 ascertained the judge who is to preside at the trial or proceed-
12 ing.

Comment

States may insert the appropriate references in the first sentence's brackets. The matter is covered by Canon 3C of the current ABA Code of Judicial Conduct.

On the principle that one should not judge his own case, see *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532

(1971), this subdivision provides that motions to disqualify be heard by a judge other than the one sought to be disqualified. See La.Code Crim.P. art. 675.

The time limits accord with those in subdivision (a), *supra*, but may be relieved from for cause.

1 (d) **Designation of substitute judge.** Upon the filing of a de-
2 mand under subdivision (a) or disqualification under subdivision
3 (b) or (c) the judge shall take no further action in the case, ex-
4 cept to prescribe terms or conditions of release if requested to do
5 so by the defendant, and [the appropriate assigning authority]
6 shall designate another judge.

Comment

Many provisions bar a disqualified judge from proceeding further in the case. See, *e. g.*, 28 U.S.C. § 144; Ariz.R.Crim.P. 200; Fla.R.Crim.P. 3.230; 38 Ill.Stat. § 114-5(a); N.M.Stat. § 21-5-8; N.D.Century Code § 29-15-21(5). The exception for setting terms of release if requested by the defendant derives from Wis.Stat. § 971.20(2).

The concluding words hereof proceed upon the assumption that someone other than the judge disqualified should designate the

substitute judge. See Alaska R. Crim.P. 25(a) (presiding judge or chief justice); Colo.R.Crim.P. 21(a)(2) (chief justice); N.M. Stat. § 21-5-8 (counsel's agreement or chief justice); N.D.Century Code § 29-15-21(7) (supreme court); Tex.Code Crim.P. art. 30.02 (presiding judge); Wash.Rev.Code § 4.12.040 (presiding judge or chief justice); Wis.Stat. § 971.20(4) (chief justice or designated associate justice).

1 (e) **Disability during trial.** If by reason of termination of of-
 2 fice, death, sickness, or other disability the judge before whom a
 3 trial has commenced is unable to proceed with the trial, a suc-
 4 cessor in office, another judge regularly sitting in the same court,
 5 or a judge designated by [the appropriate assigning authority],
 6 shall inform the defendant that a new trial will be ordered unless
 7 the parties consent to a specified judge proceeding with the trial.
 8 If the parties consent, the judge specified shall familiarize him-
 9 self with the record and proceed with the trial.

Comment

This is quite similar to ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968), F.R.Crim.P. 25(a), Idaho Crim.R. 25(a), Nev. Rev.Stat. § 175.091, and N.D.R. Crim.P. 25(a), except that those provisions apply only to jury trials, do not require the parties' consent to proceed with trial, and leave it to the new judge's discretion whether to do so. It seems that the defendant's consent should be required to change judges in the midst of even a jury trial, and it may well be constitu-

tionally required. See 2 Wright, Federal Practice & Procedure § 392 (1969). Cf. *Freeman v. United States*, 227 F. 732, 142 C.A. 256 (2d Cir. 1915); *Blend v. People*, 41 N.Y. 604 (1870); Commentary to ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968). Conversely, if the parties consent there seems no reason for not proceeding even with a judge trial. Witnesses could be recalled if it appeared necessary for the judge to personally observe them.

1 (f) **Disability after verdict or finding of guilty.** If by reason
 2 of termination of office, absence from the [district], death, sick-
 3 ness, or other disability, the judge before whom the defendant
 4 has been tried is unable to perform the duties to be performed by
 5 the court after a verdict or finding of guilty, a successor in office,
 6 another judge regularly sitting in the same court, or a judge
 7 designated by [the appropriate assigning authority] may per-
 8 form those duties or order a new trial.

Comment

This is to the same effect as former Uniform Rule 36, F.R. Crim.P. 25(b), Alaska R.Crim.P. 25(c), Colo.R.Crim.P. 25, Idaho

Crim.R. 25(b), Maine R.Crim.P. 25, Nev.Rev.Stat. § 179.101, and N.D.R.Crim.P. 25(b).

PART 5

GENERAL REQUIREMENTS

Rule 751. [Motions.]

- 1 An application to the court for an order shall be by motion.
2 A motion other than one made during a trial or hearing shall
3 be in writing, unless the court permits it to be made orally.
4 [The requirement of writing is fulfilled if the motion is stated in
5 a written notice of the hearing of the motion.] It shall state the
6 grounds upon which it is made and set forth the relief or order
7 sought. If factual issues are involved in determining a motion,
8 the court shall make essential findings.

Comment

The first, second, and fourth sentences are identical to provision in former Uniform Rule 52, F.R.Crim.P. 47, Alaska R.Crim.P. 42, Colo.R.Crim.P. 47, Idaho Crim. R. 47, and Nev.Rev.Stat. § 178.-552.

The third, optional, sentence derives from F.R.Civ.P. 7(b)(1), Maine R.Crim.P. 47, and N.D.R.

Crim.P. 47, and may be included if it is desired to require the party, as opposed to the clerk, to serve the notice of a motion's hearing.

The last sentence derives from F.R.Crim.P. 12(e) which, however, applies only to pretrial motions. Here the reference is to all motions.

Rule 752. [Service and Filing of Papers.]

- 1 (a) **Service; when required.** A written motion, other than
2 one heard ex parte, and any document supporting it [and notice
3 of the hearing of the motion] shall be served upon each party at
4 least [two] days before the date set for the hearing, unless the
5 court otherwise directs. Every written notice and similar paper
6 shall be served upon each party.

Comment

Except for replacing "affidavit" with "document," *cf.* Alaska R.Crim.P. 40(d), and except for substituting "[two] days" for five days, this is to the same effect as provision in F.R.Crim.P. 45(d), Idaho Crim.R. 45(c), Nev.Rev.Stat. § 178.478, and N.D.R.Crim. P. 45(d). The latter provisions'

"5 days" derives from F.R.Civ.P. 6(d), and seems too long for criminal cases. In situations where two days notice is insufficient, the court may direct a longer period under the first sentence's "unless" clause (although that clause would more often be used to *shorten* the period).

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The optional bracketed language in the first sentence may be omitted where it is desired to have the clerk rather than the party notify the parties as to the time for hearing.

(b) **Service; how made.** Except where these Rules specify delivery to the defendant personally:

(1) Service upon a party represented by a lawyer shall be made upon the lawyer unless the court also orders service upon the party; and

(2) Service shall be made in the manner provided in civil actions.

Comment

Apart from the reference to Alaska R.Crim.P. 44(b), Colo.R. provisions requiring service upon a party himself, this is to the same effect as former Uniform Rule 54(b), F.R.Crim.P. 49(b), Alaska R.Crim.P. 44(b), Colo.R. 49(b), Idaho Crim.R. 49(b), Maine R.Crim.P. 49(b), Nev.Rev.Stat. § 178.584, and N.D.R.Crim.P. 49(b).

(c) **Notice of orders.** The court or clerk shall promptly mail to or otherwise serve a copy of any written order upon each party and notice of any other order made out of a party's presence upon that party, except:

(1) The court may limit the application of this requirement as to an order resulting from in-camera proceedings under Rule 421(f); and

(2) An order or notice of order respecting issuance of a subpoena under Rule 731(b) need be served only upon the movant.

Comment

Apart from the exceptions, this is rather similar to that part of F.R.Crim.P. 49(c), Idaho Crim.R. 49(c), and Nev.Rev.Stat. § 178.586 which specifies, "Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing."

The "or otherwise serve" feature derives from former Uniform Rule 54(c), Alaska R.Crim.

P. 44(c), and N.D.R.Crim.P. 49(c). See Maine R.Crim.P. 49(c); Pa.R.Crim.P. 307(b).

The authorization for the court, as well as the clerk, to serve copies of orders, makes it possible for this to be done in open court without involving the clerk.

The "order made out of a party's presence" feature derives from Colo.R.Crim.P. 49(c) and Fla.R.Crim.P. 3.030(a).

- 1 (d) **Filing.** Papers required to be served shall be filed with
 2 the court. Papers filed shall be filed in the manner provided in
 3 civil actions.

Comment

This is identical to former Uniform Rule 54(d), F.R.Crim.P. 49(d), Alaska R.Crim.P. 44(d), Idaho Crim.R. 49(d), Maine R. Crim.P. 49(d), and Nev.Rev.Stat. § 178.588. See N.D.R.Crim.P. 49(d). Cf. Fla.R.Crim.P. 3.030 (c), (d); Pa.R.Crim.P. 307(a). 3 Wright, Federal Practice & Procedure—Criminal § 824 (1969) states:

[This] incorporates by reference Rule 5(d) and (e) of the Rules of Civil Procedure. These define filing to mean filing with the clerk of the court, unless the judge permits papers to be filed with him, and require papers to be filed with the court either before service or within a reasonable time thereafter.

Rule 753. [Time.]

- 1 (a) **Computation.** [In computing any designated period of
 2 time, the day from which the period begins to run is excluded.
 3 The last day of the period is included, unless it is a Saturday,
 4 Sunday, or legal holiday, in which event the period runs until
 5 the end of the next day which is not a Saturday, Sunday, or
 6 legal holiday. If the period is less than [seven] days, any inter-
 7 mediate Saturday, Sunday, or legal holiday is excluded in the
 8 computation.]

Comment

This optional subdivision, for which may be substituted a reference to a state statute or rule covering the matter, is identical in substance to provision in F.R. Crim.P. 45(a), Maine R.Crim.P. 45(a), and N.D.R.Crim.P. 45(a). See Colo.R.Crim.P. 45(a); Fla.R. Crim.P. 3.040; Idaho Crim.R. 45(a); Nev.Rev.Stat. § 178.472. Cf. former Uniform Rule 50(a); Alaska R.Crim.P. 40(a); La. Code Crim.P. art. 13.

Since this applies only to a "*designated period of time*," it does not authorize automatic exclusion of the first day or of Saturdays, Sundays, or holidays in complying with provisions which require action "*promptly*," "*without unnecessary delay*," within a "*reasonable*" time, or the like.

- 1 (b) **Additional time after service by mail.** Whenever a party
 2 has the right or is required to do an act within a prescribed pe-
 3 riod after the service of a notice or other paper upon him and

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- 4 the notice or other paper is served upon him by mail, [three]
5 days shall be added to the prescribed period.

Comment

This is identical to F.R.Crim. Nev.Rev.Stat. § 178.482, and
P. 45(e), Alaska R.Crim.P. 40(e), N.D.R.Crim.P. 45(e). See F.R.
Colo.R.Crim.P. 45(e), Idaho Crim. Civ.P. 6(e).
R. 45(d), Maine R.Crim.P. 45(e),

- 1 (c) **Time for service by mail.** If a paper is served by mail, it
2 shall either be mailed at least [three] days before, or be received
3 by, any time otherwise prescribed for service.

Comment

This is included because, al- see Moore, Federal Practice ¶ 5-
though some have argued that a 07n.7 (1974); 3 Wright, Federal
provision like subdivision (a), Practice & Procedure—Criminal
supra, requires service by mail to § 755 (1969), on its face it does
be three days earlier than the time not.
otherwise required for service,

Rule 754. **[Recording of Proceedings.]**

- 1 (a) **Proceedings to be recorded.** All oral portions of the fol-
2 lowing shall be recorded in full:

- 3 (1) Testimony at any proceeding, including any testi-
4 mony in support of the issuance of any arrest warrant, sum-
5 mons, or order directing a [law enforcement officer] to take
6 any person into custody or to bring any person before the
7 court, and any testimony under Rule 311 respecting whether
8 the grounds exist for issuance of an arrest warrant;

- 9 (2) Proceedings upon the defendant's appearance under
10 Rule 321;

- 11 (3) Detention hearings under Rule 344;

- 12 (4) Proceedings respecting waiver of rights, including
13 proceedings under Rules 431(f)(2), 511(a), (b), 711, and
14 713(b)(1);

- 15 (5) Depositions under Rules 431 and 432;

- 16 (6) Conferences respecting concurrence in a plea agree-
17 ment under Rule 443(b);

- 18 (7) Proceedings respecting pleas under Rule 444;

- 19 (8) Pretrial conferences under Rule 491;

- 20 (9) Hearings upon motions;

- 21 (10) Trial proceedings, including all proceedings speci-
 22 fied in Rules 512 through 531 and 533 through 535;
 23 (11) Disposition hearings under Rule 613;
 24 (12) Proceedings respecting revocation of probation [or
 25 of deferred imposition of sentence] under Rule 641; and
 26 (13) Upon the request of a party, informal conferences in
 27 chambers.

Comment

Clause (10)'s reference to "all proceedings specified in Rules 512 through 531 and 533 through 535" is intended to make it clear that some things which are pres-

ently not always recorded, *e. g.*, arguments to the jury, hearings on instructions, and the giving of instructions, are to be recorded.

- 1 (b) **Recorded defined.** As used in these Rules, "recorded"
 2 means taken verbatim by accurate and reliable sound recording,
 3 audio-video recording, or stenographic means.

Comment

This states the overall stand-
 ard. It is contemplated that as to
 proceedings before it, the court
 will designate the particular
 means of recording, and may
 designate different means for dif-
 ferent proceedings. As to deposi-
 tions, Rule 431(d)(2) provides for
 the party taking the deposition to

specify the means of recording in
 the notice, but Rule 431(c) au-
 thorizes the court, upon a party's
 or the deponent's motion, to
 change the manner of recording.
 As to investigatory depositions,
 Rule 432(d)(1) provides record-
 ing by such means as the prose-
 cutor designates.

- 1 (c) **Access.** Except as to in-camera proceedings under Rule
 2 421(f), any party shall be permitted under reasonable conditions
 3 to listen to or view and copy or record any sound or audio-video
 4 recording of any proceeding in the case and to inspect and copy
 5 or photograph any prepared transcript of any proceeding in the
 6 case. Upon motion of the defendant the court shall order the
 7 State to assume the cost of furnishing the defendant a copy of
 8 the recording or transcript, if the defendant shows that he is fi-
 9 nancially unable to bear the expense.

Comment

The first sentence provides ac-
 cess similar to that provided in
 Rule 421(a), *supra* (duty of
 prosecuting attorney to allow ac-
 cess). Where sound or video re-

cording is used, it should elimi-
 nate much unnecessary transcrip-
 tion, and where stenographic
 means are used it should elimi-
 nate much unnecessary copying.

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The second sentence provides expense if the defendant is financially unable to bear the expense of duplicating a recording or photocopying a transcript at state thereof.

- 1 **(d) Preparation of transcript.** Upon motion of a party the
2 court shall order the preparation of a transcript of all or a por-
3 tion of any proceeding in the case, if the party shows that it is
4 reasonably necessary to his case.

Comment

Under this subdivision, if a proceeding, he must show that the party is unable without a court transcript is reasonably necessary order to get the reporter to transcribe all or a portion of a pro- to his case.

Rule 755. [Preserving Objection.]

- 1 Except as otherwise provided in these Rules, a party suffi-
2 ciently preserves an objection to a ruling or order of the court if,
3 at the time the ruling or order is made or sought, he makes known
4 to the court the action which he desires the court to take or his
5 objection to the court's action and the grounds therefor. If the
6 ruling is one admitting [or excluding evidence, he sufficiently
7 preserves an objection by complying with Rule 103(a) of the
8 Uniform Rules of Evidence] [evidence, he sufficiently preserves
9 an objection by timely objecting or moving to strike, stating the
10 specific ground of objection if the specific ground is not apparent
11 from the context. If the ruling is one excluding evidence, he suf-
12 ficiently preserves an objection if the substance of the evidence
13 is made known to the court by offer or is apparent from the con-
14 text of the interrogation]. If a party has no opportunity to ob-
15 ject to a ruling or order, the absence of an objection does not
16 thereafter prejudice him. Exceptions are unnecessary.

Comment

The first and last two sentences and Nev.Rev.Stat. § 178.596. The are quite similar to former Uni- intervening material provides for form Rule 56, F.R.Crim.P. 51, a cross-reference to, or an incor- Alaska R.Crim.P. 46, Colo.R. poration of the essence of, Unif.R. Crim.P. 51, Maine R.Crim.P. 51, Ev. 103(a).

Rule 756. [Error Noticed by Court.]

- 1 The court at any time may call any error to the attention of
2 the parties and, if required in the interest of justice, take ap-
3 propriate action with respect to an error affecting substantial
4 rights, although an objection was not preserved by a party.

Comment

This is rather similar in effect to F.R.Crim.P. 52(b), Alaska R. Crim.P. 47(b), Colo.R.Crim.P. 52(b), and Nev.Rev.Stat. § 178.602, each of which specifies, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," and to former Uniform Rule 57(b),

Maine R.Crim.P. 52(b), and N.D. R.Crim.P. 52(b), which specify "obvious" rather than "plain." See Mont.Rev.Codes § 95-2425 ("defects affecting jurisdictional or constitutional rights"). Cf. Rule 451(c)(1), *supra* ("lack of jurisdiction of the court over the person or subject matter * * * can be raised at any time").

PART 6

APPLICATION

Rule 761. [Court Defined.]

- 1 As used in these Rules, "court" means

Comment

This provides a place for definition of the term "court" as it is used throughout the Rules. States without a unitary court system would typically provide "the district court or magistrate having jurisdiction to try the offense." Some states might wish at this point to provide, or to authorize the making of local court rules under Rule 762, *infra*, to provide for some expansion of magistrates' normal roles in cases triable only by courts of general criminal jurisdiction. For example, some states may desire to allow a magistrate (or a magistrate admitted to the bar) to issue in felony cases at least some of the nontestimonial evidence

orders covered by Rules 434 through 438, *supra*, at least if the motion is made (as it sometimes may be) while the magistrate is still otherwise involved in the case. Others may wish to allow magistrates or magistrates designated by the court with jurisdiction over felony cases to perform certain duties of the "court" in felony cases when no judge of the court with felony jurisdiction is available.

A state might also use this Rule as a place to define the term "magistrate" or any term it has substituted for "magistrate" throughout these Rules.

Rule 762. [Rules of Court.]

- 1 [District] courts [and magistrates] may make rules for the
2 conduct of criminal proceedings not inconsistent with these Rules
3 [with the approval of the [Supreme Court]]. Copies of the rules

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4 shall be [furnished to the [State Judicial Administrator] and]
5 made available to the public.

Rule 763. [Practice When Procedure Not Specified.]

1 In any situation not provided for by rule or statute, the court
2 may proceed in any lawful manner not inconsistent with these
3 Rules or any applicable statute.

Rule 764. [Appendix of Forms.]

1 The forms contained in the Appendix of forms are illustrative
2 and not mandatory.

Rule 765. [Uniformity of Application and Construction.]

1 These Rules shall be applied and construed to effectuate their
2 general purpose to make uniform the rules of criminal procedure
3 among states adopting them.

Rule 766. [Short Title.]

1 These Rules may be cited as the Uniform Rules of Criminal
2 Procedure.

Rule 767. [Severability.]

1 If any provision of these Rules or the application thereof to
2 any person or circumstance is held invalid, the invalidity does
3 not affect other provisions or applications of these Rules which
4 can be given effect without the invalid provision or application,
5 and to this end the provisions of these Rules are severable.

Rule 768. [Effect on Existing Laws and Rules.]

1 [These Rules supersede the following acts and rules of court
2 and parts thereof:

3 (1)

4 (2)

5 (3)

6 and all other acts and rules of court, or parts thereof, to the ex-
7 tent that they are inconsistent with these Rules.]

Rule 769. [Time of Taking Effect.]

1 These Rules shall take effect

APPENDIX OF FORMS

Form

1. Law Enforcement Officer's Citation.
2. Promise To Appear.
3. Information.
4. Prosecuting Attorney's Citation.
5. Summons.
6. Arrest Warrant.
7. Statement of Representation.
8. Order Setting Times.

Form 1. Law Enforcement Officer's Citation (Rule 222 (a), (b))

STATE OF _____ COUNTY OF _____ State of _____ vs. _____ Defendant	}	MUNICIPAL COURT CITY OF _____ File No. _____ <u>LAW ENFORCEMENT</u> <u>OFFICER'S CITATION</u>
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TO THE ABOVE-NAMED DEFENDANT:

PLEASE TAKE NOTICE, That unless you appear before the above-designated Court at [address] _____, [city] _____, [state] _____ at ____:____ m. on _____, _____, 19____, an application may be made for the issuance of a Summons or a Warrant for your arrest.

The undersigned will request the Prosecuting Attorney to file with the above-designated Court an Information charging you with the following offense: That on or about _____, 19____ at about ____:____ m. at [address] _____, [city] _____, _____ County [state] _____, you did unlawfully [description of offense—desirable to also specify section violated] _____

The undersigned will request that the Information be filed before the end of the second business day preceding the date specified above for your appearance before the Court. If an information is not so filed you will not have to appear and the Prosecuting Attorney will notify you not to appear.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the serv-

Form 1 RULES OF CRIMINAL PROCEDURE

ices of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, telephone _____.

Issued: _____, 19__ in [city or county] _____.

BY A LAW ENFORCEMENT OFFICER:
[signature]

[rank, badge number]

Police Department

Form 2. Promise to Appear (Rule 211(c))

STATE OF _____ MUNICIPAL COURT
COUNTY OF _____ CITY OF _____

State of _____ } File No. _____
vs. _____ }
Defendant _____ } PROMISE TO APPEAR

I promise to appear before the above-designated Court at [address] _____, _____, _____ at ____:____.m. on [day] _____, _____, 19__.

Dated: _____, 19__

Form 3. Information (Rule 231(c))

STATE OF _____ MUNICIPAL COURT
COUNTY OF _____ CITY OF _____

State of _____ } File No. _____
vs. _____ }
Defendant _____ } INFORMATION

The Prosecuting Attorney of _____ CHARGES: That on or about _____, 19__ at about ____:____.m. at [address] _____, [city] _____, _____ County, [state] _____, the above-named Defendant did unlawfully [essential facts constituting the offense—desirable to also specify ordinary name of offense] _____

in violation of [citation of law violated] _____, for which the maximum possible incarceration that may be imposed upon conviction is _____.

Dated: _____, 19__

Prosecuting Attorney

Form 4. Prosecuting Attorney's Citation (Rule 222(a), (c))

STATE OF _____	MUNICIPAL COURT
COUNTY OF _____	CITY OF _____
State of _____	File No. _____
vs.	<u>PROSECUTING ATTOR-</u>
Defendant	<u>NEY'S CITATION</u>

TO THE ABOVE-NAMED DEFENDANT:

PLEASE TAKE NOTICE, That unless you appear before the above-designated Court at _____, _____, _____ at ____:____ m. on _____, _____, 19____, an application may be made for the issuance of a Summons or a Warrant for your arrest.

The undersigned intends to file an Information, a copy of which is attached, with the Court on _____, 19____, before the time for your appearance.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the services of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, _____, telephone _____.

Issued: _____, 19____ in [city or county] _____, _____.

BY THE PROSECUTING ATTORNEY:

[signature] _____

[title] _____

[jurisdiction] _____

PROOF OF SERVICE: I certify that I served this Citation upon the above-named Defendant by _____ a copy of it and of the Information on _____, 19____ to _____

Dated: _____, 19____

[signature] _____

[title] _____

[jurisdiction] _____

Form 5 RULES OF CRIMINAL PROCEDURE

Form 5. Summons (Rule 222(a), (d))

STATE OF _____ MUNICIPAL COURT
COUNTY OF _____ CITY OF _____
State of _____ } File No. _____
vs. _____ } SUMMONS
Defendant _____ }

THE STATE OF _____ TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED, to appear before the above-designated Court at _____, _____, _____ at _____:____ m. on [day] _____, _____, 19____, in respect to the Information a copy of which is attached.

If you do not so appear an application may be made for the issuance of a Warrant for your arrest.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the services of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, _____, telephone _____.

Issued: _____, 19____ in [city or county] _____, _____.

BY THE COURT:

[signature] _____
Judge

RETURN OF OFFICER: I hereby certify that I served this Summons upon the above-named Defendant by delivering a copy of it and of the Information to the Defendant personally, on _____, 19____, at _____, _____.

Dated: _____, 19____ [signature] _____
[rank, badge number] _____
_____ Police Department

Form 6. Arrest Warrant (Rule 222(e))

STATE OF _____ MUNICIPAL COURT
COUNTY OF _____ CITY OF _____
State of _____ } File No. _____
vs. _____ } ARREST WARRANT
Defendant _____ }

THE STATE OF _____ TO ALL LAW ENFORCEMENT OFFICERS IN THE STATE:

YOU ARE HEREBY COMMANDED, To arrest the above-named Defendant charged in the Information, a copy of which

APPENDIX OF FORMS

Form 6

is attached, and without unnecessary delay to bring him before a Magistrate [unless he first meets the following terms of release: _____].

[Restrictions on manner of execution: _____].

Issued: _____ 19__

BY THE COURT: .

[signature] _____

Judge

[location of office] _____

NOTICE TO THE ABOVE-NAMED DEFENDANT:

You have the right to remain silent. Anything you say, orally or in writing, will be used against you.

You will not be questioned unless you wish.

You have the right to consult with a lawyer before being questioned or saying anything and to have a lawyer present during any questioning.

If you wish to consult with a lawyer but are unable to obtain one you will not be questioned until you have had the assistance of a lawyer.

If you are unable to pay for the services of a lawyer, one will be provided for you.

If at any time during any questioning you desire to consult with a lawyer or desire questioning to stop, questioning will stop.

The officer will inform you where you will be taken. If you are taken to a place of detention you will be permitted upon arrival to communicate with a lawyer and a relative or friend. You will be brought before the court without unnecessary delay.

RETURN OF OFFICER: I hereby certify that I arrested the above-named Defendant at ____:____.m. on _____, 19__ at _____.

Dated: _____, 19__

[signature] _____

[rank, badge number] _____

_____ Police Department

[I hereby certify that I released the above-named Defendant upon the above terms of release at ____:____.m. on _____, 19__.

Dated: _____, 19__

[signature] _____

[rank, badge number] _____

_____ Police Department]

I hereby certify that I brought the above-named Defendant before _____, a magistrate of _____ County, at ____:____.m. on _____, 19__.

Dated: _____, 19__

[signature] _____

[rank, badge number] _____

_____ Police Department

Form 7 RULES OF CRIMINAL PROCEDURE

Form 7. Statement of Representation (Rule 312)

STATE OF _____ MUNICIPAL COURT
COUNTY OF _____ CITY OF _____
State of _____ } File No. _____
vs. _____ } STATEMENT OF REP-
Defendant _____ } RESENTATION

The undersigned states that he represents the above-named Defendant in the above-entitled case.

Dated: _____, 19__

Attorney at Law

Telephone: _____

Form 8. Order Setting Times (Rule 411)

STATE OF _____ DISTRICT COURT
COUNTY OF _____ _____ DISTRICT
State of _____ } File No. _____
vs. _____ } ORDER SETTING TIMES
Defendant _____ }

The Defendant in the above-entitled case having appeared, it is hereby ORDERED that:

1. The Prosecuting Attorney shall furnish the matters specified in Rule 422(a) on or before _____, 19__.
2. The Defendant may request the matters specified in Rule 422(b) after _____, 19__.
3. The Defendant shall furnish the matters specified in Rule 423(a) on or before _____, 19__.
4. The Prosecuting Attorney may request access to the matters specified in Rule 423(b) after _____, 19__.
5. Discovery depositions under Rule 431 may be taken only with leave of court after _____, 19__.
6. Pretrial motions under Rule 451 may be made on or before _____, 19__.
7. A motion for a pretrial judgment of acquittal under Rule 481 may be made on or before _____, 19__.

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Form 8

8. A pretrial conference under Rule 491 _____

9. After _____, 19____, if the case is not disposed of by plea or otherwise, the Court will set it for trial.

Dated: _____, 19____

BY THE COURT:

Judge

*

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