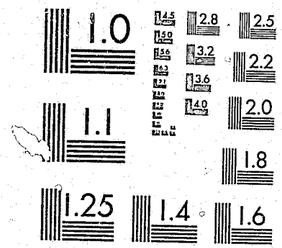

THE ROLE OF THE GRAND JURY AND THE PRELIMINARY HEARING IN PRETRIAL SCREENING

Deborah Day Emerson
Nancy L. Ames

Final Report

July 31, 1983

Abt Associates Inc., Cambridge, Massachusetts

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PREFACE

When this study was first conceived, we proposed to conduct a broad-scale investigation of the grand jury and its counterpart--the preliminary hearing--in a number of states. Partly in response to a suggestion from staff at the National Institute of Justice, we amended our early plans and concentrated our efforts on multiple jurisdictions within a single state. We believe that this change in direction was a fortuitous one. By exploring the use of these pretrial screening mechanisms in different counties operating under the same legal framework, we were able to draw some important conclusions. Among the most significant are these:

- Nothing is so inherently unique about the nature of each proceeding as to preclude using the grand jury or the preliminary hearing for the same screening purposes. The use of one or the other screening mechanism is in large measure shaped by local norms, attitudes, and informal relationships among system actors. The same justifications are often given for electing to use each.

- Both the grand jury and the preliminary hearing serve a variety of collateral functions which may be important in determining when and how each is used. For example, the preliminary hearing may be used for the purposes of discovery, preservation of testimony, testing of constitutional issues, and review of conditions of release, and an opportunity for plea negotiation. The grand jury may be used for investigation and case development.

- Neither the grand jury nor the preliminary hearing screened out a significant percentage of cases in the jurisdictions studied. At the same time, most of the cases passing their screening criteria terminated in guilty pleas or convictions. Whether the proceedings are "rubber stamps" for the prosecutor or highly effective screening mechanisms is, therefore, largely a matter of perception.

- The preliminary hearing may be deemed to provide a somewhat better test of probable cause in terms of the amount of evidence presented and the opportunity to challenge that evidence. However, there are instances in which state or local prosecutors need to use the grand jury proceeding to investigate and prepare for the prosecution of complex criminal cases. Furthermore, where the preliminary hearing is waived in a large proportion of cases, its efficacy as a screening device may be moot.

- It is impossible to say which approach is more efficient. In one of the communities studied, aggressive prosecutorial screening, coupled with routine use of the grand jury, was found to be an efficient, highly predictable pretrial screening system. In the other, prosecutors' use of the time scheduled for the preliminary hearing to negotiate pleas led to many cases being resolved quickly and efficiently at the lower court stage.

- Those who advocate grand jury "reform" should bear in mind that:

  --There is no "perfect" or "ideal" preliminary hearing against which to contrast the grand jury proceeding. State laws and court rules governing the preliminary hearing differ widely, and some offer defendants little more due process protection than those governing the grand jury. Furthermore, the operation of the preliminary hearing in practice may not resemble the proceeding as conceived in theory.

  --Attempts to reform a proceeding may produce unanticipated results. For example, the requirement that the grand jury proceeding be recorded may result in a more perfunctory proceeding. Moreover, changes which strain system resources are likely to be circumvented.

  --Since prosecutorial screening plays a critical role in weeding out cases, efforts to improve the pretrial screening process and to protect the rights of defendants should be devoted to this area as well.

The state in which our study was conducted was Arizona. The two counties which were the primary object of investigation were Maricopa County (Phoenix) and Pima County (Tucson). In addition, we explored the use of the statewide grand jury by the Attorney General's Special Prosecutions Division.

At both the county and state levels, we received tremendous cooperation from members of the criminal justice community. Without their help in making case records and transcripts available; providing us with written policy statements, statistical reports, and caseload data; and responding to our interview questions, the study could not have been completed. We would, therefore, like to take this opportunity to express our deep gratitude to the judges, magistrates, prosecutors, public defenders, and private attorneys who made this research possible.

We hope that this report does justice to the Arizona experience. More importantly, we hope that our findings and conclusions will be of interest to a broad range of individuals, including academicians, researchers, practitioners, and policymakers concerned with improving the pretrial screening process.

A great many other individuals also played a role in this research effort. We would like to thank our distinguished advisory panel members for their contributions to the research design and their feedback on draft products. The panel members were:

- Professor Robert Blakey
  Notre Dame Law School

- Dr. Janet Gilboy
  American Bar Foundation

- Professor Milton Heumann
  Political Science Department
  Rutgers University

- Ms. Catherine Reeverts
  Formerly with the National Coalition
  to End Grand Jury Abuse

- Dr. Charles Wellford
  Director, Institute of Criminal
  Justice and Criminology
  University of Maryland

We would also like to thank the staff of the National Institute of Justice, Office of Research Programs, for sponsoring this research and for their assistance throughout the research effort. Special recognition should be given to Jonathan Katz, our project monitor, for his help in formulating the study design, focusing the research questions, and responding to numerous drafts of this report.

Finally, we would like to acknowledge the contributions made by other members of the project staff. Brad Smith was instrumental in developing our overall research strategy and was primarily responsible for documenting case flow patterns in each jurisdiction. Nancy Grimes assisted in our case records search and helped set up our data base. Janice Knight and Aleta Chamberlain provided programming support, with assistance from Ken Carlson. Mary-Ellen Perry and Lisa Wenzell were responsible for the production of this report.

Deborah Emerson
Nancy Ames

July 31, 1983

CHAPTER ONE

INTRODUCTION

The grand jury system has been the subject of a variety of criticisms in recent years. It has been categorized as a meaningless rubber stamp, unable or unwilling to exercise its own will or judgment and acting as an arm of the prosecutor, charged with trampling the due process rights of witnesses and targets of its inquiries, and challenged on the ground that it violates constitutional guarantees of equal protection under the law. The grand jury has also been criticized as ineffective and a drain on scarce resources. In this vein, commentators have pointed out that the grand jury receives cases only after they have undergone prosecutorial review (and have likely been screened by victims and police as well). Furthermore, it is claimed that the laws governing the quality and quantity of evidence necessary to obtain a grand jury indictment are so minimal as to make the proceeding a mere formality.

The existence of the preliminary hearing as an alternative screening mechanism[1] is typically acknowledged by these critics only to underscore the flaws and the drawbacks of the grand jury. Ironically, the preliminary hearing is rarely critiqued on the same basis as is the grand jury although many of the same concerns apply to it as well. Furthermore, while each proceeding has been studied intensively in its own right, few have compared the two empirically as well as theoretically.

Part of the dilemma in assessing the relative strengths or merits of the preliminary hearing and the grand jury is the lack of agreement on exactly what functions these mechanisms should perform. It is one thing to assess the efficacy of each proceeding in determining whether the legal standard of probable cause has been met in a given case. It is far different to compare the grand jury and the preliminary hearing on the extent to which they facilitate discovery or plea negotiation. In fact, there are only a few studies which examine what functions are being served by the grand jury and the preliminary hearing, over and above their basic screening functions.[2]

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[1] Prosecutors may opt to present felonies to the preliminary hearing or the grand jury in approximately one-half of the states.

[2] See, for example, Graham, Kenneth and Leon Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Implications." UCLA Law Review, Vol. 18 (1971); Carp, Robert A., "The Harris County Grand Jury: A Case Study," Houston Law Review, 12:90 (1974).

There are numerous additional unanswered questions on the role and operations of the grand jury and the preliminary hearing. Very little has been written on the patterns of usage where both proceedings are available, nor has there been any analysis on the factors governing the prosecutor's choice of proceeding. Questions exist over the nature of the two proceedings as well as their efficacy and efficiency. Little attention has focused on appropriate expectations for each screening mechanism and the tradeoffs between conservation of system resources and the quality of screening. In view of the criticisms described above, the relative level of due process protection offered by either mechanism is also an important issue.

The purpose of this study was to compare the grand jury and the preliminary hearing as screening devices and to explore their larger role in the pretrial process. The study focused on the use and operation of both proceedings within a single state, in two counties whose practices differed widely. By selecting only one state in which to conduct our examination, we were able to explore the effects of "local legal culture" on the pretrial screening process while holding constant the laws and supreme court rules under which the study jurisdictions operated.

We do not pretend to have addressed all of the possible issues relevant to this subject area. Some, such as the level of screening necessary at this stage in the criminal justice process, are better left to theoreticians and legal scholars. Others, such as the use of the grand jury as an investigative tool, were not possible given the resource constraints of the study. What we have tried to do is shed some light on the important similarities and differences between the two proceedings, debunk certain myths commonly associated with the grand jury and the preliminary hearing, and suggest a number of policy and research issues for others to explore. We hope that this report will contribute to the continuing discussion over the purpose and nature of these proceedings.

1.1 Guide to this Report

In the remaining sections of this chapter, we briefly examine the objectives sought to be achieved by the pretrial screening process and the role of the grand jury and the preliminary hearing in fulfilling those objectives. We then provide an overview of the issues raised by the availability (in some states) of two distinct screening mechanisms and discuss recent proposals to upgrade the grand jury system as a result of the criticisms leveled against it. This chapter concludes with a discussion of the overall objectives of our research. (The methodology is described in Appendix A).

The second chapter in this report provides a brief review of the laws and local organizational structures affecting the operation of the grand jury and the preliminary hearing in Arizona, the state selected for this study. We

analyze the case flow patterns for the two counties studied (Maricopa County [Phoenix] and Pima County [Tucson]) and present our findings on the two significantly different patterns that we observed.

Chapters 3 and 4 provide a thorough examination of the operation of the preliminary hearing and the grand jury respectively in Maricopa and Pima Counties. We describe both proceedings as they function in actual practice, as well as the perceptions of local practitioners on the efficiency and usefulness of each.

The State Grand Jury's role in screening complex cases typically involving white collar crimes is the subject of Chapter 5. We also review the detailed procedures followed by the Attorney General's staff to avoid error in presenting cases to the State Grand Jury.

The final chapter compares the grand jury and the preliminary hearing across the sites studied and summarizes our findings. We conclude with a discussion of issues and questions to be considered in any examination of the pretrial screening process and the appropriate roles of the grand jury and the preliminary hearing. We also raise additional questions that need to be answered.

1.2 The Role of the Preliminary Hearing and Grand Jury in Pretrial Screening

The purpose of pretrial screening is, simply put, to prevent those cases which are weak, insignificant, ill-motivated or otherwise not worth prosecuting from penetrating further into the criminal justice system. Thus, the pretrial screening decisions are designed not only to save the government and the accused from incurring unnecessary expense, but also to protect the accused from unfounded and malicious allegations, thereby avoiding the anxiety and embarrassment of trial. Within the scope of this overall objective, a number of specific functions have been described.[1] In general, these fall into three categories: evaluation of proof, conservation of system resources by weeding out cases not sufficiently important to pursue, and application of community norms and judgments.

In practice, pretrial screening is not a single event, but an ongoing process which typically involves all actors in the criminal justice system. A victim's decision regarding whether to report a crime may be the first screen

[1] See, for example, Graham, Kenneth and Leon Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Implications," UCLA Law Review, 18:636, 1971.

that occurs. By deciding not to investigate a case or to make an arrest even though a suspect has been identified, police officers screen out cases. Magistrates perform a screening role when they refuse to issue an arrest warrant. Prosecutors who decide not to prosecute cases brought to their attention by law enforcement officials or to investigate citizens' complaints are screening. A magistrate at the preliminary hearing screens when he or she declines to bind over a defendant for trial and a grand jury performs a similar role when it refuses to indict.

The relative importance of the preliminary hearing and the grand jury as elements in this pretrial screening process is a matter of some debate. Some observers claim that screening decisions made by individual prosecutors may be more effective in weeding out unfounded charges than either the preliminary hearing or the grand jury, since prosecutors generally apply a more stringent standard. Prosecutors often evaluate cases using a likelihood of conviction standard, whereas the magistrate and grand jury are generally charged with determining probable cause.[1] Furthermore, these observers contend that prosecutors have little to gain from prosecuting weak cases and that the expense and negative public opinion associated with losing such cases are themselves sufficient barriers to prevent possible abuse.

Those who hold this view often play down the role of the grand jury and preliminary hearing on other grounds as well. An oft-cited argument is that, since the trial is designed to safeguard the rights of the accused, there is little need for such safeguards at the preliminary hearing or grand jury stage. The fear is that expanding the nature and scope of these proceedings would turn them into mini-trials or allow the accused to be tried twice. Therefore, the pretrial proceedings are sometimes designed to preclude consideration of certain issues (such as suppression issues or affirmative defenses), leading in turn to charges that the hearing is nothing more than a rubber-stamp for the prosecutor's decisions. Although the rubber stamp label is typically applied to the grand jury, it may also apply to the preliminary hearing in some circumstances.

On the other hand, other commentators have pointed out that there are problems with overreliance on either police or prosecutorial screening or on trials to guarantee judicial safeguards. These observers argue that the preliminary hearing and the grand jury have an important role to play as screening devices.

[1] Probable cause exists if the facts as presented would lead a reasonably intelligent and prudent person to believe that a crime has been committed and that the defendant committed it. Prosecutors may screen cases by trying to assess the likelihood of conviction by predicting the credibility or weight of their evidence when presented to a jury.

The idea that screening by either the police or the prosecutor is an adequate substitute for a more formal proceeding has been challenged for a number of reasons. Studies have shown that police rarely screen out a sizable portion of cases brought to their attention, deferring instead to the prosecutor[1] or the magistrate to weed out cases brought before them.[2] Given the routine contact and close working relationship between the police and the prosecutor, the police version of the facts might not be examined as thoroughly by the prosecutor as it would be by a detached observer. Moreover, it is claimed that prosecutorial screening lacks uniformity. For example, prosecutors within a single jurisdiction may disagree on the standard of proof required for prosecution or on the "convictability" of a case, thereby making disparate screening decisions.[3]

Also cited as a weakness in police or prosecutorial screening is the absence of any involvement by the community or any outside authority in the decision-making process. The magistrate or the grand jury represent such outside participation, given that they are not involved in case preparation or presentation. Although outside scrutiny of this type may often have a limited or indirect effect on pre-trial proceedings, its importance is underscored when one considers the infrequency of such involvement at the trial stage.

Those who argue that the availability of trial is inadequate to guarantee protection base their arguments on the widespread use of plea negotiations to dispose of cases. Stating that "...the modern adversarial jury trial is far too expensive, complex, and time-consuming to be used as the system's routine method for dispute resolution," Arenella asserts that trials are offered to all in the hope that few will accept.[4] It is true that defense counsel and the judiciary have an obligation to ensure that pleas of guilty are entered voluntarily, reliably demonstrate factual guilt and are made in conjunction with a knowing and intelligent waiver of the right to contest legal guilt at trial. As Aranella contends, however, there are a number of institutional factors which may impede the ability of these actors to make these guarantees. Excessive caseloads, lack of time to investigate and prepare cases fully, and uncooperative clients may reduce the effectiveness of the procedures established to guarantee due process. Morover, depending on the nature of local discovery laws or provisions for testing the admissibility of evidence, pleas may be entered on the basis of incomplete information.

[1] Graham and Letwin, op. cit.

[2] McIntyre, Donald M., "A Study of Judicial Dominance of the Charging Process," Journal of Criminal Law, Criminology and Police Science, 59:4, 1968.

[3] Graham and Letwin, op. cit.

[4] Arenella, Peter, "Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication," Michigan Law Review, 78: 463, 1980.

The importance of plea negotiations to the efficient functioning of the system may also create normative pressure on defense attorneys. Court rulings permitting more lenient sentences for those who plead guilty than for those convicted at trial may introduce subtle coercion in the plea negotiation process. Judicial inquiry designed to ferret out any overt coercion and to ascertain the defendant's understanding of his action provides some minimal guarantee that the defendant understands the factual elements of the crime. It does not necessarily ensure that the defendant understands what would constitute an affirmative defense, nor does it guarantee that the government has sufficient legal evidence, other than the defendant's own admission, to prove the essential elements of the crime.

In sum, both the preliminary hearing and the grand jury have been the subject of some criticism, although the grand jury has borne the brunt of these attacks. These criticisms have been fueled by claims that these proceedings offer different levels of due process protection, although they perform similar screening functions and, in fact, operate as alternative screening mechanisms in many jurisdictions.

1.3 The Dual System of Prosecution

The Fifth Amendment to the United States Constitution mandates grand jury involvement in federal felony prosecutions unless waived. This requirement has never been applied to the individual states, however.[1] As a result, the 50 states vary considerably in their procedures for filing felony cases. In some states (and in the federal system) both proceedings may occur although only the indictment is required (if not waived). One-half of the states have abolished the requirement of an indictment and given the prosecutor the discretion to choose between the preliminary hearing and the grand jury for case screening.

Those who favor the grand jury as a screening device believe it confers a number of benefits, including, among others: 1) greater efficiency; 2) secrecy, which is considered especially important in cases involving protected witnesses and undercover agents; and 3) broad investigative powers, including the ability to subpoena evidence and compel testimony. Those who favor the preliminary hearing for pretrial screening believe that it provides a higher level of due process protection since it is typically adversarial and open. It also serves a number of important collateral functions,

[1] In Hurtado v. California, 110 U.S. 516 (1884), the U.S. Supreme Court ruled that, for the states, prosecution by information was a Constitutionally permissible alternative to prosecution by indictment. The authority of states to choose whether to use the grand jury was more recently upheld in Branzburg v. Hayes, 408 U.S. 665 (1972).

including but not limited to: 1) early discovery of the government's case, 2) perpetuation of evidence, and 3) an opportunity for early plea negotiation.

The due process issues are by far the most controversial when comparing the preliminary hearing and the grand jury. These have been used by commentators urging grand jury reform or even abolition. Samuel Dash, for example, compared the two proceedings in their screening capacity (specifically exempting the investigative grand jury) and concluded that there is considerable difference in the nature of these proceedings.[1] Whereas the preliminary hearing is an open proceeding before an impartial magistrate in which the accused may be present and may participate through cross-examination and the introduction of evidence, the grand jury proceeding is by nature secret and is ex parte. It is not directed by an impartial individual but by the prosecutor whose decision it is to file charges. Thus, Dash argues that in those jurisdictions where the prosecutor has exclusive control over the choice of screening mechanism, he also controls the defendant's access to the protections inherent in the preliminary hearing.[2] Dash concludes that if the right to participate and the right to counsel attach at the preliminary hearing,[3] then the indicting grand jury must also be deemed a critical stage of prosecution at which those rights apply. By imposing parallel requirements, the prosecutor's choice of screening mechanism would no longer determine the protections extended to the defendant.[4]

Two solutions to the equal protection issue are generally proposed: 1) restructuring the screening process so that the prosecutor cannot deny the defendant due process protections as a result of the method of filing charges; or 2) revising the grand jury proceeding to incorporate due process protections comparable to those available at the preliminary hearing. Each of these approaches has been tried.

In November 1978, the California Supreme Court in Hawkins v. Superior Court adopted the first of these solutions by mandating post-indictment preliminary hearings on the basis of the equal protection clause of the State

[1] Dash, Samuel, "The Indicting Grand Jury: A Critical Stage?," The American Criminal Law Review, 10:807, 1972.

[2] See also Alexander, Richard P. and Sheldon Portman, "Grand Jury Indictment Versus Prosecution by Information--An Equal Protection-Due Process Issue," Hastings Law Journal, 25:997, 1974.

[3] Coleman v. Alabama, 399 U.S. 1(1969).

[4] The U.S. Supreme Court has ruled that the due process safeguards applicable in a preliminary hearing are not required before the grand jury. In United States v. Mandujano, 42 S U.S. 564 (1975), for example, the Court rejected the right to counsel at grand jury proceedings.

Constitution.[1] The Court found "that a defendant charged by indictment is seriously disadvantaged in contrast to a defendant charged by information."[2] Specifically, the fundamental rights of counsel, confrontation, and a hearing before a judicial officer were cited as unavailable to defendants charged by grand jury indictment. It was the existence of a dual system of prosecution with differing due process safeguards that triggered the equal protection issue. As noted by the Court,

> the prosecuting attorney is free in his completely unfettered discretion to choose which defendants will be charged by indictment rather than information and consequently which catalogue of rights, widely disparate though they may be, a defendant will receive.[3]

The Court in Hawkins found no compelling state interest to justify this discrimination. The solution devised by the Court was to require a post-indictment adversarial hearing at which the defendant would have access to the full range of due process protections that would be available during any preliminary hearing.

Although similar challenges to the grand jury have been raised for years in many other states, the courts have consistently supported the use of the grand jury indictment to initiate prosecutions.[4] The Hawkins decision remains unique at this time. However, the procedural requirements of Hawkins were adopted in Wisconsin through legislation. In 1979, the law was amended to require:

> [u]pon indictment by a grand jury a complaint shall be issued [and] . . . the person named in the indictment . . . shall be entitled to a preliminary hearing . . . and all proceedings thereafter shall be the same as if the person . . . had not been indicted by a grand jury.[5]

In recent years, the major thrust of debate and activity involving grand juries has focused on the second approach to the equal protection issue: changing the rules and procedures of the grand jury itself, rather than

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[1] Hawkins v. Superior Court, 22 Cal.3d 584, 586 P.2d 916 (1978).

[2] Ibid., at 592.

[3] Ibid., at 592.

[4] See, for example, State v. Bojorquez, 114 Ariz. 549, 535 P.2d 6 (1975) and Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969).

[5] Chapter 291 of the Laws of 1979, repealing and recreating Wisconsin Statutes, section 968.06.

restructuring the process for case screening as occurred in California and Wisconsin. Perhaps the best known set of proposals for grand jury reform was developed by the American Bar Association's (ABA) Section of Criminal Justice through its Grand Jury Committee. The Committee, established in 1974, has developed 30 legislative principles of grand jury reform. Initially, 25 of these were approved as ABA policy by the House of Delegates in August 1977; three were approved in 1980; and two more followed in 1981. The 30 principles include measures designed to protect the rights of witnesses, including the right to counsel in the grand jury room and the right against self-incrimination; to establish evidentiary standards for grand jury proceedings; to require recording of testimony and commentary; and to set up guidelines for granting immunity and using the contempt powers of the grand jury.[1]

Any comparison of the preliminary hearing and the grand jury as alternative screening mechanisms should address not only their relative due process safeguards, but other factors as well. For example, it is important to compare the two proceedings on their relative effect on resources and scheduling. Furthermore, the grand jury and the preliminary hearing serve collateral functions, such as facilitating early discovery or plea negotiations, in addition to their screening function. While advocates of the preliminary hearing stress its assurance of due process guarantees, this does not explain why defendants so often waive their right to a preliminary hearing. Similarly, arguments that the grand jury is far more efficient from the prosecutor's standpoint do not explain why prosecutors occasionally elect to use the preliminary hearing. Indeed, despite the rhetoric, tactical considerations often carry far greater weight in decisions governing the use of the grand jury versus the preliminary hearing than the particular rules under which they operate. Therefore, it is imperative that these two proceedings be examined not only in relation to theoretical considerations but as they exist and are used in practice.

It is also important to note that debates centering on both the due process issues and other more practical considerations often treat the preliminary hearing and the grand jury as if they represented a single "ideal" or "typical" proceeding. Yet, as will be discussed throughout this report, the manner in which these screening devices operate varies dramatically from jurisdiction to jurisdiction, depending upon state laws and rules as well as local norms and customs. It is not possible to state, therefore, that the preliminary hearing guarantees a certain combination of due process protections which are not available at the grand jury proceeding, since neither proceeding is uniform from state to state. In fact, in some states there is little difference, from the defendant's point of view, in the due process protection offered by either the preliminary hearing or the grand jury. A major purpose of this study is to help inform the debate over these pretrial screening

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[1] The ABA principles and their implementation at the state and federal level are discussed in Emerson, Deborah Day, Grand Jury Reform: A Review of Key Issues (Washington, D.C.: National Institute of Justice, 1983.)

processes by contrasting their operation within a single statutory framework. Before discussing the results of our own research efforts, however, it is useful to describe the research questions addressed and summarize the methodology used.

1.4 The Current Study

In view of the concerns raised about the grand jury's role in case processing, its effectiveness and efficiency both in its own right and in contrast to the preliminary hearing, we set out to conduct an exploratory and descriptive analysis of some of these issues. The primary subject of investigation was defined to be the grand jury *per se*--its structure, functions and basic operations. In examining the grand jury's screening functions, we felt it was essential to examine its counterpart--the preliminary hearing--and the process by which prosecutors elect one mechanism or the other. The issue of grand jury reform was also included insofar as it affected the types of grand jury procedures utilized in the jurisdictions selected for study.

Our study design involved a comparison of the use and operations of the grand jury and the preliminary hearing in a single state where the legal framework was constant but prosecutorial discretion over the method of case initiation resulted in considerable variation in local practice. Five basic research questions were developed to guide this study:

1. On what basis do prosecutors elect to utilize the grand jury versus the preliminary hearing to screen cases?

2. How do the grand jury and the preliminary hearing screening processes actually operate with respect to:

   - basic organization, structure and functions; and
   - actual operations, including scheduling, duration, and roles of major participants?

3. What evidentiary requirements are applied by law and what types of evidence are typically introduced in each screening proceeding?

4. How efficient and effective are the grand jury and preliminary hearing proceedings as screening mechanisms?

5. How is the grand jury used as a screening mechanism in more complex cases such as those involving white collar or organized crime?

The methodology used to select the sites for this study and to carry out the research design is described in detail in Appendix A. Basically, the research was conducted in a single state (Arizona) in which local practices varied dramatically despite the common statutory framework. The two largest counties--Maricopa County (Phoenix) and Pima County (Tucson)--presented a natural experiment for study since Pima County uses the grand jury for most cases whereas Maricopa County is more selective in presenting cases to the grand jury. The statewide grand jury, which focuses on complex cases typically involving white collar crime, was also examined. As described in Appendix A, this research combined interview data with an examination of case records to provide qualititative material as well as descriptive statistics.

With the cooperation of local authorities, we were given access to both grand jury and preliminary hearing transcripts to complete our case records analysis. These were critical to our description of the characteristics of the two proceedings; they also provided us with rich anecdotal material which is interspersed throughout this report. Since grand jruy proceedings are secret in nature and transcripts are generally not made available to the public (other than in the interests of justice), we were extremely fortunate in obtaining them in furtherance of our research objectives.

In order to examine the preliminary hearing and the routine screening grand jury, cases were randomly sampled from all those filed in the two counties between July 1, 1979 and June 30, 1980. Special samples, representing more complex cases, were also drawn from the records of the Organized Crime and Racketeering Unit (OCRU) in Maricopa County and the Consumer Protection/Economic Crime Unit (CP/ECU) in Pima County. In conjunction with drawing these samples, 500 cases were randomly identified in each site to provide a general description of the case flow in each county. A final set of cases was drawn from those presented to the State Grand Jury by the Attorney General's office. Each of these samples provided a unique insight into the pretrial screening process, as will be discussed in the remainder of this report.

CHAPTER TWO

FELONY CASE INITIATION AND PROCESSING

This chapter is intended to provide a brief introduction to the legal and organizational structures and case flows in the two counties under study.[1] First we describe the court system and provide a brief overview of case initiation events. Next, we describe the local socio-legal culture and discuss the manner in which felony cases proceed in each county. What is striking in this discussion is that, despite the fact that the two counties operate under a single legal framework, they have adopted two sharply differing approaches to the pretrial screening process. Subsequently, we provide a summary of the major differences between Maricopa and Pima Counties, as well as some speculative comments on the origins of or factors associated with these differences. It is clear from the marked contrasts between these jurisdictions that local history, norms, and expectations have more to do with the behavior of system participants than the formal legal structure.

2.1 Overview of the Arizona Court System and the Laws Governing Case Initiation

The Arizona court system is divided into four levels, as displayed in Figure 2.1.[2] Only two of these levels are involved directly in the pretrial screening process--the Superior Court and the courts in which the justices of the peace sit, referred to throughout this report as Justice Courts.

The Superior Court is a single, statewide court system. At the close of 1980, the Superior Court consisted of 81 judges sitting in 14 counties. The Superior Court is a trial court of general jurisdiction and, in addition to civil jurisdiction, presides over felony prosecutions and may hear misdemeanors if not otherwise provided by law. Of particular interest to this study, the Superior Court is responsible for impanelling the grand jury in those counties where the grand jury sits.[3] It also has concurrent authority with the Justice Court to conduct preliminary examinations, although the vast majority of such hearings are heard in the lower court (see Chapter 3).

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[1] The laws governing case initiation in Arizona are described in more detail in Appendix B.

[2] These data are drawn from the 1980 Annual Judicial Report published by the Supreme Court of Arizona.

[3] By statute, all counties with a population of 200,000 or more must call a grand jury three times a year--in January, May, and September. At the time of this study, only Maricopa and Pima Counties had sufficient population to fall under this requirement.

Figure 2.1

ORGANIZATIONAL CHART—THE ARIZONA JUDICIARY

SUPREME COURT
Chief Justice*
Vice Chief Justice*
3 Associate Justices
6-Year Terms

COURT OF APPEALS
12 Judges, 6-Year Terms

Division I-Phoenix
Chief Judge* & 8 Associate Judges
3 Departments (A, B & C)
Presiding Judge* & 2 Judges Ea.

Counties: Apache, Coconino
Maricopa, Mohave, Navajo,
Yavapai, Yuma

Division II-Tucson
Chief Judge* & 2 Associate Judges

Counties: Cochise, Gila,
Graham, Greenlee
Pima, Pinal,
Santa Cruz

SUPERIOR COURT
81 Judges, 4-Year Terms
Presiding Judge Each County**

Maricopa	41	Yuma	3	One each: Apache, Graham, Greenlee, Santa Cruz
Pima	16	Gila	2	
Cochise	3	Mohave	2	
Coconino	3	Navajo	2	
Pinal	3	Yavapai	2	

JUSTICES OF THE PEACE
84 Judges, 84 Courts (Precincts)
4-Year Terms

Maricopa	18	Navajo	5
Pinal	12	Pima	5
Yavapai	7	Apache	4
Cochise	6	Mohave	4
Yuma	6	Greenlee	3
Coconino	5	Graham	2
Gila	5	Santa Cruz	2

MUNICIPAL COURTS
64 Full-time Judges
53 Part-time Judges
74 Cities/Towns

*Elected by their members
**Appointed by the Supreme Court

Superior Court judges in Maricopa and Pima Counties are selected on the basis of merit; in other counties, judges are elected. The presiding judge in each county is appointed by the Supreme Court. In counties with three or more judges, the presiding judge may appoint court commissioners to perform duties defined by law or Supreme Court rules. In criminal cases, the commissioners may preside at the initial appearance of the defendant in Superior Court.

Statewide, there are 84 justices of the peace, each serving a single precinct. These justices are elected by the voters in the precinct to a four-year term of office. The Justice Courts have jurisdiction over misdemeanor cases (concurrently with the Municipal Courts). Their involvement in felony cases is limited to handling appearances of a defendant following the filing of a complaint and holding preliminary hearings when they occur (except in the rare instance a preliminary hearing is held in the Superior Court).

As noted, this study is concerned with the flow of cases into and through the Justice Courts and the Superior Court. Figure 2.2 provides a simplified version of the three possible case flow patterns from initiating event to filing in Superior Court. These three patterns, labelled Patterns A, B, and C for easy reference throughout this report, are described in greater detail in Appendix B. Case flow statistics and descriptions of each county's practices are described below.

2.2 Maricopa County

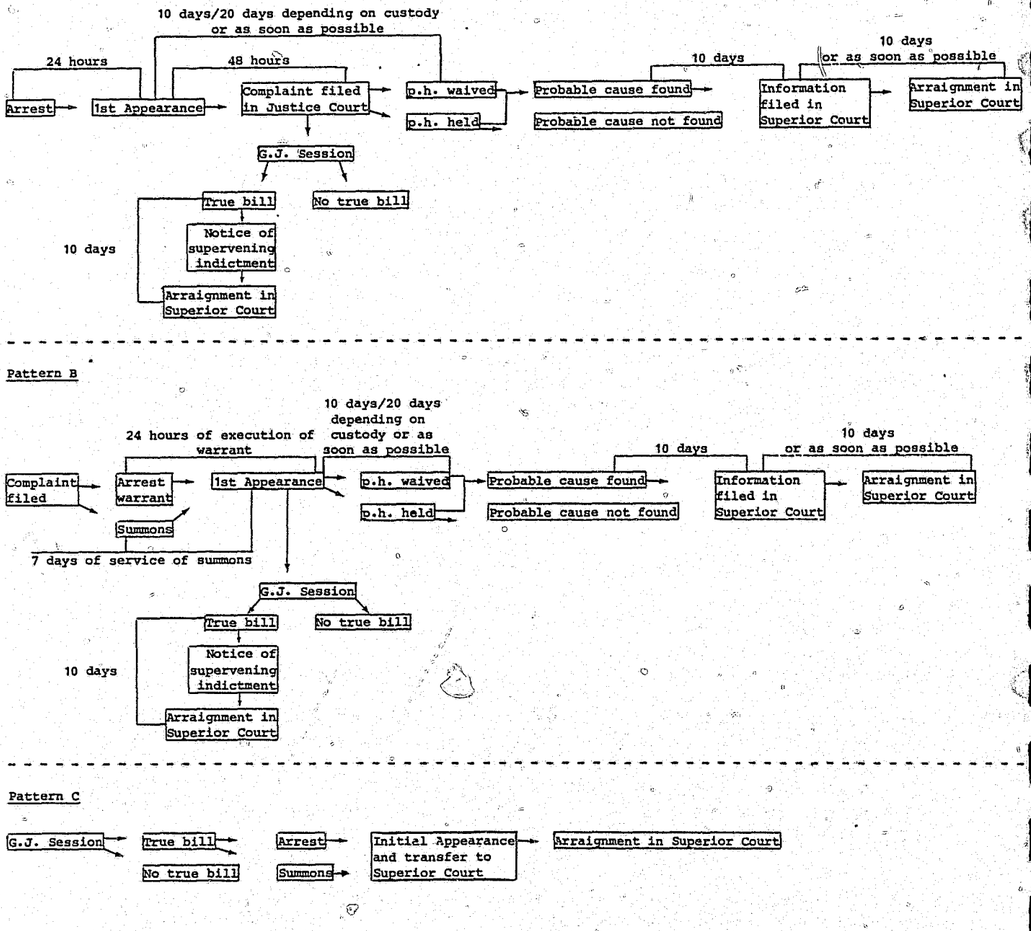
Maricopa County encompasses metropolitan Phoenix, the governmental and commercial center of the state. In addition, it includes a number of affluent resort communities, the university community of Tempe, poor Mexican-American areas and five Indian reservations, the largest of which is the Gila River Indian Reservation. (Criminal cases arising on Indian reservations are handled in the federal court system.) In 1980, the population was 1,511,552, an increase of nearly 56 percent since 1970.[1] Over half the state's population currently lives in Maricopa County, which is 9,155 square miles in land area. Approximately 15 percent of the population is Mexican-American, with a small proportion of blacks and Indians.

The influx of population into this area, due largely to the dry, warm climate and growing employment opportunities, has transformed Phoenix from a relatively small, largely agricultural ranching community to a sprawling metropolis. The enormous growth has not been without cost. For example,

[1] Figures drawn from population estimates in the 1970 and 1980 Uniform Crime Reports.

Figure 2.2

FELONY CASE FLOW: INITIATION TO ARRAIGNMENT WITH MAXIMUM TIME LIMITS*



*Cases may be dismissed and refiled at any point.

during the 1970s the Phoenix area became the center of many land fraud and securities fraud schemes. These ultimately resulted in the creation of the state-wide grand jury and a special prosecution unit within the Attorney General's Office. (See Chapter 5.)

2.2.1 The Maricopa County Court System

As of spring 1982, the Superior Court of Arizona, Maricopa County, had 39 judges including a presiding judge and an associate presiding judge. The Criminal Division had 11 judges and two full-time commissioners, appointed by the presiding judge to three-year terms. The position of presiding criminal judge is rotated every one to two years at the discretion of the presiding judge.

During 1980, the last year from which cases were sampled, the court had 7,450 felony filings (plus 50 transfers in) and 6,528 terminations.[1] Backlog at the beginning of the year was 3,329; at the end, 4,301. Very few misdemeanors were handled directly in Superior Court (80 filings and 68 terminations).

The current presiding judge, who has served in his present position for several years, has exercised considerable influence on the operation of the grand jury in Maricopa County. In the early 1970s, as a result of off-the-record proceedings in a number of grand jury cases in both Maricopa and Pima Counties, this judge made it clear that he would not tolerate similar lapses of procedure in the future and noted that it might be necessary to disimpanel the grand jury before the conclusion of its statutory term of service. Breaches of grand jury secrecy, an additional problem at approximately the same time, were also the subject of his concern. In response to these concerns, the Maricopa County Attorney's Office developed a standardized procedure to be followed in presenting cases to the grand jury and submitted it to the judge for approval. Subsequently, upon the creation of the State Grand Jury, the attorney general's staff was informed that strict adherence to the rules governing grand jury proceedings would be expected. The formalized procedures developed at the state level and in Maricopa County (which will be described in subsequent chapters) can, therefore, be attributed in large part to the policies established by the presiding judge in Maricopa County.

There are 18 justices of the peace in Maricopa County, corresponding to the 18 precincts in the county. These justices are elected officials and, according to state law, need not be lawyers. Of the 18, only a few are trained as lawyers. Their education and experience vary greatly: one

[1] Data drawn from the Arizona Courts: 1980 Caseload, Financial and Personnel Report, published by the Administrative Office of the Courts on behalf of the Arizona Supreme Court. (Phoenix, 1980).

is currently a rancher, another is a former chief of police. During 1980, 11,472 felony complaints were filed in the 18 justice courts.

2.2.2 The Maricopa County Attorney's Office[1]

During the time of our study, four major bureaus in the County Attorney's Office were involved with the processing of adult felony cases: the Charging Bureau, the Trial Bureau, the Major Felony Bureau, and the Organized Crime and Racketeering Unit.

The Charging Bureau, which was staffed with approximately 20 attorneys in 1979, was primarily responsible for reviewing cases presented by the various law enforcement agencies in the county for factual and legal soundness. According to office policy, no complaint or indictment could be filed unless the evidence established a reasonable likelihood of conviction on the offense charged. In conjunction with reviewing cases brought before it, the Charging Bureau performed the following functions:

- review of departmental (police) reports;
- preliminary evaluation of a defendant's candidacy for adult diversion;
- filing of criminal complaints in justice court;
- election of the preliminary hearing or the grand jury as the charging mechanism;
- presentation of cases going to the grand jury, with the exception of those handled by the Major Felony Bureau and Organized Crime and Racketeering Unit;
- selecting and subpoenaing witnesses to the preliminary hearing; and
- reassigning cases, where appropriate, to the Major Felony Bureau or the Organized Crime and Racketeering Unit.

The Criminal Trial Bureau, the largest bureau in the County Attorney's Office with nearly 40 attorneys, was responsible for the prosecution of all criminal cases in Maricopa County Superior Court and the downtown Phoenix justice

[1]The Maricopa County Attorney's Office is described here as it operated at the time the cases under study were being processed. Where appropriate, we note some of the organizational changes implemented since 1981.

courts with the exception of cases assigned to the Major Felony Bureau and the Organized Crime and Racketeering Unit.[1]

In addition, the Trial Bureau was responsible for conducting all preliminary hearings scheduled by staff in the Charging Bureau. These hearings were assigned on a daily basis, with each attorney in the Bureau spending approximately one to one and one-half days a week in Justice Court for preliminary hearings. Thus, in the typical instance, cases were processed horizontally, with different staff members handling the charging and trial functions. (This occasionally posed problems vis a vis scheduling of witnesses at the preliminary hearing, as discussed in Chapter 3.)

The Major Felony Bureau's goal was vigorous prosecution of major offenses and offenders with maximum penalties. Priority was given to the following types of cases: homicide, sexual assault where weapons were used, armed robbery over a certain dollar amount, major arsons, multiple defendant cases, and cases involving repeat offenders.

The Bureau received its cases either through direct contact by law enforcement agencies or through referrals from the Charging Bureau and the Criminal Trial Bureau. The Bureau's functions included case development and investigation before and after case filing, locating and interviewing witnesses, presentation of the case to either the grand jury or preliminary hearing, pretrial preparation, trial, sentencing, and post-conviction work. Within this and the Organized Crime and Racketeering Unit, cases were handled vertically, insofar as possible. In 1979, 12 attorneys and six investigators were assigned to this Bureau.

Finally, the Organized Crime and Racketeering Unit (OCRU) was devoted to the prosecution of organized crime, white collar crime, official corruption and large-scale pornography. OCRU handled all phases of the cases it prosecuted, from investigation through post-conviction work. During 1979, it was staffed by 12 attorneys and nine investigators, including one investigative accountant and one legal clerk.

A new county attorney was elected in January 1981. After running on a strong law and order platform, the new county attorney began instituting policies consistent with his beliefs. The adult diversion program was dismantled; plans were developed to utilize investigative resources more proactively against drug dealers; and the office began to explore the possibility of increased reliance on the grand jury rather than the preliminary hearing to file cases, primarily to expedite case flow.

[1]Cases in outlying justice courts were generally handled by attorneys in outlying Charging Bureau offices located within the respective jurisdictions.

In addition to these initiatives, the office was reorganized from a centralized to a decentralized model. The new organization involved vertical case processing, with clusters of lawyers assigned to prosecute crimes committed in each of several geographical subdivisions. Each unit was charged with handling cases from charging through disposition. The County Attorney's Office hoped that this geographical organization would help generate neighborhood support, increase accountability to the community, and foster attorneys' commitment to the area. Based on a private industry model, this organization was also designed to encourage healthy competition among units. The Major Felony Bureau and OCRU continued in operation as they existed under the previous administration.

2.2.3 Maricopa County Case Flow[1]

The case flow in Maricopa County (depicted in Figure 2.3[2]) shows two pretrial screening stages in most cases -- the initial screen and review stage which is the sole responsibility of the prosecutor, and a second stage involving (upon the occasion of a scheduled preliminary hearing) prosecutors, defense attorneys and sometimes a magistrate while the case is still within the jurisdiction of the Justice Court. Summarizing briefly, we find that:

1. Less than two-thirds of the cases survived stage one. Roughly 62 percent of the 15,800 felony cases received from the police were initially filed as felonies in Justice Court.[3] The other 6,050 (38%) were screened out by the prosecutor at the earliest opportunity. Thus, only 9,750 (62%) survived the initial stage.

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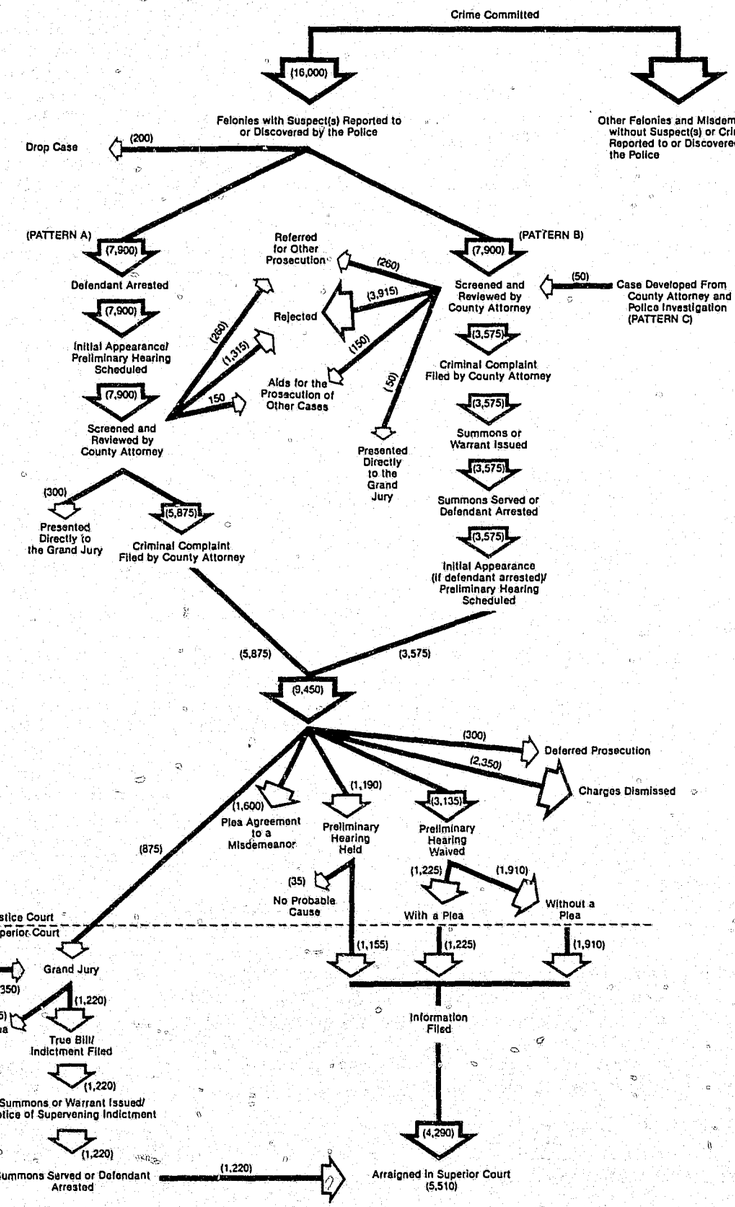
[1] Data on case flow in the two counties were obtained through an examination of 500 randomly sampled felony cases in each county and interviews with prosecutorial and law enforcement personnel. These data were used to develop estimates of case flow patterns. Estimates in this chapter represent numbers of defendants. For a description of the laws governing each case flow pattern, see Appendix B.

[2] The flow charts in the following sections have been somewhat simplified for purposes of describing the typical case flow. For example, we have not attempted to depict the ways in which a case can reenter the system after a dismissal, a rejection, or a finding of no probable cause, although the prosecutor typically can refile a case after these events. For purposes of these figures, each case is considered to enter and exit the system only once. We have also simplified these charts by ignoring case attrition, which may be due to a defendant being a fugitive or undergoing psychiatric hospitalization, for example. In our flow charts we have assumed that each event leads to the next logical event and have estimated the number of cases at each stage using the proportion of cases in our sample that reached that stage.

[3] These calculations do not include the estimated 50 cases presented directly to the grand jury without ever being filed in Justice Court (labelled Pattern C cases throughout this chapter). They include 300 cases presented to the grand jury directly following arrest and initial appearance before a magistrate.

Figure 2.3
Maricopa County Case Flow Estimates[1]



[1] Estimates used in this figure represent numbers of defendants.

Source: Developed by Abt Associates from summary statistics, interview data and an analysis of 500 randomly selected cases.

2. Roughly half the felony caseload is resolved in Justice Court. Of the 9,750 felony cases filed in Justice Court (and not screened out upon initial prosecutorial review), 4,285 (45%) were resolved in Justice Court through dismissal, deferral, plea to a misdemeanor, or a finding of no probable cause; another 1,225 (13%) were bound over to Superior Court only for the purposes of accepting a plea and sentencing. The remaining 4,240 cases (43%) were bound over to the Superior Court without immediate resolution.

3. Clearly, the preliminary hearing track is the preferred mode of operation in this jurisdiction. Of the 9,750 cases filed as felonies in Justice Court (and which survived the initial review), 1,175 (12%) were presented to the grand jury. All other cases remained on the preliminary hearing track.

4. While a great many preliminary hearings are scheduled, few are actually held. Of the 9,750 cases in which a preliminary hearing was initially scheduled (excluding those screened out upon initial prosecutorial review), preliminary hearings were held in only 1,190 (12%). The other cases which had been scheduled for the preliminary hearing were resolved in several ways: 2,825 (29%) were resolved through a plea in either Justice or Superior Court; 2,650 (27%) were dismissed or deferred; and 1,910 (20%) waived the preliminary hearing without a plea, often in exchange for some benefit. As noted above, the remaining 1,175 cases (12%) were presented to the grand jury. Thus, in the final analysis, the number of grand jury proceedings and preliminary hearings were roughly equal.

In the remainder of this section we describe the Maricopa County case flow in detail, highlighting the timing of screening decisions, the locus of responsibility at each screening stage, and the factors involved in these decisions. Where possible we note the relationship (if any) between offense type and case flow patterns. (See Tables 2.1 and 2.2 in Section 2.4 for a cross-county analysis of caseflow statistics).

At the time of our study, initial intake decisions were handled by the Charging Bureau, except for cases within the jurisdiction of the Major Felony Bureau or the Organized Crime Racketeering Unit. (In certain instances, cases handled by the latter two Bureaus go directly to the grand jury after they are screened and follow Pattern C, depicted earlier in Figure 2.2 and described in detail in Appendix B.)

The Charging Bureau reviews the remaining cases either following the initial appearance (Pattern A) or before any charges are filed in Justice Court

(Pattern B).[1] Respondents in Maricopa County suggested that nearly two-thirds of cases rejected by prosecutors were Pattern B cases which were often stale, involved out-of-state defendants, or had a very low priority.

The Charging Bureau almost always files a felony charge in the approximately 62 percent of the cases which survive this initial review. There is no standard policy or practice that covers reducing charges to misdemeanors at this point; rather, cases are filed as felonies and initially follow the typical felony case flow.[2] For almost all cases, the first judicial proceeding is the initial appearance before the magistrate. The routine practice in Maricopa County is to schedule the preliminary hearing at this initial appearance. Although our estimates show that preliminary hearings actually occur in only 1,190 (12%) of the cases in which a hearing date is scheduled (excluding those Pattern A cases screened out by the prosecutor following the initial appearance), this date is the focal point for the second level of screening.

In Maricopa County, the normative expectation is that most cases will continue on this track, which provides an opportunity for negotiation between defense and prosecution prior to or at the occasion of the preliminary hearing. It is unusual for prosecutors to bypass the scheduled preliminary hearing at this point and present a case to the grand jury. We estimate that such intervention did occur in 1,175 (12%) of the cases surviving the initial prosecutorial review.

According to an internal policy memo issued in September 1979 by the Maricopa County Attorney, circumstances in which cases should be presented to the grand jury include the following:

- when there are out-of-state witnesses;
- when there are professional witnesses (doctors, pharmacists, etc.);
- when multiple jurisdictions are involved (since each involved precinct would have to hold its own preliminary hearing);
- When the investigation requires a large number of witnesses;

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[1] In Figure 2.3, Pattern A and Pattern B cases are shown as equally frequent. Although one type of case may be more common than the other, we were unable to obtain any estimates of the proportion of cases in each category in Maricopa County from interview respondents.

[2] Of the estimated 6,050 cases screened out at this initial review, approximately 520 (less than 9%) were "referred for other prosecution." This catchall phrase includes cases reduced to misdemeanors and filed as such in city court.

- when the case involves more than one defendant; and
- when the identification of the defendant is not a problem in the case (i.e., there are surveillance photographs or fingerprints, etc.).

On the other hand, there are circumstances in which the grand jury should not be used since the preliminary hearing offers tangible advantages.[1] The policy memo identifies the following situations for which the preliminary hearing is the preferred approach:

- when it is desirable to have testimony preserved;
- when it is desirable to have the witness testify because events surrounding the crime are confused and unclear;
- when it is desirable to have a further identification by the victim of the suspect;
- when it is important to assure that the victim is interested in pursuing the matter; and
- where there is some uncertainty as to whether or not witnesses will be willing to testify.[2]

Although there are clearly articulated reasons for the prosecutor to use either the grand jury or the preliminary hearing, it is important to recognize that neither proceeding is held in 7,385 (76%) of the 9,750 cases that pass the initial prosecutorial screen and in which an initial appearance is held in Justice Court. As noted above, mechanisms have evolved in Maricopa County to involve all participants in the criminal justice process in attempting to resolve cases prior to their being bound over to Superior Court. These include plea agreements to misdemeanors (thus retaining the Justice Court's jurisdiction over a case), diversion or deferred prosecution programs, and agreements to plead upon arraignment in Superior Court. Cases may also be dismissed at this point, sometimes in conjunction with plea negotiations in other cases involving the defendant. Each of these is discussed in detail below.

Of the 9,750 cases scheduled for a preliminary hearing, we estimate that 2,650 (27%) are dropped at this stage. A small number of these (300 cases) are referred to deferred prosecution programs, almost always as a result

[1] Clearly, there may be cases in which factors favoring both proceedings are present, although prosecutors we interviewed seemed to have no difficulty in choosing between the grand jury and the preliminary hearing in individual cases. Given the atypical usage of the grand jury, it would be fair to infer that the reason for going to the grand jury would have to be quite strong to cause a change from routine practice.

[2] The relationship between these factors and the decision to proceed by way of the grand jury or the preliminary hearing was verified in interviews with prosecutors, defense counsel, and judges.

of negotiation between the defense attorney and the prosecutor. The remainder of these cases are dismissed by the prosecutor. In some instances this occurs following plea bargaining in other cases involving the same defendant. In other cases, the dismissal is at the initiative of the prosecutor. While this latter event might occur independent of the preliminary hearing date, it is more likely to result from the failure of a victim or a witness to appear at the scheduled preliminary hearing, which is then cancelled. It is critical to point out, however, that in this latter instance the prosecutor can almost always refile the charges at a later date. From our sample of 500 cases, we found that the cases dismissed at this stage represented a range of offenses. Nearly one-third of the dismissed cases in our sample involved crimes of violence (typically aggravated assault), and slightly over one-third involved property offenses. Approximately one-quarter of this group were charged with drug offenses, which almost always involved marijuana. The remaining cases represented offenses against public order or multiple types of offenses.

Negotiations at this stage can also lead to some cases being reduced to misdemeanors. Our analysis in Maricopa County indicates that 1,600 cases, or approximately 16 percent of the 9,750 cases in which a preliminary hearing was scheduled, were terminated at this stage through a plea to a misdemeanor charge. These cases may be pled in Justice Court under only two conditions. First, the charge must actually be reduced to a misdemeanor, not an "open charge" which may be treated as either a felony or misdemeanor. Second, any probation which is imposed must be unsupervised, since supervised probation is only available through the Superior Court. Sixty-six percent of the cases in our random sample of 500 which terminated through a plea agreement to a misdemeanor involved drug offenses. With only one exception, the drug involved was marijuana. Property offenses (generally petty thefts and vandalism) accounted for 16 percent of the pleas to misdemeanors, whereas only eight percent stemmed from crimes of violence. Offenses against public order accounted for the remaining 10 percent of these cases.

In some instances, a plea agreement may be developed at the time scheduled for the preliminary hearing but the Justice Court may lack jurisdiction to adjudicate the case. This situation exists if the defendant is pleading guilty to a felony or to an open charge, or if the plea agreement involves a sentence of supervised probation. In these cases, the defendant typically waives the preliminary hearing and the case is transferred to Superior Court for a "plea arraignment." There is no need for any judicial involvement at the Justice Court level in cases with such waivers. This procedure, used only in Maricopa County, occurs at the first appearance in Superior Court which would otherwise constitute the traditional arraignment. At the plea arraignment, the presiding criminal judge accepts the guilty plea and imposes sentence. According to one defense attorney, this procedure usually is reserved for negotiations involving pleas to charges that preclude the imposition of any prison sentence under the new sentencing code. Estimates derived from our case analysis indicate that roughly 1,225 cases, or 13 percent of the 9,750 cases scheduled for a preliminary hearing, were resolved in this fashion. Property offenses accounted for the largest portion (approximately 38%) of the cases waived with a plea in our sample of

500. Violent crimes represented one-quarter of the cases resolved in this way; drug offenses were charged in 17 percent of these cases; and the remaining cases following this pattern involved driving while intoxicated, crimes against public order, or multiple categories of offenses.

The preliminary hearing may also be bypassed at the discretion of the defendant although no plea is negotiated. Known as "straight waivers," these cases are bound over to the Superior Court, where a traditional arraignment occurs and the progression of events leading to trial commences. We have estimated that straight waivers occur in 1,910 cases, or approximately 20 percent of the 9,750 cases scheduled for a preliminary hearing.[1] Respondents generally agreed that straight waivers were enacted by the defendant in exchange for release on personal recognizance or for scheduling convenience. Respondents were not as consistent on whether waivers were made to obtain early discovery; some felt that the discovery policies were sufficiently liberal to eliminate this as a benefit for the defendant, whereas others indicated that this was an adequate quid pro quo.

As might be expected, a range of different offense types are handled in this manner. From our analysis of 500 randomly selected cases, we found that the distribution of offense categories was as follows among the cases in which straight waivers occurred: property offenses (44%); crimes of violence (28%); drug offenses (12%); other offenses (13%); and mixed offense types (3%).

As noted above, preliminary hearings or grand jury proceedings are held in only 2,365 (24%) of the 9,750 cases filed in Justice Court. Our sample of preliminary hearings showed that 44 percent of the caseload involved crimes of violence, 27 percent involved property crimes, 17 percent involved drug offenses, and the remaining 13 percent involved other types of offenses or combinations of offenses. (The caseload of the preliminary hearing is discussed in more detail in Chapter 3.) In Maricopa County, the grand jury's caseload was distributed as follows: 29 percent of the cases involved crimes of violence; 35 percent involved property crimes; 25 percent involved drug offenses; and 10 percent involved other offenses or combinations of offenses. (More detail is provided in Chapter 4.)

[1] One issue of interest concerning waivers in which no plea is negotiated is the power of the prosecutor to contest or veto the waiver, since the waiver must be signed by the prosecutor as well as by the defendant and his attorney. Respondents in Maricopa County indicated that there were circumstances in which the prosecutor would object to waiver of the preliminary hearing, particularly where there was a need to preserve certain testimony. We were not able to document any cases in which the waiver was opposed, however. A small number of cases in which the defendant was not allowed to enter a waiver did appear in our sample in Pima County. These will be discussed in the following section.

Clearly, similar types of cases may proceed by any of the case flow paths described above. With few exceptions (such as the use of a plea agreement to a misdemeanor to resolve many marijuana cases or the use of the preliminary hearing for many crimes of violence), the process of determining how a case will proceed is not bound by the nature of the offenses charged.

What is common in most of these cases is the use of the occasion of the scheduled preliminary hearing as an opportunity for discovery and negotiation.[1] In most instances, this is the first time the parties meet face-to-face. Although there may be contact between the prosecution and the defense prior to the date set for the preliminary hearing, there is typically not enough time between the initial appearance and the preliminary hearing for any significant negotiation to occur, since the interval must be 10 days or less if the defendant is in custody. Therefore, both parties approach the hearing date uncertain as to whether a hearing will actually take place or whether some form of negotiation will occur.

Respondents indicated that negotiation is not possible at such an early stage when cases are presented to the grand jury rather than scheduled for a preliminary hearing. Resolving cases in this fashion and at this stage in the process reduces the burden on both defense and prosecutorial resources, particularly that of trial preparation. The inducements to enter or accept a plea at this point are similar to those in effect closer to trial when plea negotiations traditionally occur. The process is facilitated by the informal practice of allowing the defense access to the police report prior to or at the time set aside for the preliminary hearing, although this is not required by the laws governing discovery. Resolving cases in this fashion results in efficiencies for the courts as well. The Justice Court does not have to hold a preliminary hearing, and the Superior Court, at most, is involved in accepting the plea at arraignment for those cases which remain felonies.

2.3 Pima County

Pima County covers the southern portion of the state, extending to the Arizona-Mexico border. Apart from the state's second largest city, Tucson, which is the commercial, educational and cultural center of southern Arizona, the county is very rural. The Papago Indian Reservation and two cactus forests consume over half of the County's 9,240 square mile area. Like Maricopa County, Pima County has experienced rapid growth during the last decade. Its population in 1980 was 539,800, up 53 percent from 1970. Persons of Spanish heritage account for approximately 25 percent of the total population and other minorities account for an additional seven percent.

[1] Although Maricopa County has devised a pre-preliminary hearing conference (described in Section 3.3.1), there are no data available on the frequency of these conferences. The scenarios we have described may occur at this conference or at the time set for the preliminary hearing itself.

Like most other parts of the country, Pima County has experienced a substantial rise in the crime rate over the last decade. According to the FBI's Uniform Crime Report, the rate of violent crime has more than doubled between 1970 and 1980.[1] A major concern for law enforcement officials is the heavy illegal drug traffic along the Mexican border. Tucson, which is only 65 miles from Mexico, is reputed to be a major center for illegal drugs entering the United States.

Although Tucson is the second largest city in the state, it is considerably smaller than Phoenix. In fact, Tucson has retained some of the characteristics associated with small towns, including a relatively informal atmosphere within governmental agencies. For example, individual prosecutors are allowed a good deal of discretion in the performance of their duties. Clearly, formalization is a matter of degree; however, our observations and those of others interviewed during our study indicated that there is less formality or structure in the operation of the pretrial screening process in Pima County than in Maricopa County. Furthermore, many of our respondents characterized the judges in Pima County as fairly liberal as a group, although individual variations were noted. Another difference noted between Maricopa County and Pima County was the more aggressive nature of the defense bar in the latter. These aspects of the socio-legal culture help explain the different approaches to case processing, as will be described below.

2.3.1 The Pima County Court System

The Superior Court of Pima County has 16 judicial positions, only 15 of which were filled as of April 1980. The presiding judge is named by the Arizona Supreme Court, taking into account the wishes of the local judges. The presiding judge at the time of our study had held that position for the last three years. Typically, the associate presiding judge is the successor to the presiding judge. The presiding judge also names one judge to supervise the processing of criminal cases and one responsible for the civil caseload. However, due to a shortage of judges, the associate presiding judge often assumes one of these positions. There are also three full-time commissioners.

A few years ago, the Pima County Superior Court created a separate criminal division, with five judges assigned exclusively to criminal caseloads. The change in court structure was one of several recommendations which emerged from a one-year federal grant which focused on the court system. This organizational scheme was dropped after one year, however, because it did not produce the anticipated result: there was no increase in the number of

[1] The FBI's Uniform Crime Report's crime rate figures measure the number of reported crimes in a community compared with population size. Violent crime includes offenses of murder, forcible rape, robbery and aggravated assault. Nationally, the violent crime rate increased by 61 percent from 1970 to 1980.

cases processed. Furthermore, according to the presiding judge, the criminal judges were "burned out" and asked for reassignment.

During 1980, the court had 2,796 felony filings (plus 30 transfers in) and 2,589 terminations.[1] Backlog at the beginning of the year was 1,024; at the end 1,266. Only eight percent of the felony cases pending at the end of the year exceeded the 150 day time limit for speedy trial. Only two misdemeanors were filed directly in Superior Court and both were dismissed on the prosecutor's motion.

The Justice of the Peace Court in Pima County includes five judges; four are located in Tucson and one in the town of Ajo. During 1980, 1,238 felony complaints were filed in the five justice courts.

2.3.2 The Pima County Attorney's Office

The increase in the crime rate in Pima County was not matched by a concomitant increase in prosecutorial resources. In order to improve efficiency, the County Attorney's Office made a number of changes in organization and procedure during the mid-1970s. An adult diversion program for first-time property crime offenders was initiated, and a decision was made to prosecute as misdemeanors cases involving first offenders charged with possessing small amounts of marijuana. Specialized staff were designated (1) to review cases for charging, (2) to prosecute drug crimes and complex white collar crimes by means of joint law enforcement/prosecutor teams, and (3) to handle sex crimes, arson, and serious offenders. The organizational structure is described more fully below.

The Criminal Division handles prosecution of all criminal cases, regardless of the age of the offender or the seriousness of the charge. Within the Criminal Division, separate units are responsible for charging decisions, felony trials, and prosecution of misdemeanors in the Justice Court.

The Issuing Team, which consists of a supervisor and two experienced attorneys assigned on a rotating basis, handles all felony cases except speciality areas such as sexual offenses, drugs or consumer fraud. They are responsible for reviewing cases and deciding whether to begin a felony prosecution, prosecute the case as a misdemeanor, request further investigation, or reject the case. In addition to screening cases, the issuing attorneys decide whether the case will go to the grand jury or the preliminary hearing.

[1] Data drawn from the Arizona Courts: 1980 Caseload, Financial and Personnel Report, published by the Administrative Office of the Courts on behalf of the Arizona Supreme Court. (Phoenix, 1980).

Once the Issuing Team has carried out its functions, the case is assigned to one of several Trial Teams. Each trial team includes a senior attorney who is responsible for supervising the work of the deputy county attorneys. The Trial Teams handle all felonies except those assigned to special units which are responsible for prosecuting cases involving narcotics, serious offenders, sex abuse, child abuse, and arson.

In Pima County, white collar crime cases are typically handled by the Consumer Protection and Economic Crime Units. Although Arizona law currently assigns the primary responsibility for consumer protection to the State Attorney General's Office, an agreement between the attorney general and the county attorney has delegated this responsibility to the Pima County Attorney's Office for cases within its jurisdiction. The Consumer Protection Unit accepts complaints related to business practices from citizens. The business or person involved is given an opportunity to reply to the complaint. If there is evidence that a crime has been committed or a regulation violated, an investigation may be undertaken and, if the results warrant, a civil action or a criminal prosecution may be initiated. The Economic Crime Unit works as a law enforcement/prosecution task force. Alleged offenses are handled as criminal cases or as civil cases, depending on the facts, the available evidence, and the probability of obtaining restitution for the victim. While most frauds are handled by the Consumer Protection Unit, securities violations and land frauds are prosecuted by the Economic Crime Unit.

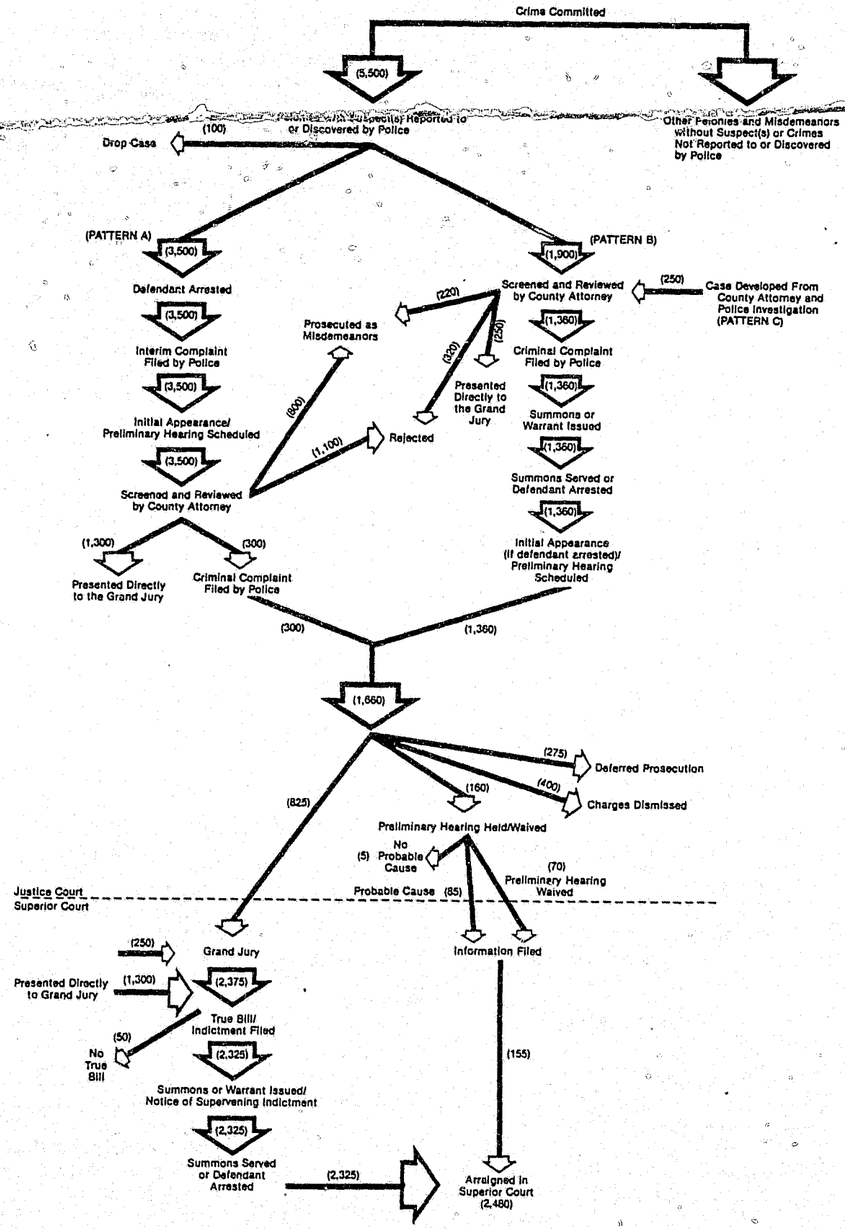
2.3.3 Pima County Case Flow[1]

The felony case flow in Pima County depicted in Figure 2.4 is less complex than that of Maricopa County.[2] In Pima County, there are only two key

[1]Data on case flow in the two counties were obtained through an examination of 500 randomly sampled felony cases in each county and interviews with prosecutorial and law enforcement personnel. These data were used to develop estimates of case flow patterns. Estimates in this chapter represent numbers of defendants. For a description of the laws governing each case flow pattern, see Appendix B.

[2]The flow charts in the following sections have been somewhat simplified for purposes of describing the typical case flow. For example, we have not attempted to depict the ways in which a case can reenter the system after a dismissal, a rejection or a finding of no probable cause, although the prosecutor typically can refile a case after these events. For purposes of these figures, each case is considered to enter and exit the system only once. We have also simplified these charts by ignoring case attrition, which may be due to a defendant being a fugitive or undergoing psychiatric hospitalization, for example. In our flow charts we have assumed that each event leads to the next logical event and have estimated the number of cases at each stage using the proportion of cases in our sample that reached that stage.

Figure 2.4
Pima County Case Flow Estimates[1]



[1]Estimates used in this figure represent numbers of defendants.

Source: Developed by Abt Associates from summary statistics, interview data and an analysis of 500 randomly selected cases.

events--the initial screening decision by the prosecutor and the grand jury proceeding. Pretrial case processing decisions are in large part controlled by the prosecutor and do not involve any negotiation process with the defense. There is also little reliance on the Justice Court during the screening process. Summarizing briefly, our findings are that:

1. A number of potential felony cases are automatically filed as misdemeanors by law enforcement officials in Pima County operating under a policy directive issued by the Pima County Attorney's Office. An undetermined number of cases, frequently involving possession of marijuana, are never presented to prosecutors for screening. Instead, they are directly filed as misdemeanors in City or Justice Court (depending on the location of the offense) by law enforcement personnel. Although we were unable to determine the number of cases handled in this manner, this aspect of case processing in Pima County should be kept in mind when analyzing the case flow statistics for this jurisdiction.

2. Of the 5,400 cases actually reaching the prosecutor, approximately 2,440 (45%) were screened out at the earliest opportunity.[1] Some of these cases were filed as misdemeanors and others rejected outright. The remaining 2,960 cases continued to be treated as felonies.

3. Few cases are resolved while in Justice Court in Pima County. Of the 2,960 cases accepted for prosecution by the county attorney and filed in Justice Court, only 680 (23%) were disposed of before reaching the Superior Court, through dismissal, deferral, or a finding of no probable cause.

4. The grand jury is by far the preferred screening mechanism in Pima County, handling 2,125 (72 percent) of the 2,960 cases which survived the original prosecutorial screen and which originated in Justice Court. It is standard procedure to use the grand jury for case screening in Pima County. Preliminary hearings are scheduled rarely and occur even less frequently. Of the 2,480 cases arraigned in Superior Court (including those following Pattern C), 2,325 (94%) were filed there following an indictment.

[1]These calculations do not include the estimated 250 cases presented directly to the grand jury without being filed in Justice Court (labelled Pattern C throughout this chapter).

This case flow is discussed in more detail in the remainder of this section. Following this discussion, the case flows for the two counties are contrasted.

In Pima County, the police play an important role in early screening in two ways. First, many cases are directly screened out from the felony case flow by police acting in accordance with the policy enunciated by the Pima County prosecutor that certain types of offenses (such as cases involving small quantities of marijuana) are not to be presented to the county attorney but are to be filed directly as misdemeanors. Second, the Pattern A case flow has been modified in Pima County by local practice so that police are authorized to file an interim complaint following an arrest without first presenting the case to a deputy county attorney for his or her review. This mechanism is used to shortcut the filing of a formal complaint within 48 hours of initial appearance.

Although we are unable to quantify the extent of screening that occurs as a result of the county attorney's policy, Figure 2.4 shows our estimates for cases which are presented to the prosecutor for review. Of the 5,400 cases actually reaching the prosecutor in Pima County for screening,[1] approximately 2,960 or 55 percent were prosecuted as felonies. Of the remainder, 1,420 (26%) were rejected, and 1,020 (19%) were reduced to misdemeanors.

The rate of rejection for felony prosecution appears related to the method of case initiation. Most cases in Pima County are initiated by arrest rather than by complaint; our estimates show that approximately 3,500 cases (65%) follow Pattern A, whereas 1,900 (35%) follow Pattern B. However, we determined that approximately 1,900 (78%) of the 2,440 cases screened out at this stage were initiated by arrest.

Statistics collected by the Pima County Attorney's Office show that between 25 and 30 percent of the declined cases were referred to the city attorney, suggesting that some of the cases covered by the policy directive may actually be reaching the county attorney inappropriately. Others may have entered the system unnecessarily. If the prosecutor had been involved in screening these cases initially, those considered inappropriate for felony prosecution might have been rejected or deferred without the filing of felony charges. Some argue that this additional step could spare the defendant the cost and embarrassment of arrest or court appearance on such charges and reduce the workload of the courts, the prosecutors, and the defense attorneys.[2]

[1]This figure does not include those in which the prosecutor was involved in investigating and presenting the case directly to the grand jury.

[2]Whether prosecutors would actually elect to screen out cases before the complaint was filed is an open question. Clearly, there are counterpressures against rejecting the case at this early stage, not the least of which comes from law enforcement.

Once cases are accepted for prosecution, screening remains almost exclusively within the control of the prosecutor. Defense attorneys and the Justice Court are not generally involved as in Maricopa County. Instead, approximately 2,125 (72%) of the 2,960 cases which are filed in Justice Court (and not initially screened out by the prosecutor) are presented to the grand jury.[1] In most of the cases in which the police file an interim complaint, no formal complaint is ever filed. Instead, the case is scheduled for the grand jury soon after the initial prosecutorial review. The preliminary hearing is considered useful only in limited circumstances in Pima County. Furthermore, time scheduled for the preliminary hearing is not viewed as an opportunity for negotiation with the defense. Instead, the stated policy in the charging unit is "go to the grand jury unless there is a good reason to do otherwise."

Although technically the initial appearance triggers the scheduling of the preliminary hearing under Arizona's Rules of Criminal Procedure, this does not occur as a matter of local practice in Pima County. Since preliminary hearings are held only rarely, it is considered inefficient to clutter the Justice Court calendar with hearings which, for the most part, will not occur. Instead, the Justice Courts in Pima County typically note the last date on which any given preliminary hearing may be held under the applicable time limits, but do not schedule a hearing until a deputy county attorney indicates that he or she intends to present the case in this manner.

While the two jurisdictions differ dramatically in their preferred mode of pretrial screening, it is interesting to note that the justifications most often noted for holding a preliminary hearing are very similar in both counties: to test the credibility of witnesses, to assess case strength, and to preserve testimony. In both counties, these benefits are viewed as particularly attractive in non-sexual assault cases, especially those involving parties who are either acquainted or related. In both sites, such cases are expected to go to the preliminary hearing which serves as a mechanism for weeding out the reluctant victim or the weak case. In Maricopa County, this rationale is also offered for use of the preliminary hearing in sexual assault cases. In Pima County, prosecutors rely on the local victim-witness program to ensure witness cooperation and view the testing of witnesses on the stand or preservation of testimony as largely unnecessary for sexual assault cases. Moreover, the grand jury is seen as providing an additional benefit to the victim: he or she does not have to testify in the presence of the defendant or be subjected to intense cross-examination. Nevertheless, when the victim is a child, the preliminary hearing may be used in Pima County to preserve testimony and thus avoid difficulties if the child's memory lapses before trial.

We found that preliminary hearings were held in only 90 (3%) of the 2,960 cases filed in Justice Court and surviving the initial prosecutorial screen. The use of the preliminary hearing in only selected instances was borne out

[1] In addition, an estimated 250 cases bypass the justice court and are presented directly to the grand jury following Pattern C.

by our analysis of characteristics of cases going to the preliminary hearing. We found that 77 percent of the cases in which a preliminary hearing was held involved crimes of violence (although typically not involving sexual assault). Another 11 percent involved crimes of violence in conjunction with other categories of crime. The remaining 12 percent of the preliminary hearing cases involved property or other crimes. In contrast, the grand jury caseload in Pima County included a wide variety of offense types. Fifty percent of grand jury cases involved crimes against property, 19 percent involved crimes of violence, 14 percent involved drug offenses, and the remaining 18 percent involved other crimes or multiple categories of crimes.

As noted above, prosecutors in Pima County used the preliminary hearing to obtain specific benefits. However, one of these benefits--the desire of the prosecutor to preserve the testimony of elderly or transient witnesses--is often offset by the hope on the part of the defense that the witness will be unavailable at trial and that preliminary hearing testimony will not be introduced in lieu of the witness. Thus, the defense is placed in a double-bind: forego the benefits of discovery or cross-examination to avoid the preservation of testimony or participate in the preliminary hearing knowing that the transcript may save the government's case later. Although waivers are not used as a means of prosecuting cases efficiently in Pima County (there are too few such cases to effect any reduction in workload), they do occur with some frequency, whether for tactical considerations as suggested above or as part of a plea agreement.[1]

The defendant's right to waive the preliminary hearing did not appear as an issue in any of our cases in Maricopa County. However, in one of our sample cases in Pima County, the defendants were not allowed to waive the preliminary hearing. Although we have no way of knowing how frequently this occurs, the arguments on both sides are interesting.

> Some of the victims in one case who were expected to testify at the preliminary hearing were transients. Therefore, when the defendants tried to waive the preliminary hearing, the prosecutor opposed this move. The court ruled that the preliminary hearing would be held since it was not an exclusive right of the defendant but of the state as well, especially in light of the state's interest in preserving the testimony of transient witnesses.

The fact that the prosecutor controls the pretrial screening process in Pima County so tightly probably reflects long-term relationships with the local defense bar. The perceptions of interview respondents in both counties and

[1] Our respondents suggested this sometimes occurred in less serious cases or in instances in which the defendant was entering military service, for example. Pima County does not use the "plea arraignment" mechanism used in Maricopa County for this type of case.

aggressive.[1] Prosecutors expressed doubts that the process of negotiation and waivers, which allow the system used in Maricopa County to operate effectively, would be feasible in Pima County. The Justice Courts could not function if preliminary hearings were scheduled in many cases without expectation of waivers or plea agreements to reduce the caseload. This is not to say that cases are not resolved or that some plea negotiation does not occur at the Justice Court level in Pima County. Of the 2,960 cases filed in Justice Court and passing the initial prosecutorial screen, an estimated 275 cases (9%) entered the deferred prosecution program at this point and another 400 cases (14%) were dismissed. Nevertheless, when we combine these two groups, we find that only 675 (23%) of the 2,960 cases in Pima County are resolved at the Justice Court, whereas well over 50 percent of the cases in Maricopa County are either dismissed or deferred in lower court or require only a "plea arraignment."

For the most part, there is little participation by the defense in screening in Pima County and very little activity in the Justice Courts. An estimated 2,280 (77%) of the 2,960 cases which are accepted for prosecution and which pass through the Justice Courts are bound over to the Superior Court. An important consequence of the case flow pattern in Pima County is that plea negotiation and discovery take place later than if cases were processed through the Justice Court system. There may be no adversarial meeting of the parties until trial (or at a settlement conference if one is held). Without access to the police report at the preliminary hearing (or even earlier as occurs under the informal practice in Maricopa County), the defense is not in a position to negotiate until after a grand jury indictment is returned.

Defense attorneys contend that prosecutors deliberately process cases this way and use the grand jury to bring the highest charges possible to strengthen their position when plea negotiation does occur. Prosecutors claim this pattern is followed primarily for reasons of efficiency and to avoid overloading the Justice Court system.

2.4 Summary

Table 2.1 summarizes the case flow statistics for each site.[2] As can be seen, although Maricopa County issues slightly more felony cases than Pima

[1] This characteristic (admittedly subjective) has been attributed to several factors. Some have suggested that the defense bar is aggressive in response to the "tough" stance taken by the prosecutor. Others feel that the judiciary in this county is fairly liberal and the defense bar's aggressiveness reflects their expectation of achieving a reasonable return for their efforts.

[2] Cases following Pattern C were excluded in the discussion up to this point, since these cases are never filed in justice court. Pattern C cases are included in Table 2.1, however, to show overall case flow.

Table 2.1

SUMMARY CASE FLOW ESTIMATES

	Maricopa County		Pima County	
	Number	Percent	Number	Percent
Total felony cases*	16,050		5,750	
Felony cases surviving initial prosecutorial screening*	9,800	(61% of total felony cases)	3,210	(56% of total felony cases)
Of cases surviving initial prosecutorial screening:				
Presented to grand jury	1,225	12	2,375	74
Not presented to grand jury	8,575	88	835	26
TOTAL	9,800	100	3,210	100
Immediate Outcome				
--No bill/no probable cause	40	<1	55	2
--Resolved in Justice Court through dismissal, deferral, or plea	4,250	43	675	21
--Filed in Superior Court**	5,510	56	2,480	77
TOTAL	9,800	100	3,210	100

*Includes cases presented directly to the grand jury without being filed in Justice Court (Pattern C).

**Includes cases referred to Superior Court for a Plea Arraignment even though the parties have already reached an agreement on the case while it was in Justice Court.

County (61% versus 56%), fewer cases are actually bound over to Superior Court (56% of those surviving initial screening versus 77%). Of those cases, Pima County presents 74 percent to the grand jury while in Maricopa County only 12 percent are handled this way and the remaining 88 percent have a preliminary hearing scheduled. Only a small fraction (14%) of the scheduled preliminary hearings in Maricopa County are ever held, however, as displayed in Table 2.2. Instead, the occasion of the preliminary hearing is used to weed out cases at the Justice Court level through negotiation with the defense bar. Of the cases scheduled for a preliminary hearing in Maricopa County, close to 19 percent end in plea negotiation at the Justice Court level, and 14 percent are resolved except for the formality of the "plea arraignment" in Superior Court. Approximately 31 percent of those scheduled for a preliminary hearing are deferred or dismissed at this point. The time scheduled for the preliminary hearing serves as a unique opportunity for plea negotiation since it is often the first time that the defense and prosecution have a chance to meet and go over a given case. In fact, this opportunity is viewed as one of the benefits of leaving cases on the preliminary hearing calendar rather than presenting them to the grand jury. Consequently, 44 percent of the cases in Maricopa County are resolved in Justice Courts. This figure would be even higher if it included plea arraignment cases which are resolved at the lower court level except for necessary formalities. In contrast, only 21 percent of all felonies issued in Pima County are resolved at the Justice Court level through deferral or dismissal. Instead, as noted above, nearly three-quarters of the cases in this site are screened by the grand jury.

What makes heavy reliance on the preliminary hearing work in Maricopa County is the fact that the hearing is so rarely held. Although the defense is typically given the opportunity for a preliminary hearing and defense attorneys quickly point out the shortcomings of the grand jury as they view them, they often waive the preliminary hearing. In some ways this is a reflection of the low expectations of the preliminary hearing held by the defense bar. Defense attorneys do not feel they obtain particularly useful discovery from the preliminary hearing or that it is a proper forum for raising suppression issues or testing affirmative defenses. These factors are attributable to the limits placed on the preliminary hearing by the Arizona Rules of Criminal Procedure, the availability of early discovery through informal arrangements with prosecutors, and the quantity and quality of evidence needed to demonstrate probable cause. Although defense attorneys do value the opportunity to cross-examine the government's witnesses and to identify weaknesses in the case, there are tactical advantages to waiving the preliminary hearing in some cases. These advantages, often obtained through discussions with the prosecutor, include additional or earlier discovery and the release of the defendant on recognizance, as well as favorable plea negotiations.

There are a number of factors inherent in each proceeding and in each jurisdiction's adaptation of statewide rules that contribute to the case flow patterns described above. In the next two chapters, we describe each proceeding in detail, highlighting differences between the two counties.

Table 2.2

OUTCOMES OF CASES BY SCREENING MECHANISM

	Maricopa County		Pima County	
	Number	Percent	Number	Percent
Cases presented to the grand jury				
No bill	5	<1	50	2
Filed in Superior Court	1,220	>99	2,325	98
TOTAL	1,225	100	2,375	100
Cases not presented to the grand jury				
Preliminary hearing held/ No probable cause	35	<1	5	1
Preliminary hearing held/ Filed in Superior Court	1,155	13	85	10
Preliminary hearing waived (stright waiver)	1,910	22	70	8
Preliminary hearing waived with plea (plea arraignment)	1,225	14	--	--
Pled to a misdemeanor	1,600	19	--	--
Deferred or dismissed*	2,650	31	675	81
TOTAL	8,575	100	835	100

*In Maricopa County, these dispositions occur after a preliminary hearing has been scheduled, whereas in Pima County the reverse in true.

CHAPTER THREE

THE PRELIMINARY HEARING IN ARIZONA

In the preceding chapter, we found that use of the preliminary hearing in Arizona varied widely from one county to the other. In Maricopa County, the vast majority of cases are scheduled for the preliminary hearing. Thus, although the defense attorney may, and often does, waive the proceeding, the preliminary hearing handles a cross-section of cases. In Pima County, the grand jury is the screening method of choice and the preliminary hearing is scheduled only rarely. It is used primarily in sensitive cases and cases where the prosecutor desires to test the credibility of the victim or other witnesses, assess their presence under cross-examination, and/or preserve their testimony for use at trial.

Prosecutorial decisions regarding which screening mechanism to use are guided by and, in turn, affect the nature of the proceeding itself. In deciding whether or not to waive the hearing, defense counsel must also consider the nature of the proceeding and the benefits perceived to be associated with it. In this chapter, we explore the nature of the preliminary hearing in each of the jurisdictions under study, basing our discussion on an analysis of Arizona's Rules of Criminal Procedure, interviews with individuals in the court system, and case records data obtained by reviewing a sample of preliminary hearings transcripts and related case files.

We begin with a brief overview of the types of preliminary hearings that are utilized on the national level in order to place Arizona's experience in a broader context. What is clear from this overview is that there is no single or uniform way of handling this proceeding--the preliminary hearing has many variants, each offering different levels of screening and due process safeguards. At the same time, while Arizona's approach to the preliminary hearing may not be "representative," it is not unlike the systems used by many other states across the nation.

Next, we describe the operation of preliminary hearings in Maricopa and Pima Counties, including the manner in which they are scheduled, the duration of the proceedings, the nature of the evidence introduced by prosecutors, and the operation of various due process protections for witnesses including the opportunity to be accompanied by counsel and the privilege against self-incrimination. We also examine the extent to which the defense participates

in the proceedings by cross-examining witnesses, testing the admissibility of evidence and offering affirmative defenses. These topics are of particular interest, since they are among the major issues raised in the debate over grand jury reform.[1]

Finally, we discuss the efficacy of the preliminary hearing as a screening mechanism, as well as the collateral functions served by the proceeding. Our analysis suggests that the secondary benefits accruing to the preliminary hearing process may outweigh the proceeding's value as a screening mechanism per se.

3.1 The Legal Framework

3.1.1 A National Perspective

A comprehensive analysis of the laws and court rules governing the preliminary hearing across the United States was beyond the scope of this study. Drawing upon secondary sources, however, we can provide an overview of the diversity that exists among federal and state jurisdictions.

Perhaps the most common approach to the preliminary hearing is typified by the federal proceeding, although there are many state variations on this theme. According to the Federal Rules of Criminal Procedure, a preliminary examination must be held within 10 or 20 days of a defendant's initial appearance before a magistrate, depending on whether the defendant is in custody. (A grand jury indictment precludes the requirement for a preliminary hearing). At the preliminary examination, the magistrate is charged with determining whether there is probable cause to believe an offense was committed and that the defendant committed it. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant has the right to cross-examine the government's witnesses, to introduce exculpatory evidence, and, by[2] U.S. Supreme Court ruling, the Sixth Amendment right to assigned counsel. The defense may not object to evidence on the ground that it was acquired unlawfully, since suppression motions are heard by the trial court. Upon a finding of probable cause, the magistrate is required to hold the defendant to answer to the federal grand jury. Otherwise, he or she must dismiss the complaint and discharge the defendant. (The discharge

[1] See the discussion in Chapter 1 and Emerson, Deborah Day, Grand Jury Reform: A Review of Key Issues (Washington, D.C.: National Institute of Justice, 1983.)

[2] Coleman v. Alabama, 399 U.S. 1 (1973).

does not preclude the government from initiating a subsequent prosecution for the same offense.) The record of the proceeding may be made available to defense counsel for use in connection with subsequent hearings and for pretrial preparation under conditions set forth in the Rules.

The promulgators of the Federal Rules felt that "administrative necessity and the efficient administration of justice" precluded the use of strict evidentiary standards in the federal proceeding.[1] While recognizing the value of trial rules of evidence in ascertaining whether the defendant should be bound over for trial, they were concerned that increasing the procedural and evidentiary requirements of the preliminary examination would result in two such determinations: one before the magistrate and again at trial. Given the availability of the grand jury as an alternative screening device, they also feared that such requirements would serve as a disincentive to holding the preliminary hearing. Thus, the dual system of prosecution has not only been used to support grand jury reform and to justify a post-indictment preliminary hearing, the two approaches discussed in Chapter 1; it has also been used as a rationale for keeping the preliminary hearing limited in nature, so that it is not circumvented entirely by prosecutors.[2]

In summary, the federal legal framework affords defendants a number of rights at the preliminary hearing stage. These include the right to call witnesses and present evidence in their own behalf; to be accompanied by counsel and to have counsel appointed, if indigent; and, upon application, to have access to the preliminary hearing transcript. On the other hand, both the Federal Rules and relevant case law make it clear that the evidence produced at the preliminary examination need not meet either the quantitative or qualitative standards necessary to support a conviction at trial. The evidence need only convince the magistrate that the accused probably committed the crime.[3]

According to one source, the preliminary hearing process in approximately 22 states is based in whole or in part on the federal approach.[4] While it was not possible to conduct an independent legislative analysis in the course of this study, it seems fair to say that the federal process is generally representative of current state practice. At the same time, it is important to

[1] See Notes accompanying Rule 5.1, Federal Rules of Criminal Procedure.

[2] Federal prosecutors may proceed directly to the grand jury without first holding a preliminary hearing, so long as the indictment is returned within the time limits set by the Rules.

[3] See, for example, U.S. v. King, 482 F.2d 768 (D.C. Cir. 1973).

[4] The Grand Jury: Its Evaluation and Alternatives, a National Survey." Criminal Justice Quarterly. 3:114-148, Summer 1975.

point out that a number of states do not follow the federal pattern. For example, in a relatively small number of states, California being the best documented, the probable cause determination must be based solely on legally admissible evidence. And in at least one state--Rhode Island--probable cause is generally determined in a non-adversarial setting.[1] Thus, our comparison of the grand jury and the preliminary hearing in Arizona must, of necessity, be limited in nature.

3.1.2 The Arizona Legal Framework

Under Arizona law, any justice of the Supreme Court, judge of the Superior Court, justice of the peace, or police magistrate is a "magistrate" for all functions given to "magistrates" by Arizona rules or statutes. In theory, then, the preliminary hearing falls within the jurisdiction of all courts in the state. In reality, respondents in both counties studied indicated that the preliminary hearing was largely within the purview of the Justice Court system. Nevertheless, justices of the peace are not required to be lawyers and must run for election every four years. Thus, prosecutors occasionally take to the Superior Court cases involving complex legal issues or requiring a record of the highest quality, as well as cases where there is concern that a justice's behavior and decisions may be politically motivated.

The procedure followed in the preliminary hearing in Arizona is summarized by Rule 5.3(a):

- The magistrate is required to admit only such evidence as he or she feels is material to the determination of probable cause;
- All parties have the right to cross-examine the witnesses testifying personally against them and to review their previous written statements prior to cross-examination;

[1] In Rhode Island, the prosecutor may charge by information in non-capital offenses. Following initial screening, the prosecutor charges the defendant without a probable cause hearing. The prosecutor is required to attach to the information all exhibits on which he or she relies to establish probable cause and the defense has 10 days in which to move for dismissal of the charges. If the defendant makes such a motion, a hearing is held at which the prosecutor must rely on the aforementioned exhibits to demonstrate probable cause, unless the court grants permission to supplement them. If the court grants the defendant's motion, the state is precluded from again bringing the same accusation. The Rhode Island practice was held to be constitutional by Supreme Court decision--Gerstein v. Pugh, 420 U.S. 103 (1975).

- At the close of the prosecution's case including cross-examination of prosecution witnesses by the defendant, the magistrate must determine and state for the record whether the prosecutor's case established probable cause;
- The defendant may then make a specific "offer of proof," including the names of witnesses who would testify or produce the evidence offered;
- The magistrate may refuse to allow the offered evidence, if he or she determines that it would be insufficient to rebut the finding of probable cause.

The rules are fairly restrictive in limiting the purpose of the preliminary hearing to the determination of probable cause. As in the federal system, Rule 5.3(b) specifically states that suppression motions or any other challenges to the legality of the evidence are not applicable at the preliminary hearing, but rather are reserved for the trial court.

Further provisions regarding the evidentiary standards to be applied at the preliminary hearing are contained in Rule 5.4(c). That Rule states that the finding of probable cause must be based on substantial evidence, which may be hearsay in whole or in part in the following forms:

- written reports of expert witnesses;
- documentary evidence without foundation, provided there is a substantial basis for believing such foundation will be available at trial and the document is otherwise admissible;
- the testimony of a witness concerning the declarations of another or others where such evidence is cumulative or there is reasonable ground to believe that the declarants will be personally available for trial.

As discussed previously, in addition to screening cases for probable cause, the preliminary hearing typically facilitates a number of collateral functions, one of which is discovery. It is interesting to note that the priority given to this function in Arizona changed considerably with the implementation of the new Rules of Criminal Procedure in 1973. At the same time that the new Rules substantially broadened discovery overall, the role of the preliminary hearing in the discovery process was downgraded. Prior to these changes, the preliminary hearing was essentially a mini-trial. Strict rules of evidence were in force and hearsay was not allowed. The defendant could call witnesses and make sworn or unsworn statements. In contrast, the courts currently view the purpose of the preliminary hearing as fairly restrictive in nature. In State v. Prevost, for example, the State Court

of Appeals ruled that discovery at the preliminary hearing was incidental.[1] This theme has been reiterated in several other recent decisions.[2]

Since the use of the preliminary hearing for discovery purposes is now limited, it is important for defense counsel to have other opportunities to interrogate witnesses in the course of preparing for trial. An issue of some concern, therefore, is whether the defendant's questioning of a witness at the preliminary hearing precludes obtaining a statement from that witness at a later date. Rule 15.3 governs the availability of depositions. Upon motion of any party or a witness, the court may order an oral deposition for one of three reasons: to preserve testimony, to obtain discovery from an uncooperative witness, or to secure the release of a witness who has been incarcerated for failure to assure his or her future appearance. While the revised Rules specifically exclude persons who have testified at the preliminary hearing, either party may seek a voluntary interview with such witnesses (counsel may not ethically advise noncooperation).[3] Furthermore, in exceptional cases, additional discovery may be sought from witnesses under Rule 15.1(e). According to this provision, the witness may be deposed upon court order if he or she refuses to cooperate and the defendant can show:

- that he or she has a substantial need for the information in preparing the case; and
- that he or she cannot obtain the substantial equivalent by other means without undue hardship.[4]

3.2 Characteristics of Preliminary Hearing Cases

Differential use of the preliminary hearing and the grand jury in Maricopa and Pima Counties is reflected in the characteristics of the cases reaching the proceedings.[5] Table 3.1 displays the number of defendants involved in each of the sampled cases in Maricopa and Pima Counties.

[1] State v. Prevost, 118 Ariz. 100, 574 P.2d 1319 (App. 1977).

[2] See, for example, State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975); State v. Canaday, 117 Ariz. 572, 574 P.2d 60 (App. 1977); and State v. Williams, 27 Ariz. App. 279, 554 P.2d 646 (1976).

[3] See American Bar Association, Standards for Criminal Justice, Standards 3-3.1(c), 4-4.3(c)(2d ed. 1980).

[4] A parallel set of conditions governs prosecutors' motions for additional discovery under Rule 15.2(f).

[5] As noted in Chapter 2, although Maricopa County schedules most cases for a preliminary hearing, many of these hearings are never held. The data in this chapter do not include cases in which a preliminary hearing was scheduled but not held.

Table 3.1

NUMBER OF DEFENDANTS CHARGED IN PRELIMINARY HEARING CASES

Number of Defendants	Maricopa County	Pima County
1	89%	81%
2	8	17
3	3	1
4	-	1

As can be seen, the Pima County cases are slightly more likely to involve multiple defendants. Pima County cases also differ from Maricopa County cases with respect to offense type, as illustrated in Table 3.2.

Table 3.2

OFFENSES CHARGED IN PRELIMINARY HEARING CASES

Offenses	Maricopa County	Pima County
Crimes of violence only*	33 (44%)	65 (77%)
Crimes against property only	20 (27%)	6 (7%)
Both crimes of violence and crimes against property	2 (3%)	8 (10%)
Drug offenses only	13 (17%)	0 (0%)
Drug offenses and crimes of violence	0 (0%)	1 (1%)
Drug offenses and crimes against property	2 (3%)	0 (0%)
Other	5 (7%)	3 (4%)
Missing	0 (0%)	1 (1%)
	75 (101%)	84 (100%)

*Crimes of violence include murder, assault, sexual offenses, kidnapping, robbery, and theft from the person. Although the latter two offenses involve the taking of property, they also often involve force or the threat of injury and direct confrontation between the victim and the perpetrator. Crimes against property include burglary, theft, and forgery.

As can be seen, in Maricopa County a variety of types of cases were handled at the preliminary hearing. In contrast, crimes of violence (alone or in combination with crimes against property) clearly dominated the preliminary hearing calendar in Pima County. Another dramatic difference between the two counties was in the use of the preliminary hearing for drug offenses. In Maricopa County, 20 percent of all preliminary hearing cases studied were drug-related, whereas in Pima County, only one case involved a drug charge, and that case also involved a crime of violence.

These findings are largely consistent with the case flow patterns discussed in Chapter 2. In both counties, prosecutors indicated they favored the preliminary hearing as a screening mechanism when they wanted to assess the victim's intent to pursue the case, or if they needed to preserve testimony.[1] In Pima County, this was perceived to be especially critical in cases involving young children. Our case records data reveal that sexual assault charges were involved in 23 percent of the preliminary hearings in this site. Although we did not collect data on the victim's age, it is clear from the specific offenses charged (e.g., child molestation, sexual assault on a minor) that at a minimum, over half of all these sex-related cases involved children as victims.

The differential presence of drug offenses in the records samples is also consistent with the case processing policies of prosecutors in each jurisdiction. As noted in Chapter 2, it is routine procedure for police in Pima County to treat drug violations as misdemeanors or for prosecutors to reduce the charge as soon as possible. Drug offenses would rarely be screened at the preliminary hearing in this site. Maricopa County typically uses the occasion of the preliminary hearing as a time to dispose of such cases; in at least a few instances, the preliminary hearing is actually held.

Another case characteristic we examined was the number of counts alleged per case. In the majority of cases in both counties, only one offense was charged. Pima County, however, presented multiple count cases at the preliminary hearing more frequently than did Maricopa County. As displayed in Table 3.3, 26 percent of the cases in Pima County involved three or more charges, whereas the comparable figure for Maricopa County was only six percent.

[1] Despite their common rationale, the rates at which they used the proceeding were markedly different as discussed in Chapter 2.

Table 3.3

NUMBER OF COUNTS CHARGED PER CASE

Number of Counts	Maricopa County			Pima County		
1	57	(76%)		43	(51%)	
2	13	(17%)		19	(23%)	
3	4	(5%)		9	(11%)	
4	0	(0%)		8	(10%)	
5	1	(1%)	6%	2	(2%)	26%
7	0	(0%)		1	(1%)	
9	0	(0%)		1	(1%)	
missing	0	(0%)		1	(1%)	
	75	(99%)		84	(100%)	

In summary, Pima County preliminary hearing cases appear to involve more defendants, more charges, and more sensitive types of offenses. Differential use of the proceeding and case selectivity may help explain some of the differences in preliminary hearing operations described below.

3.3 Preliminary Hearing Operations

3.3.1 Scheduling and Preparing for the Preliminary Hearing

In Maricopa County, the preliminary hearing is scheduled at the time of the defendant's first appearance although it is unknown at that time whether the preliminary hearing will be waived or, if held, how many witnesses will be called. Typically, the justices of the peace allow one half-hour per hearing, although cases occasionally last much longer as discussed in Section 3.3.2 below. While the docket does get backed up occasionally, forcing a continuance, this rule of thumb generally works--largely because so many of the scheduled hearings are never actually held.

Justices of the peace report that they are often able to predict whether the preliminary hearing will be waived and, if not, how long it will take from an analysis of the charges filed and/or the counsel representing the defendant. For example, according to one respondent:

- Criminal damage cases are generally pled.
- The charge of aggravated assault on a police officer (i.e., resisting arrest) is generally reduced from a Class 6 felony to a misdemeanor and pled.
- Police witnesses generally require less time than civilian witnesses.
- Child molestation cases generally take a long time.

These and other characteristics of the case are taken into account in the scheduling process where possible.

In Maricopa County, the massive volume of cases has forced the court to take additional steps to facilitate case flow. One mechanism developed by the justices of the peace in downtown Phoenix is the pre-preliminary hearing conference used at the discretion of the court. The conference is scheduled well within the 10 to 20 day limit set for the hearing itself. All such conferences are set for one time slot on a single day--for example, 11:00 AM on Thursday. Witnesses are not subpoenaed to the pre-preliminary hearing conference but are invited to attend. According to a justice of the peace, the subpoena process would take too long, since time is needed to file a complaint following an initial appearance, then issue and serve the subpoena. At the conference, the police report is made available to the defense, and both parties have their first opportunity to communicate with one another.[1] The purpose of the pre-preliminary hearing conference is to provide an opportunity for the parties to negotiate a settlement without actually holding a preliminary hearing.

Opinions regarding this "invention of court" are divided. Clearly, the conference has been useful in expediting case flow and bringing about early settlements. On the other hand, there is some concern among defense counsel that the conference can "force" the prosecutor and defense counsel to strike a deal, particularly in cases involving charges of possession of marijuana. In fact, one respondent, who stated that he felt he had been "tricked" into going (thinking the conference was actually the preliminary hearing), now refuses to attend such sessions.

[1] It is important to note that, in certain instances, the defendant may also receive the police report earlier than required under the Rules governing disclosure, either through an informal agreement between the parties or in exchange for an outright waiver of the preliminary hearing, without the use of this conference.

In Pima County, the scheduling process is handled quite differently. Without the scheduling of a preliminary hearing to facilitate plea negotiations and because so few preliminary hearings are actually held, no automatic system exists for putting them on the calendar. Instead, at the time of the initial appearance, the Justice Court notes the outside date at which the preliminary hearing could occur. If the prosecutor decides to present the case at a preliminary hearing, he or she will notify the court, which will then schedule the hearing. Otherwise, the case will proceed directly to the grand jury.

Arizona's Revised Rules of Criminal Procedure require the magistrate to "issue process to secure the attendance of witnesses" and to secure a court reporter to record the proceedings unless waived by both parties. The actual witnesses to be heard are selected by the parties involved. Generally, both civilian and law enforcement witnesses receive subpoenas, regardless of their willingness to testify. The subpoena effectively serves as a notification that the preliminary hearing has been scheduled and requests the attendance of the individual on whom it is served.

In the past, the Charging Bureau in Maricopa County was responsible not only for selecting the preliminary hearing or the grand jury as the screening device, but also for identifying the witnesses to be called. Prosecutors in the Charging Bureau did not actually conduct the preliminary hearing, however; that task was handled by staff of the Trial Bureau. According to one respondent, this division of labor posed certain problems. In some cases, the Charging Bureau attorney would subpoena everyone listed in the police report; in others, only law enforcement officers were subpoenaed. While the Trial Bureau generally preferred not to have civilian witnesses testify, prosecutors felt compelled to put them on if they were subpoenaed and appeared. Under a recent reorganization, Trial Bureau attorneys are in charge of subpoenaing witnesses for the preliminary hearing, thus eliminating the coordination problem.

3.3.2 Duration of the Proceeding

According to our analysis of case records, almost all preliminary hearings were concluded on the same day they were opened. In Maricopa County, only seven percent of the cases were held over for more than one day; in Pima County, the comparable figure was 11 percent. The median number of pages of testimony per case was 28 in Maricopa County and 39 in Pima County.[1] Data were not available on elapsed time per hearing in either county. Assuming

[1] Page length varies widely in both counties. In Maricopa County, the number of pages of testimony per case ranged from 10 to 166. In Pima County, the minimum page length was five and the maximum was 540.

that one page of transcript is roughly equivalent to one minute of testimony, however, we can estimate the typical length of these proceedings. In Maricopa County, we estimate that the typical case lasts approximately 30-35 minutes; in Pima County, the estimated duration is roughly 40-45 minutes. This slight difference in the length of the two proceedings is probably related to the discrepancy in overall usage patterns and case characteristics as discussed earlier.

It is interesting to note that despite the fact that the laws and rules governing the preliminary hearing in California are, in theory, more rigorous than those in Arizona,[1] in actual practice, the California proceeding is also relatively brief. In their intensive analysis of the preliminary hearing in Los Angeles, Graham and Letwin found that the typical proceeding lasted only 30 minutes.[2] The prosecutor normally attempted to put on a fairly complete case in order to preserve testimony and prepare a transcript which could later be used in lieu of trial under California law. (Occasionally, magistrates would bar additional witnesses on the ground that probable cause had already been established.) In contrast, the defense rarely introduced evidence of its own, and defendants were not ordinarily called as witnesses, despite elaborate rules protecting their rights. The defense did use the hearing to cross-examine the government's witnesses, however. After the testimony was completed, the parties each presented their arguments to the magistrate. These arguments centered primarily on constitutional issues which were often resolved in a "rough and tumble" manner. Clearly, the formal legal framework only partially accounts for local preliminary hearing operations. Other factors, such as tactical considerations, the need for efficiency, and local norms and customs, explain much more.

3.3.3 Presentation of the Government's Case

Testimonial Evidence

The mean number of witnesses testifying in Maricopa County was 1.7; in Pima County, the mean was 2.3. The vast majority of witnesses were called by the prosecutor--98 percent of all witnesses in Maricopa County and virtually 100

[1] In California, as noted above, suppression issues may be properly raised at the preliminary hearing and strict evidentiary standards apply.

[2] Graham, Kenneth and Leon Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Implications." UCLA Law Review, Vol. 18, (1971), pp. 636-757. It should be noted that Graham and Letwin's analysis predated the Hawkins decision; however, the Rules governing the hearing per se have remained constant over time.

percent in Pima County. However, according to the Rules described above, both the prosecutor and the defense attorney have the opportunity to question any witnesses who testify regardless of which side called the witness.

As noted above, the government's case may be based on hearsay in whole or in part, with certain provisos. Documentary evidence may be introduced without foundation as long as there is substantial evidence for believing foundation will be available at trial and the document is otherwise admissible. Furthermore, hearsay testimony must be cumulative in nature or there must be reasonable grounds to believe the declarant will be personally available for trial.

Although it is typically more efficient for the prosecutor to consolidate evidence from a number of sources into the hearsay testimony of one witness, direct testimony was often introduced at the preliminary hearing.[1] Prosecutors in both counties view the preliminary hearing as a forum for testing the performance of witnesses on the stand and as a mechanism for preserving testimony. These objectives tend to offset whatever benefits accrued from reliance on hearsay.

In both counties, a large fraction of the witnesses who testified in our sample of cases were civilians. In Pima County, civilians comprised 68 percent of all witnesses testifying; in Maricopa County, civilians accounted for 52 percent of all witnesses. (See Table 3.4.) Victims were the most common type of civilian witness appearing. In Maricopa County, 70 percent of the civilian (36% of all witnesses) were victims, whereas in Pima County 55 percent of the civilian witnesses (37% of all witnesses) were victims. Eyewitnesses were the second largest class of civilian witnesses, accounting for 16 percent of all civilian witnesses in Maricopa County and 30 percent in Pima County.

[1] As will be discussed in Chapter 4, introduction of hearsay testimony was far more prevalent in the grand jury proceeding.

Table 3.4

TYPES OF WITNESSES TESTIFYING AT THE PRELIMINARY HEARING

	Maricopa County N	Maricopa County %	Pima County N	Pima County %
Police Officers and Investigators	63	48	63	32
Civilian Witnesses	67	52	134	68
Victims	47	36	73	37
Eyewitnesses	11	9	40	20
Defendants	2	2	4	2
Other	7	5	17	9

Very few witnesses at preliminary hearings were defendants at that same proceeding--only 2 percent of all witnesses were defendants in either Maricopa County or Pima County. Although the issues of calling targets to testify and compelling testimony are generally raised in relation to grand juries, they may arise in conjunction with a preliminary hearing as well. The following case illustrates these issues in practice.

Two defendants were charged with conspiring to murder the wife of one of the defendants. After six witnesses had testified, the court found no probable cause on the conspiracy charge against one defendant but did bind that defendant over on a charge involving fraudulent schemes.

Following a week's recess, the proceeding reconvened with the prosecutor's announcement that he intended to call the defendant against whom the conspiracy count had been dropped and to grant him use immunity. The attorney for that defendant objected on the grounds that use immunity would not offer protection against federal charges which might arise since the telephone was allegedly used in the commission of the crime.[1] In addition, he

[1]Use immunity prevents the government from using the immunized witness's testimony against the witness in any subsequent prosecution. The issue of whether use immunity in one jurisdiction is binding on other jurisdictions including the federal system is the subject of varying interpretations.

claimed that use immunity would not protect the defendant in the continuing state prosecution and stated that the prosecutor should drop all charges against this defendant if he intended to call him as a witness.

The court ordered the defendant/witness to testify after informing him of his rights under the grant of use immunity and warning him of the penalties for perjury or contempt. Prior to questioning the defendant/witness, the prosecutor offered to disclose to the court all evidence available for use against this defendant/witness to avoid later challenge on the basis that the grant of immunity had been violated. The court ordered the evidence sealed in an envelope. Following the defendant/witness's testimony, probable cause was found against the co-defendant.

Defendants are not the only type of witnesses that may be placed in jeopardy by testifying. On occasion, a prosecutor will call as a witness an individual who participated in the crime but has already been tried or has agreed to testify as a result of a plea agreement. Another type of witness who may fear self-incrimination is someone who was involved in either related or unrelated illegal conduct with the defendant but has not been charged. Although Arizona law does not require that witnesses be notified of their legal rights (such as the right against self-incrimination) before testifying, we noted instances in which witnesses were informed of such rights. The issue was raised somewhat erratically, however, as discussed below.

In some cases, defense counsel expressed concern over the possibility of self-incrimination, even though the government witnesses' rights were the ones at stake. One such case is described in the anecdote which follows.

A witness testifying as the victim of theft and assault by a prostitute was describing the initial encounter between himself and the defendant. As he testified that he exposed himself to reassure the defendant that he was not a police officer, the defense attorney raised the issue of the witness's rights against self-incrimination by stating:

> ...perhaps the Court should appoint an attorney for this witness. There may be some statements that he makes where he may be admitting to criminal offenses.

The judge, speaking to the witness, said:

> You do understand you do have a right to invoke the Fifth Amendment privilege if you feel that any answer you give may tend to incriminate you in any way?
>
> The witness's responses indicated some confusion and an off-the-record conversation occurred. Following that discussion, the prosecutor announced that the state would go on record that it had no intention of prosecuting the witness. After the defense attorney pointed out that city prosecutors would not be bound by this, the judge once again advised the witness regarding his rights. The witness was informed that he had the right to an appointed attorney, that he could refuse to answer questions, and that he could not be compelled to answer without a formal grant of immunity. The witness then completed his testimony, claiming the Fifth Amendment only once in response to a question on cross-examination. He was ordered to answer the question by the judge, however, since the issue had already been covered during direct examination.[1]

In some other instances, concern for the rights of a witness was raised by the prosecutor or by the judge, as described below.

> In one case, several friends who were involved in an altercation with strangers were testifying for the prosecution at a preliminary hearing on aggravated assault charges. During cross-examination, the defense counsel sought to elicit testimony on conversations among the victims to show that the victim on the stand would have been unable to identify the defendant without information supplied to him by the other victims. It became clear that the victims had consulted an attorney and that some of these conversations had taken place in the presence of the attorney. The prosecutor raised the issue that the victim who was testifying should be apprised of the attorney-client privilege.

[1] In this and subsequent anecdotes, we have quoted statements directly where feasible without attempting to make them grammatically correct. We have also tried to avoid summarizing what is being said to make it more concise or clear. In this way, the reader may judge the effectiveness of information given to civilian witnesses or lay jurors, for example.

> Are you aware there is a matter of privileged communication between an attorney and client? Communications which occur between the attorney and client are within an attorney-client relationship. That is, the attorney is being consulted as an attorney, it can be a criminal or civil matter, it doesn't matter. Actually it goes to statements you make to the attorney. There are certain ways that can be waived for the issues here, a number of people present, they would have to all be clients of the attorney, basically, to invoke the privilege. You have a privilege...where you tell an attorney or another client tells the attorney...A privilege where you don't have to disclose what the statements are.

We do not have an exact count of the number of times witnesses received notice of their rights when the need arose. We did find instances, however, when notice would have been appropriate, but was not given. At the same hearing described in the anecdote above, for example, another witness testified about an unauthorized entry into an office without receiving any warning from the court that his testimony might be self-incriminating.

Physical and Documentary Evidence

For the most part, probable cause determinations were based almost exclusively on testimonial evidence. Our data collection instruments were designed to determine what types of physical or documentary evidence were introduced (including evidence such as weapons, contraband, checks, other financial records, video- or audio-recordings or fingerprints) as well as the method of introduction (such as direct introduction of the item, presentation through expert testimony, or presentation through a report specifying findings from forensic analysis).

In both counties, physical or documentary evidence was brought directly into the preliminary hearing in approximately 7 percent of the sampled cases. The types of evidence presented to the magistrate included photographs (typically of the crime scene or the deceased in a homicide case), other pictures or diagrams, and documents (such as checks or forged instruments). Weapons were rarely brought to the preliminary hearing as evidence.

The admissibility of hearsay contributes to the absence of this type of evidence. Using hearsay in place of physical or documentary evidence is

considered particularly efficient by prosecutors in cases involving forensic evidence, since it allows them to introduce the findings of scientific analysis without calling an expert witness or introducing the expert's report. Typically, the findings are entered into the record through a law enforcement witness who testifies in this manner: "Lab analysis showed the drug to be marijuana," or "A medical doctor told me the victim's injuries were consistent with the knife that was recovered."

In Maricopa County, procedures have evolved to prevent objections on the grounds of qualifications of experts where their findings are at issue. According to respondents, most experts routinely used by the police are on a list given to the court and updated regularly. For each expert on the list, the Arizona Department of Public Safety and the Phoenix Police Department laboratories have sent certified letters to the court verifying his or her qualifications and standing as an expert.[1] This allows the witness either to testify as an expert without direct proof of expert status or, more often, to submit a written report to law enforcement investigators which is introduced through hearsay testimony without challenge to the conclusions or findings. Some justices of the peace still insist on the introduction of the written report, however.

3.3.4 Cross-examination

The power of the magistrate to terminate a defendant's cross-examination is interpreted in different ways by Arizona's courts and local practitioners. Some argue that the revised Rules liberalizing discovery generally mitigate the need for extensive cross-examination at the preliminary hearing. Case law tends to support this view. For example, in State v. Canaday, the court ruled that a defendant's opportunity to cross-examine witnesses at the preliminary hearing is only a limited one.[2] In State v. Williams, the court ruled that due process does not require that the defense be given the opportunity for limitless cross-examination for discovery purposes at the preliminary hearing.[3]

Nevertheless, a number of respondents continue to believe that the magistrate either cannot (under the Rules) or should not limit the defense's cross-examination of witnesses. According to the public defender's office

[1] In exceptional cases, police have submitted affidavits on the qualifications of individual experts.

[2] State v. Canaday, 117 Ariz. 572, 574 P. 2d 60 (App. 1977).

[3] State v. Williams, 27 Ariz. App. 279, 554 P.2d 646 (1976).

in Maricopa County, for example, the preliminary hearing is critical in getting the police officer or civilian witness on the record. This office believes that the defense has an "absolute right" to question witnesses on "pertinent issues." Of course, the definition of "pertinent" may vary.

One justice of the peace we interviewed allows cross-examination if (1) it is relevant; (2) it is related to an affirmative defense; or (3) it tests the credibility of the witness. This justice of the peace grants the defense wide latitude in cross-examination, believing that such latitude is in conformity with the generally broad discovery rules in Arizona. As he put it, "Otherwise cases might as well go to the grand jury." In his view, since preliminary hearing witnesses cannot be deposed at a later time, the preliminary hearing is the only opportunity available to the defense to question the witness.[1]

According to our case records analysis, the defense almost always exercised its right to cross-examination. In only 5 percent of the cases in Maricopa County and 7 percent in Pima County did the defense fail to ask any questions of any witness. In fact, the defense attorney often questioned witnesses more extensively than did the prosecutor. Our analysis revealed that in 61 percent of the cases in Maricopa County, the number of pages of testimony resulting from questioning by the defense attorney equalled or exceeded the amount of testimony elicited by the prosecutor. In Pima County, this occurred in 57 percent of the sampled cases. The median number of pages of testimony on direct examination was 12, and a median of 16 pages were developed through cross-examination in Maricopa County. The comparable figures for Pima County showed very little difference between the prosecution and the defense, with the median number of pages being 20 and 19.5, respectively.

3.3.5 Exculpatory Evidence/The Offer of Proof

As noted above, at the close of the prosecution's case (including defense cross-examination) the magistrate must determine and state for the record whether probable cause has been established. At that time, the defendant may make a specific "offer of proof," including the names of witnesses who would testify or produce evidence. The magistrate may refuse to hear the evidence if he or she believes it is insufficient to rebut the finding of probable cause. Thus, the Arizona Rules do not guarantee the defendant's right to testify in his or her own behalf or to offer evidence. These provisions are designed to prevent the preliminary hearing from becoming a

[1] As noted in Section 3.1.2 above, in actuality the defense may have other opportunities to interrogate witnesses either through their voluntary cooperation or by means of court ordered depositions.

mini-trial or other full-scale hearing. They reinforce the purpose and scope of the hearing as a mechanism for binding the defendant over and preventing possible abuse of power, not for the ultimate adjudication of guilt or innocence.

According to a number of respondents, an offer of proof is rarely made. (For example, one magistrate estimated that an offer was made in only one out of every ten cases.) Our case records analysis confirmed this estimate by revealing that an offer of proof was made in only 8 percent of the preliminary hearing cases examined in Maricopa County. In Pima County, it was made in 14 percent of the cases examined.

According to the defense counsel interviewed, the infrequent use of the offer of proof is due to several factors:

- An offer of proof is unlikely to affect the probable cause determination, since the probable cause standard is not a rigorous one.
- Defense counsel are wary to put a defendant or other witnesses on the stand because the prosecutor may "trip the witness up" and make him or her open to future impeachment.
- Defense counsel are reluctant to provide the prosecution with information related to defense strategy.
- The defense's objective at the preliminary hearing is not to obtain a finding of no probable cause but, through cross-examination, to obtain discovery or to lay the foundation for subsequent attacks on the credibility of the witnesses.

Magistrates do not accept the offer of proof in all cases. According to one justice of the peace in Maricopa County, the magistrate must consider the type of information which will be contributed in responding to an offer of proof. For example, if the defense claimed "self-defense," the offer of proof would probably be denied, since this magistrate believes the purpose of the hearing is only to determine probable cause and not to assess the defendant's motivation. On the other hand, if the case involved only circumstantial evidence of burglary and the defendant makes an offer of proof of three alibis, the justice of the peace would probably allow the defense to present its evidence so that the credibility of the witnesses could be assessed.

We found that the majority of offers of proof were accepted,[1] although these did not always involve the introduction of new evidence or additional witnesses. Instead, the magistrate often made his or her decision on the basis of the summary or legal arguments provided by the defense attorney. According to case records analysis, two-thirds of the offers of proof were accepted in Maricopa County and three-quarters in Pima County. The following anecdotes illustrate some of the issues raised by offers of proof:

> Following the conclusion of testimony in an aggravated assault case, the defense attorney informed the judge that there were eyewitnesses who could testify that the victim did not have a reputation for honesty and that the victim was armed with a knife at the time of the alleged assault. The defense attorney also notified the court of numerous other contradictions between the victim's testimony and that of the eyewitnesses. The judge noted that it appeared that the defendant was claiming self-defense but pointed out that issues of self-defense and provocation were not appropriate for the preliminary hearing. Instead, these issues were for the jury to resolve based on the credibility of all the witnesses. The judge defined the purpose of the preliminary hearing in this instance as allowing a determination whether the victim did receive the wounds as he claimed. The judge noted that, since the defendant was not claiming that he had been wounded, the labels of victim and defendant had been correctly applied.

In a case involving several members of a rock band who were allegedly assaulted following a dispute with a club manager over payment for their performance, the offer of proof included a claim that exculpatory evidence was available:

> When the problem of payment arose, the club manager called the police, who allegedly told the parties that since the dispute was civil, the police need not be involved. The police allegedly indicated that the band could stay overnight at the club until paid in the morning. According to the testimony, the defendants (friends and employees of the club manager) returned to the club in the morning and assaulted the members of the band.
>
> During the testimony of one of the band members, a defense attorney told the court that there was evidence available that was potentially exculpatory and raised doubts about the witness's credibility. This attorney

[1] By "accepted," we mean that the magistrate allowed the evidence to be introduced, not that no probable cause was found.

pointed out that the situation was unusual since the witness had made prior statements that were extremely inconsistent with his testimony. In addition, he claimed that he had informed the prosecutor of the availability of the club owner who would testify that the alleged victims were not authorized to remain in the club overnight. In light of these circumstances, the defense attorney charged that the prosecutor was required to stop the preliminary hearing or to investigate the charges further. The prosecutor responded by saying he would argue these points at the conclusion of the hearing and the testimony continued.

Following the completion of testimony, each of the three defense attorneys challenged the proceeding. Contradictions between the testimony and prior statements were again brought to the court's attention in conjunction with a request that the charges be dismissed. A dismissal was also sought on the basis that the judge's rulings on defense objections had denied the defendant substantial procedural rights. Another issue which was raised involved a claim that two of the witnesses discussed their testimony during a recess; the defense attorney asked that one of these witnesses be recalled to be questioned about this matter.

The judge refused to dismiss the charges and asked the defense to submit their offers of proof. These offers of proof included an offer that the club owner would testify that the band was not authorized to remain in the club and that one of the defendants was acting on his orders, and an offer that the defendants would testify that the altercation involved mutual combat. The court disregarded each of these lines of argument but did allow evidence on the claim that one witness had instructed another witness how to testify.

When the defense attorney recalled a witness and asked him whether he had discussed his testimony with another witness during a recess, the witness denied it. The defense attorney then asked that his client be allowed to testify regarding what he had overheard at the recess. The judge denied the request, noting that it was not part of the initial offer of proof. The judge then ruled that the offer of proof failed and found probable cause for all defendants on all charges.

Rarely did the offer of proof actually affect the outcome of the preliminary hearing. Indeed, as will be discussed in Section 3.4 below, a finding of no probable cause was extremely rare under any circumstances.

In cases where the defense does present evidence, the Arizona Rules of Criminal Procedure give the prosecutor the right to cross-examine witnesses on issues related to probable cause. According to our case records analysis, however, this is highly unusual in practice. In the small number of cases in

which the defense actually introduced evidence, the prosecutor did not once elect to cross-examine the witnesses.

3.3.6 Admissibility of Evidence

As discussed above, hearsay testimony may be introduced, as long as the evidence presented is cumulative or there is reasonable ground to believe the declarants will be personally available at trial. So too, documentary evidence may be introduced without foundation, provided there is substantial basis for believing such foundation will be made available at trial.

Although both counties rely heavily on civilian witnesses at the preliminary hearing,[1] this does not preclude prosecutors from also introducing hearsay testimony. Such evidence is not always introduced without defense challenge, however. Furthermore, prosecutors may question the introduction of hearsay during the defense's cross-examination.

Table 3.5 displays the frequency of objections to hearsay made by both parties. As might be expected, the defense was far more likely to make such objections, questioning the prosecutor's use of hearsay on direct examination. The total number of such objections per case was relatively small, however. In Maricopa County, the average was just under one per case (72 objections in 75 cases). In Pima County, the average number of objections per case was just over one (96 objections in 84 cases). Moreover, the number of objections raised varied substantially by case and by witness.

In Maricopa County, the justice of the peace was just as likely to sustain the objection as to overrule it, regardless of whether the prosecutor or the defense counsel made the challenge. In Pima County, the justice of the peace was likely to sustain the prosecutor's objections, which were very rare. He or she was far less likely to sustain the more frequent objections of the defence bar. (See Table 3.5.) As noted above, such rulings were based on the court's opinion regarding whether the evidence presented was cumulative and whether there was reason to believe the witness would be available for trial.

[1] As discussed in Section 3.3.3, 52% of the witnesses in Maricopa County and 68 percent of the witnesses in Pima County were civilians.

Table 3.5

OBJECTIONS TO HEARSAY

	Number of Objections Made	Percentage Sustained
Maricopa County		
Prosecutor	18	50%
Defense	54	46%
Pima County		
Prosecutor	6	67%
Defense	96	30%

The following anecdotes provide examples of the types of objections raised against hearsay evidence:

> One defense attorney challenged hearsay testimony concerning the means of entry into the premises where the crime occurred. He argued that the testimony concerned a material fact which should not be admissible through hearsay simply accompanied by a claim that the appropriate witness would be available for trial. The defense objection was overruled.

Another case involved an assault which arose out of an argument over some tires.

> The prosecutor tried to introduce hearsay testimony regarding a statement by a companion of the defendant on the subject of where the tires came from. In response to the defense objection, the prosecutor said,
>
> > ...This statement is not being offered for the truth of the matter contained therein, just being offered for the fact that it was said. It's...only being offered to better explain the circumstances of the incident.
>
> The hearsay was admitted.

Hearsay is not the only grounds upon which evidence can be challenged. A line of questioning may be halted due to objections that it is irrelevant or immaterial to the determination of probable cause. Table 3.6 displays the number of objections made by prosecutors and defense counsel on the grounds of relevance. As can be seen, such objections were far more prevalent in Pima County than in Maricopa County. In Pima County, there were 233 instances recorded in 84 cases (an average of 2.8 per case), with more than three-quarters of the objections lodged by the prosecutor's office. In Maricopa County, there were only 60 such objections in 75 cases (an average of 0.8 per case), and the prosecutor's objections accounted for three-quarters of the total. Whereas in Maricopa County the justice of the peace was somewhat more likely to sustain the prosecutor's objections, the reverse was true in Pima County.

Table 3.6

OBJECTIONS ON THE GROUNDS OF RELEVANCY

	Number of Objections Made	Percentage Sustained
Maricopa County		
Prosecutor	46	67%
Defense	14	50%
Pima County		
Prosecutor	178	53%
Defense	55	77%

Another ground for objection involved leading the witness, although such objections were less frequent then those described above. Objections of this type were far more likely to be made by the defense during the prosecutor's direct examination of the witness. The justice of the peace sustained defense counsel's motions in over half of the cases (57%) in both Pima and Maricopa Counties. The few objections lodged by the prosecutor were virtually all sustained. (See Table 3.7).

Table 3.7

OBJECTIONS ON THE GROUNDS OF LEADING THE WITNESS

	Number of Objections Made	Percentage Sustained
Maricopa County		
Prosecutor	5	80%
Defense	14	57%
Pima County		
Prosecutor	1	100%
Defense	46	57%

Finally, other types of objections were made, including claims that questions were argumentative, had already been asked and answered or were not based on sufficient foundation. These are summarized in Table 3.8.

Table 3.8

OTHER OBJECTIONS

	Number of Objections Made	Percentage Sustained
Maricopa County		
Prosecutor	75	72%
Defense	70	40%
Pima County		
Prosecutor	227	52%
Defense	192	48%

As can be seen, once again such objections were far more prevalent in Pima County (with roughly five per hearing) than Maricopa County (with nearly two per hearing). In Pima County, the justices of the peace sustained roughly half the objections made, independent of the objecting party. In Maricopa County, the prosecutor's objections were somewhat more likely to be sustained than those made by the defense bar.

Before concluding this section, we should make a final point regarding suppression issues. The revised Arizona Rules of Criminal Procedure specifically preclude the use of the preliminary hearing to test the legality of search and seizures and other Fourth Amendment issues. Yet, a number of defense counsel pointed out that the hearing did allow them to probe along these lines, as long as they did so indirectly and without overstepping local norms and informal rules of behavior. Thus, while illegally obtained evidence may not be challenged at the preliminary hearing, the opportunity to cross-examine government witnesses may help the defense prepare later suppression motions.

3.4 Efficacy of the Preliminary Hearing as a Screening Mechanism: Immediate and Ultimate Outcomes

3.4.1 The Determination of Probable Cause

According to Arizona's Rules of Criminal Procedure, once probable cause is determined, the magistrate must enter a written order holding the defendant to answer before the Superior Court.[1] (Upon request, he may reconsider the conditions of release.) The Arizona courts have ruled that probable cause presupposes that a prima facie case has been established. Mere suspicion is not deemed sufficient for a finding of probable cause; there must be more evidence for, rather than against, guilt and there must exist a state of facts that would lead a man of ordinary caution to entertain conscientiously a strong suspicion of guilt. That is, where more than one inference is equally reasonable, probable cause does not exist; however, if one inference is more reasonable than another (and is on the side of guilt), probable cause exists. Evidence presented at the preliminary hearing need not be sufficient to establish guilt beyond a reasonable doubt, but must meet the "ordinary caution" standard defined above.[2] The magistrate is not bound to find

[1] As noted earlier, the Rules further state that the probable cause finding must be based on substantial evidence which may be hearsay in whole or in part.

[2] See, for example, State v. Abbott 103 Ariz. 336, 442 P. 2d 80 (1968); In re Anonymous, Juvenile Court No. 6358-4 14 Ariz. App. 466, 484 P.2d 235 (1971); Drury v. Burr 107 Ariz. 124, 483 P. 2d 539 (1971); Dodd v. Boies 88 Ariz. 401, 357 P. 2d 144 (1961).

probable cause at the preliminary hearing simply because there has been a prior determination of probable cause to issue an arrest warrant. The magistrate is charged with making an independent and unbiased determination of whether probable cause exists to bind the defendant over for trial.[1]

In actuality, the chances of the defendant being bound over following the preliminary hearing are extremely high. In our sample of 500 cases used to study overall case flow (see Chapter 2), only a very small number of cases resulted in a finding of no probable cause. Our estimates indicate that this occurred in three percent of the cases sampled in Maricopa County and six percent in Pima County.

The Rules do not allow the magistrate to hold the defendant to answer for a crime different from that charged in the initial complaint. For example, if armed robbery was the charge on the initial complaint, but no evidence was introduced concerning the existence of a weapon, the magistrate could only dismiss the complaint or find probable cause for armed robbery. He or she could not amend the complaint and find probable cause for simple robbery. The only way a complaint may be amended is through a negotiated plea between the parties. Before a magistrate can hold a defendant to answer on new or additional charges, a new complaint must be filed.

In this way, as in others, the courts have attempted to make a distinction between a judicial trial and the preliminary hearing. For example, in Application of Williams the court ruled that it is not the duty of magistrates to determine ultimate guilt or innocence or to determine the degree of crime charged but only to determine whether there is probable cause to believe the defendant is guilty of the offense charged.[2] It is left for the trial tribunal to make the final determination of the applicability of law to the facts and for the jury to determine whether the defendant is guilty of the offense charged or of an included offense.

This does not mean that the magistrate is without discretion entirely. If more than one charge is brought, the magistrate may find probable cause to bind the defendant over on a subset of the charges in the complaint. He or she need not bind over the defendant or dismiss the case outright. A number of respondents cited the magistrate's influence over the charging decision as an advantage of the preliminary hearing. In the view of these respondents, the grand jury typically returns an indictment on the highest charge possible; in contrast, when a case goes to the preliminary hearing, a reduction in the number of counts is possible. According to our case records

[1] State v. Gause 107 Ariz. 491, 489 P.2d 830 (1971).

[2] Application of Williams 85 Ariz. 109, 333 P.2d 280 (1959).

analysis, however, such a reduction in charges was extremely rare, suggesting this was more myth than reality. One or more counts were dropped at the preliminary hearing in only about five percent of the cases in either county. Occasionally, this occurred because the charge had already been disposed of in the City Court; in other cases, the charge was dropped as the result of a finding of no probable cause.

A finding of no probable cause is not necessarily a final determination, however. Consistently, the courts have ruled that the preliminary hearing is not a final judgment and that a magistrate's dismissal of a complaint is not an absolute bar to further prosecution.[1] Although the prosecuting attorney cannot file a complaint in Superior Court after the justice of the peace has dismissed the same complaint, he or she can return to the Justice of the Peace Court if it appears that a different decision would be justified or present the matter to the grand jury. We do not have quantitative data on the number of cases which were resubmitted following a finding of no probable cause. One interesting case had been presented to a grand jury which refused to indict. When the same case was presented at a preliminary hearing, the defense attorney unsuccessfully challenged the state's right to refile charges following a finding of no probable cause.

> The defense petitioned the court for a dismissal saying that a grand jury had refused to return an indictment in the same case and claiming that seven out of 10 grand jurors voted against the indictment. Accusing the state of forum-shopping, the defense attorney claimed that if 10 citizens couldn't find enough evidence to hold the defendant to answer, then the preliminary hearing should not be used to bring about that result. The prosecutor cited case law supporting the practice and indicated that it was not unusual as he had presented three cases that week at preliminary hearings following grand jury proceedings in which the grand jury refused to vote for all or part of the indictment. The judge concurred with the prosecutor and allowed the hearing to proceed. The defense attorney then argued that the prosecutor should be required to introduce more evidence than that contained in the grand jury transcript. The prosecutor acknowledged that he was doing just that, since the victim was scheduled to testify. The preliminary hearing terminated with a finding of probable cause, and the case was ultimately disposed of through plea negotiation.

[1] Wilson v. Garrett, 104 Ariz. 57, 448 P.2d 857 (1969).

3.4.2 Judicial Review of the Preliminary Hearing

Arizona's revised Rules specify the grounds for review of the preliminary hearing by the Superior Court. Review must be initiated by a motion for a new finding of probable cause on the grounds that (1) the defendant was denied a substantial procedural right or (2) no credible evidence of guilt was adduced. The motion, which must be filed within 25 days after completion of the preliminary hearing, must specifically allege the ways in which such evidence was lacking. The review of the evidence must be based on the transcript of the proceedings, and unless a new preliminary hearing is commenced within 10 days after entry of the remand order, the case must be dismissed.

According to the commentary accompanying the Rules, the authors sought to eliminate the dichotomy between motions to quash (for legal insufficiencies) and petitions for writ of habeas corpus (for factual inconsistencies) under the former Arizona law. A single remedy--a motion to repeat the probable cause proceeding--is provided by the new Rules. The defendant's remedy is thus not dismissal of the charges, but only a remand for reconsideration on appropriate instructions, which can lead to a dismissal if a timely hearing is not held. In addition, substantive defects in the prosecution not remediable by remand for further evidence can be handled as follows:

> The court, on motion of the defendant, shall order that a prosecution be dismissed upon finding that the indictment, information, or complaint is insufficient as a matter of law.[1]

We were unable to develop our own estimates of the frequency of remands. According to defense counsel in Maricopa County, motions to remand are made in only a small fraction of preliminary hearing cases and few are won. One attorney pointed out, "You need something solid." According to another respondent, remands are extremely rare--maybe two out of 1000 cases. A case can be remanded on the ground that the prosecutor failed to prove all the elements of the crime. The remand is supposed to describe fully the grounds for the order, but according to one magistrate, this is not always the case. If remanded, the prosecution may refile. In Maricopa County, we were told that the County Attorney's Office rarely refiles the case unless a new witness is added or the wrong precinct was involved in the initial filing.

3.4.3 Ultimate Outcomes

One might argue that the infrequency of no probable cause determinations following the preliminary hearing is indicative of a very ineffectual screening

[1] Arizona Rules of Criminal Procedure, Rule 16.7(b).

process. Since so few cases are weeded out at this stage, the label "rubber stamp" might be applied to the Justice Court as well as the grand jury. Data on the ultimate disposition of such cases can be used to counter this argument, however. As shown in Table 3.9 in Maricopa County only two (3%) of the 59 defendants in our sample for whom we have outcome data were acquitted. Of the remainder, 44 (75%) pled guilty to one or more charges, four (7%) were convicted of one or more charges, and nine (15%) had their charges dismissed by the prosecutor. In Pima County, only three (4%) of the 77 defendants in our sample who were bound over following the preliminary hearing were acquitted. Of the remainder, 56 (73%) pled guilty to one or more charges, 10 (13%) were convicted of at least one charge, and eight (10%) had their charges dropped by the prosecutor.

Table 3.9

ULTIMATE DISPOSITION OF PRELIMINARY HEARING CASES*

Outcome	Maricopa County N	Maricopa County %	Pima County N	Pima County %
Dismissed	9	(15%)	8	(10%)
Pled	44	(75%)	56	(73%)
Convicted following bench or jury trial	4	(7%)	10	(13%)
Acquitted following bench or jury trial	2	(3%)	3	(4%)
TOTAL	59	(100%)	77	(100%)

*Data were available on only a portion of the defendants in our case records sample.

Of course, these findings also highlight once again the important role of the prosecutor, not only during the pretrial screening process but also with respect to the ultimate disposition of criminal cases. In Maricopa County, only six (7%) of the defendants bound over following the preliminary hearing ever went to trial. The remainder either pled to charges or had their charges dismissed. In Pima County, the comparable figure was 13 (17%).

Convictions are only one way of assessing pretrail screening. Most convictions occur as a result of plea agreements, and nothing in the plea negotiation process itself requires the government independently to develop reliable

evidence of factual and legal guilt. In the opinion of the study authors, then, conviction rates are ultimately a poor measure of the efficacy of the pretrial screening process. Rather, one must evaluate the process vis-a-vis the quality and quantity of evidence actually introduced and the due process protections provided.

3.5 Collateral Functions

Obviously, the preliminary hearing serves a number of collateral functions in addition to its primary function as a screening mechanism. Some of these were discussed in Chapter 2 of this report; others were hinted at throughout the preceding discussion. Each of these collateral functions is discussed briefly below.

Although the revised Rules expanding discovery in Arizona somewhat mitigated the use of the preliminary hearing for this purpose, they did not eliminate this function entirely. The preliminary hearing transcript supplements the information supplied in the formal complaint and, thus, supplements the formal pleading. The opportunity to cross-examine also serves a number of discovery purposes, including testing the credibility of witnesses on the stand and identifying possible defense strategies. While the preliminary hearing is not a forum for addressing Constitutional issues,[1] it does allow the defense limited opportunity to probe for Fourth Amendment suppression issues as well.

The second collateral function served by the preliminary hearing is the preservation of testimony of witnesses who may ultimately be unable to testify at trial. Within three days after waiver or conclusion of the preliminary hearing, the magistrate must submit all papers and records in the case to the clerk of the Superior Court. The transcript must be filed in Superior Court within 20 days after completion of the hearing.

According to the revised Rules, statements made under oath by a party or witness during a previous judicial proceeding (or a deposition) are admissible in evidence if (1) the "defendant" was a party to the previous action or proceeding, had the right and opportunity to cross-examine the declarant, and was represented by or waived counsel; and (2) the declarant is unavailable as a witness, or is present and subject to cross-examination.[2]

[1] This is a major collateral function of the California preliminary hearing, as described in Graham and Letwin, op. cit.

[2] Arizona Rules of Criminal Procedure, Rule 19.3(c).

As discussed in Chapter 2, use of the preliminary hearing transcript for this purpose may be important for a number of reasons. First, it preserves the testimony of very young children, who may forget the details of the incident over time. Second, it preserves the testimony of those who may not be available at trial, by reasons of illness, death, or relocation. And third, in the view of our respondents, it reduces the likelihood of witnesses being importuned or harmed in some way. In Arizona, where there is a sizable population of transients--including many elderly people--visiting the state for the winter months, these benefits were cited as particularly important.

The preliminary hearing transcript can also serve other purposes. Frequently, the transcript is used to impeach witnesses at trial. Together with the police report, the preliminary hearing transcript may also be submitted to the trial court to establish guilt or innocence. According to Arizona case law, the transcript may be used in this manner only if it can be shown that the defendant has an understanding of all the rights he or she waived, including:

- advice as to the range of sentencing and parole possibilities;
- the right to testify on his or her own behalf;
- the right to call witnesses;
- the right to offer any further evidence; and
- the right to trial by jury.[1]

If the preliminary hearing transcript has more than enough evidence to support a guilty verdict, then an agreement to submit charges to the trial court on the basis of the transcript and police report is tantamount to a guilty plea.

In Los Angeles County, the use of the transcript as a substitute for a full trial has a number of advantages,[2] including fast turnaround on the trial court's "short-cause" calendar. Thus, this practice is fairly common in that jurisdiction. We found little use of the transcript for this purpose in our study jurisdictions, however. More commonly, it was used to support plea negotiations and sentencing decisions.

[1] Arizona v. Price, 27 Ariz. App. 673, 558 P.2d 701 (1976).

[2] Graham and Letwin, op. cit.

Another secondary use of the preliminary hearing in our study was as an occasion for plea negotiation. In Maricopa County, fully one-third of the cases scheduled for the preliminary hearing were pled either in Justice Court or in superior court (at the "plea arraignment") without the preliminary hearing ever actually taking place.

A final use of the preliminary hearing is as a mechanism for determining the legality of detention and reviewing the conditions of release. At the conclusion of the hearing, once probable cause has been found and the defendant bound over, the justice of the peace may, upon request, reconsider the conditions of release. In addition, favorable conditions of release were also negotiated on occasion in Maricopa County in exchange for waiver of the hearing.

3.6 Summary

The preliminary hearing in Maricopa and Pima Counties is not a mini-trial as a result of the provisions implemented through the 1973 Rules of Criminal Procedure, nor is it a one-sided or summary proceeding. Instead, it serves the purposes of both the prosecution and defense in different ways. For the prosecution, the preliminary hearing offers the opportunity to test case strength and to preserve the testimony of witnesses who may not be available at trial.[1] For the defense, there is a feeling that it is an opportunity for discovery and identifying weaknesses in the government's case. Our case analysis indicated, however, that very few cases (3 to 6%) are actually screened out at the preliminary hearing.

Key characteristics of the preliminary hearing in the two counties are compared in Table 3.10. As can be seen, the preliminary hearings are likely to be more time-consuming and perhaps more complex in Pima County compared to Maricopa County. Although in both counties the majority of preliminary hearings involve one defendant charged with one count, Pima County follows this pattern less often than does Maricopa County. Moreover, cases in Pima County have more witnesses, a greater total volume of testimony, and more objections than cases in Maricopa County. These findings reflect the fact that in Pima County, the preliminary hearing is the less preferred device, whereas in Maricopa County it is the screening method of choice. Thus, the former involves a select group of cases, whereas in Maricopa County it includes a fairly broad cross-section even though many cases are, in effect, screened out by defense waivers.

[1] Particularly in Pima County, prosecutors use the preliminary hearing for well-defined purposes, i.e., in cases involving crimes of violence where the victim's presence on the stand can be assessed.

Table 3.10

SUMMARY COMPARISON OF PRELIMINARY HEARING CHARACTERISTICS

Characteristics*	Maricopa County	Pima County
Percent of single-defendant cases	89%	81%
Percent of cases with one count	76%	51%
Mean number of witnesses per case	1.7 witnesses	2.3 witnesses
Percent of witnesses who were civilians	52%	68%
Percent of witnesses who were defendants	2%	2%
Median pages of testimony	28 pages	39 pages
Percent of cases in which defense questioning exceeded prosecutor questioning	61%	57%
Percent of cases in which physical/documentary evidence was introduced directly	7%	7%
Percent of cases in which an offer of proof was made	8%	14%
Aver. number of objections per case (on any ground):		
Prosecution	1.9%	4.9%
Defense	2%	4.6%
Percent of cases in which no probable cause was found	3%	6%

*Note that the types of cases presented to the preliminary hearing in Pima County are far more selective than those presented in Maricopa County, which uses the preliminary hearing as its screening device of choice. Even in Maricopa County, however, many preliminary hearings never occur as a result of waivers, and this self-selection may influence case characteristics.

At the same time, the defense in both counties is likely to develop more testimony through questioning than is the prosecutor. Furthermore, there is no difference between the two counties in the extent to which physical or documentary evidence is introduced at the hearing, an offer of proof is made, or defendants take the stand. In neither county are such events likely to occur. As noted above, rarely is the defendant not bound over following the hearing in either jurisdiction.

CHAPTER 4

THE COUNTY GRAND JURY IN ARIZONA

Use of the grand jury as an alternative screening mechanism varies between the two counties studied in Arizona.[1] As described in Chapter 2, the grand jury is the predominant screening device in Pima County, whereas it is used only in specific instances in Maricopa County. Thus, in Pima County there is a presumption that a case will go to the grand jury absent special circumstances; in Maricopa County the presumption is that most cases will not go to the grand jury.

To review the factors influencing the decision-making process in Maricopa County, respondents indicated that the grand jury was most likely to be used in cases involving multiple defendants, complex documentary evidence, or large numbers of witnesses (particularly if they are undercover agents, from out-of-state, or professionals such as doctors or scientific experts). The grand jury was also favored for cases involving crimes covering more than one precinct, since a separate preliminary hearing would be required in each precinct. Prosecutors in Maricopa County cited the grand jury's efficiency in such cases as the primary reason for selecting that mechanism. However, the grand jury is likely to be used in these instances only when the perceived advantages of scheduling a preliminary hearing do not apply or are clearly outweighed by the benefits anticipated from the use of the grand jury.

Given these two dramatically different approaches to using the grand jury to screen cases, the manner in which the grand jury operates in practice in each county becomes of interest. To place Arizona's grand jury system in context, this chapter briefly examines the range of grand jury variation on a national basis (with particular emphasis on the extent to which certain grand jury reforms have been implemented). Turning to Arizona's experience, we describe the grand jury proceeding itself, referencing the Rules of Criminal Procedure, perceptions of practitioners interviewed in the course of this study, and the findings of our analysis of grand jury transcripts in sampled cases. We describe the types of cases presented to the grand jury, the impanelment process, and the characteristics of the proceeding itself, including duration, the nature of the evidence, and the respective roles of the prosecutor and the grand jurors. In closing, we discuss the effectiveness of the grand jury in performing its screening role.

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[1] The use of the grand jury at the state level in Arizona to screen complex cases is discussed in Chapter 5.

4.1 The Legal Framework

4.1.1 A National Perspective

As noted in the introduction to this report, the grand jury has been the subject of considerable criticism in recent years and has been the focus of a number of proposals and initiatives dedicated to its reform.[1] The thrust of these efforts has been to incorporate due process protections for targets and witnesses into the grand jury proceeding and to upgrade the quality of evidence in addition to making the proceeding more open and subject to review. Provisions which allow witnesses to be accompanied by an attorney while testifying before the grand jury or which require notice to witnesses of their legal rights and notice to targets that they are the subject of an inquiry have been advocated as mechanisms to guarantee that due process is not circumvented in the grand jury room. Other reforms have been proposed to improve the quality and quantity of evidence available to the grand jury. These include reforms which would require that the grand jury be allowed to hear only evidence which would be admissible at trial and mechanisms to facilitate the introduction of exculpatory evidence. A third category of reform proposals has been aimed at creating a formal record of the grand jury proceeding and opening the proceeding to external scrutiny including judicial review.

States vary in the extent to which they have adopted any of these provisions as part of their laws governing grand juries. To determine the range of national variation, state laws were analyzed using three provisions which were selected as indicators of the degree of implementation of grand jury reform proposals: the right to counsel in the grand jury room, applicability of trial rules of evidence, and requirement of a formal record of the proceedings.[2] These provisions were selected because proponents of reform include them as central elements in proposals to modify the grand jury, and they are typically specified by law rather than local custom or informal practice. (See Figure 4.1.)

Fifteen states have enacted a statutory right to counsel in the grand jury room, although there is considerable variation in the types of witnesses who may exercise this right. Seven states allow all grand jury witnesses to be accompanied by an attorney, and two states (including Arizona) restrict this right to witnesses categorized as targets of the grand jury's inquiry. One state allows all witnesses except those under a grant of immunity to have an

[1] For a more thorough discussion of the issues related to grand jury reform see Emerson, Deborah Day, Grand Jury Reform: A Review of Key Issues (Washington, DC: National Institute of Justice, 1983).

[2] This analysis was first conducted for the National Institute of Justice and is reported in Emerson, op. cit.

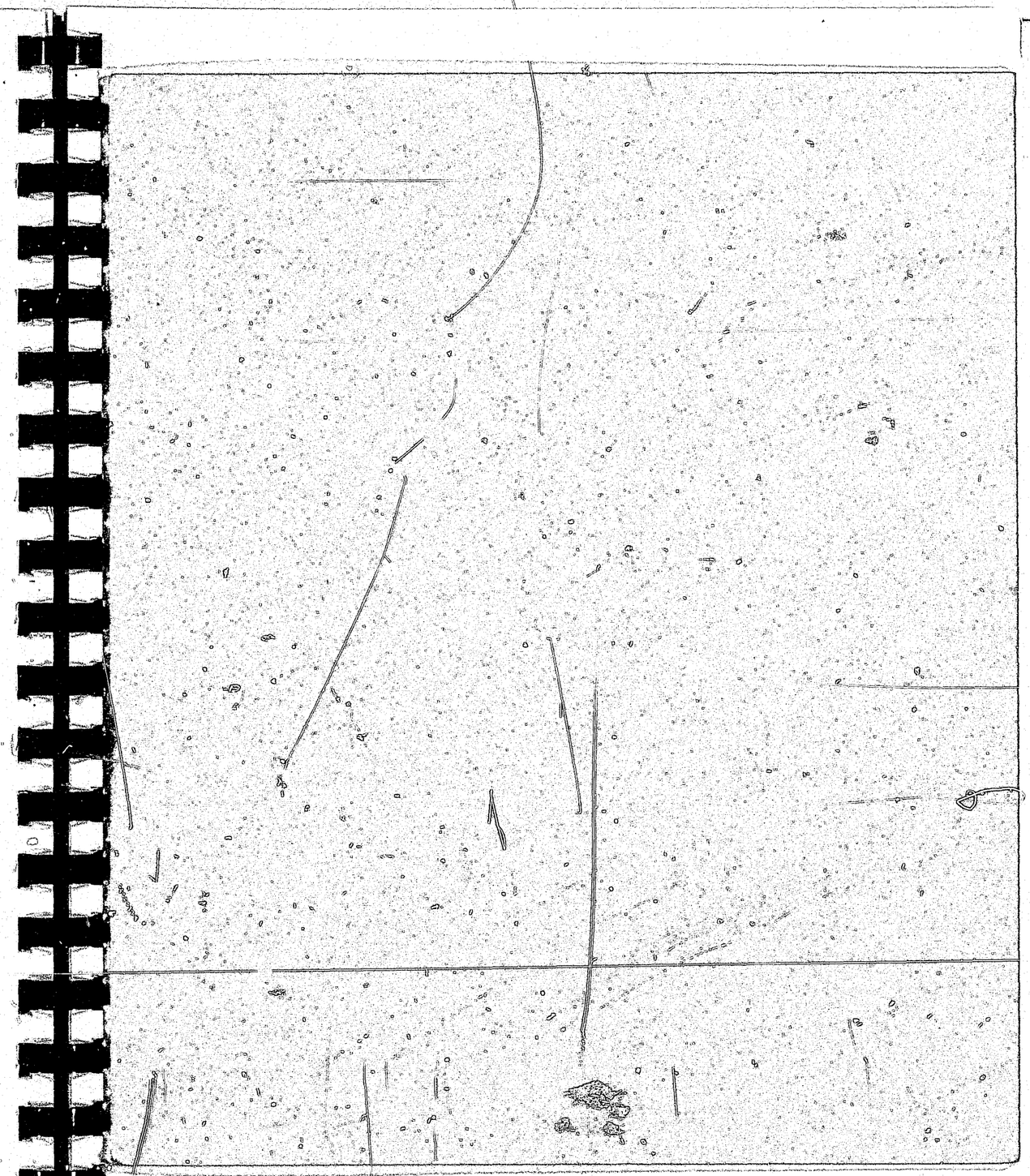

Figure 4.1

NATIONAL OVERVIEW OF ENACTMENT OF GRAND JURY REFORMS[1]

GRAND JURY REFORMS	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS
Right to Counsel in the Grand Jury Room			X[2]			X								X			X[3]					X	X[4]	X[5]	
Trial Rules of Evidence					X								X												
Requirement of Formal Record of Grand Jury Proceedings			X		X	X	X							X			X					X		X	

(continues)

Figure 4.1

NATIONAL OVERVIEW OF ENACTMENT OF GRAND JURY REFORMS[1]

GRAND JURY REFORMS	MO	MT	NB	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
Right to Counsel in the Grand Jury Room							X[2]	X[5]				X		X[6]			X					X[7]	X[8]		X	
Trial Rules of Evidence				X			X	X		X		X	X				X			X						
Requirement of Formal Record of Grand Jury Proceedings				X		X	X	X		X		X		X[6]	X					X	X	X[7]	X			

[1] For purposes of this figure, the right to counsel is available to all witnesses, unless otherwise specified, and jurisidictions are characterized, if applicable, as requiring trial rules of evidence, although one or two exceptions to the trial rules are made for grand jury hearings.

[2] Right to counsel available only for target witnesses.

[3] Only state in which counsel is allowed to object to questions.

[4] Right to counsel available only for those witnesses who have been granted immunity.

[5] Right to counsel available only for those witnesses who have waived their right to immunity.

[6] These provisions only apply to investigative grand juries. Grand juries in this state are not authorized to issue indictments.

[7] These provisions only apply to special grand juries, which are investigative only and do not have the power to issue indictments.

[8] Right to counsel available for all witnesses except those testifying under a grant of immunity.

SOURCE: Emerson, op. cit. Based on a review of state laws enacted through 1981.

attorney present; another allows only immunized witnesses to be accompanied by an attorney; and two other states permit only those who have waived immunity to have counsel with them. The final two states allow witnesses to be accompanied by an attorney only before investigative or special grand juries. In all 15 states (except Kansas, where the attorney may object to a question), the role of the attorney is limited to advising his or her client. Attorneys are directly prohibited from addressing the grand jury.

The second type of provision analyzed relates to the applicability of evidentiary standards to the grand jury proceeding. In some states, no standards apply, and the grand jury may receive hearsay evidence without regard to its reliability. Ten states have enacted evidentiary standards for the grand jury that approach the requirements imposed at trial, although a few exceptions to the trial rules are allowed in the grand jury proceeding. Most frequently, hearsay is the one exception which is permitted.

The third provision involves the requirement that the grand jury proceeding (except deliberations) be recorded. Given the secrecy surrounding the grand jury and its one-sided nature, many commentators have cited the need for a mechanism to protect against potential abuse. The requirement of a formal record of the proceeding is the most frequently enacted of the three provisions. However, states vary considerably in their requirements governing the scope and distribution of the record. Some require that only testimony be recorded, whereas others mandate the recording of the entire proceeding. Furthermore, some automatically make the record available to the defense soon after the indictment is made public; others have strict limits governing access.

In summary, fewer than half of the states have implemented any of these reforms, and fewer still have implemented more than one. Although the impact of these laws on the degree of due process protection or in deterring or uncovering abuse is unknown, one thing remains clear: these provisions by themselves do not dramatically alter the basic nature of the grand jury proceeding, which remains non-adversarial and largely under the direction of the prosecutor.

4.1.2 The Arizona Legal Framework

Arizona's grand jury is not atypical of others in the country, although no single state can be truly representative, given that each is unique. Under the State's law, a grand jury consists of 16 randomly selected qualified electors and four alternates who are screened for general bias prior to impanelment by the superior court in the appropriate county. The court also appoints a foreman who is charged with maintaining order and ensuring that the grand jury proceedings are conducted in accordance with the appropriate laws. Since the Arizona Rules of Criminal Procedure require that at least

nine grand jurors concur on an indictment, one of the important procedures at the beginning of each session is to make certain that there are at least nine qualified jurors present. In addition to meeting the general qualifications to sit on a grand jury, each juror must be free of involvement or bias in an individual case to be qualified to hear that case.

The Rules of Criminal Procedure govern the operation of the grand jury in Arizona as well as the selection and duties of jurors. Some of the modifications described above as part of the national perspective have been implemented in Arizona. Rule 12.5 provides that a witness may be accompanied by counsel "if the witness is a person under investigation by the grand jury." If such a person appears (either as a result of a subpoena or as a result of the grand jury's granting his or her written request to appear), Rule 12.6 requires that he or she be advised of the right to remain silent and the right to be accompanied by an attorney. If the latter right is exercised, the Rule limits the role of counsel by stating: ". . . counsel shall not attempt to communicate with anyone other than his client" and provides for summary expulsion of the attorney by the foreman for violation of that requirement.

A complete stenographic record of the proceedings (except deliberations) is required by the Arizona Rules. This requirement, although stated fairly generally by the rule, has been clarified by case law. In a landmark case, an indictment was challenged due to off-the-record conversations between jurors and discussions between jurors and witnesses during short recesses. The Court of Appeals strongly upheld the requirement of a thorough recording, ruling as follows:

> All proceedings are to be recorded, except the jury's deliberations. Recording during a formal recess is not required, i.e., if the recess is actually a hiatus in the proceedings where the jurors are not to discuss the case with each other, let alone with a witness or the prosecutor. No conversation is to be allowed between jurors and witnesses during a recess. No off-the-record conversation is to be allowed between the jurors and the prosecutor regarding the case or any legal aspect of it. All actions of the prosecutor and the jurors should be susceptible to review to ensure to the defendant an impartial, just and unbiased hearing.[1]

Following an indictment, a transcript of the recording must be filed in Superior Court and is available only to the prosecution and the defense. This record can be used to challenge the indictment on the grounds that the defendant was denied a substantial procedural right or that an insufficient number of qualified jurors concurred in the indictment. The remedy for this type of challenge is a remand for a new determination of probable cause.

[1] Wilkey v. Superior Court, 115 Ariz. 526, 566 P.2d 327 (1977).

There are no provisions for challenging an indictment on the sufficiency or quality of the evidence introduced (unless the defendant successfully alleges that these led to a denial of a "substantial procedural right"), since Arizona has not adopted evidentiary standards for grand jury proceedings.

4.2 Characteristics of Grand Jury Cases

As with the preliminary hearing caseload, the nature of the cases handled by the grand jury is interrelated with the factors influencing a prosecutor's decision to use the grand jury. This is particularly true in Maricopa County, where cases do not routinely go to the grand jury but are handled in that fashion because of a specific advantage anticipated by the prosecutor. These advantages may be tied to case characteristics, e.g., the grand jury may be perceived as more efficient in multiple defendant cases. However, other reasons unrelated to case attributes may lead to a decision to use the grand jury in individual cases. For example, a prosecutor may present a case to the grand jury to avoid an anticipated confrontation with a particular defense attorney, thereby making the decision on the basis of personalities rather than the nature of the case. Nonetheless, it is interesting to look at the types of cases presented to the grand jury in the two counties studied, although these factors clearly are not predictive.

Although single-defendant cases were the most common type of case presented to the grand jury, our samples contained a number of multiple defendant cases, with the highest number of defendants in one case being seven. Table 4.1 displays the number of defendants per case in each county.

Table 4.1

NUMBER OF DEFENDANTS PER CASE*

Number of Defendants	Maricopa County	Pima County
1	80%	78%
2	13	16
3	3	3
4	3	1
5 or more	1	1

*Cases originating from the specialized prosecution units in the two counties (the Organized Crime and Racketeering Unit (OCRU) in Maricopa County and the Consumer Protection/Economic Crime Unit (CP/ECU) in Pima County) involved one defendant 80 percent of the time.

The frequency of multiple-defendant cases before the grand jury is especially interesting since many prosecutors perceive the grand jury as far more efficient than the preliminary hearing for these types of cases. In Maricopa County the use of the grand jury for multiple defendant cases is much more pronounced, given that only 11 percent of preliminary hearings involve more than one defendant (see Section 3.2) compared to 20 percent of the grand jury cases.

Another factor that may influence the decision to use the grand jury and the nature of the proceeding is the type of crime involved. Table 4.2 examines the patterns of offenses charged in grand jury cases.

Table 4.2

OFFENSES CHARGED IN GRAND JURY CASES

Offenses	Maricopa County	Pima County
Crimes of violence only*	22 (29%)	14 (19%)
Crimes against property only	26 (35%)	37 (50%)
Both crimes of violence and crimes against property	4 (5%)	3 (4%)
Drug offenses only	19 (25%)	10 (14%)
Drug offenses and crimes of violence and crimes against property	1 (1%)	0 (0%)
Other	3 (4%)	10 (14%)
	75 (99%)	74 (101%)

*Crimes of violence include murder, assault, sexual offenses, kidnapping, robbery, and theft from the person. Although the latter two offenses involve the taking of property, they also involve force or the threat of injury and direct confrontation between the victim and the perpetrator. Crimes against property include burglary, theft, and forgery.

As can be seen in Table 4.2, Maricopa County presents cases with a broad range of offenses to the grand jury, as is the case with the preliminary hearing (see Chapter 3). Property crimes were more prevalent at the grand

jury than were crimes of violence, although many cases involving crimes of violence were presented as well. Our interview data suggesting that the most serious cases were typically presented to the grand jury received support from our finding that 80 percent of the homicide cases in our sample were presented to the grand jury. Sexual assault cases also appeared in our grand jury samples. This finding is consistent with the stated desire to minimize the burden on the victim through use of the grand jury, but it is somewhat surprising that some of the cases involved child victims, given the emphasis placed on the preliminary hearing as a mechanism for preserving testimony should a child victim's memory begin to fade.

In Pima County, crimes against property account for one-half of the workload of the grand jury. In view of the selective use of the preliminary hearing, these cases are following the typical path rather than receiving unusual treatment. Five "driving while intoxicated" charges fell into the "other" category. The remaining five charges all involved crimes against the justice system, including bribery, perjury, and obstructing justice.

The number of counts per case was another case characteristic examined. Again, single-count cases were the most common but multiple-count cases represented 41 percent of the cases in Maricopa County and 45 percent of those in Pima County. This again suggests that the grand jury is considered an important tool in more complex or time-consuming cases. The two counties were similar in the distribution of counts per case.

Table 4.3

NUMBER OF COUNTS CHARGED PER CASE*

Number of Counts	Maricopa County	Pima County
1	44 (59%)	41 (55%)
2	19 (26%)	19 (26%)
3	6 (8%)	9 (12%)
4	3 (4%)	3 (4%)
5	2 (3%)	1 (1%)
7	1 (1%)	0 (0%)
10	0 (0%)	1 (1%)
	75 (101%)	74 (99%)

*The majority of the cases presented to the grand jury by the specialized units, OCRU, and CP/ECU involved multiple counts. In Maricopa County, only 20 percent of the cases presented by OCRU involved a simple allegation, whereas the pattern in Pima County more closely resembled the general caseload, with 44 percent of the cases involving single defendants.

There is less difference in the types of cases presented to the grand jury in the two counties than there is in the characteristics of the respective preliminary hearing caseloads. Thus, any variation between counties in the operation of the grand jury is less likely related to differential usage patterns (as is probably the case with the preliminary hearing) than to differing local policies or practices.

4.3 Grand Jury Operations

4.3.1 Selection and Impanelment

After a pool of qualified electors has been selected from which grand jurors may be drawn, it is the responsibility of the impanelling judge in each county to verify each prospective juror's qualifications, screen for bias or other grounds for exclusion, and determine whether any other barriers to service on the grand jury exist. Although the questions asked of prospective jurors generally covered similar topics in the two counties, the method of examining the panel differed. In Maricopa County, an initial series of questions was directed to a panel of 65 prospective jurors as a group, and the judge did not announce his decisions until after the examination had been completed on all issues. Therefore, the jurors did not know which factors would result in an excuse from service on the panel and which would not. In Pima County, however, the entire group was not screened. Instead, the clerk of court randomly selected 16 prospective jurors from among those present in a large pool. (It is not possible to determine the exact size of the pool from the transcript.) Although only these 16 were initially questioned, the entire group remained present throughout the proceeding, since replacements might have been needed as excuses were granted. To avoid the need to repeat any questions if replacements were needed, the judge asked that everyone take note of the questions asked of the group of 16.

The level of questioning also varied between counties in most topics discussed. In Maricopa County, the impanelling judge posed very specific questions to the jurors, such as, "What would be the effect of your absence on your employer?" In contrast, the Pima County impanelment judge typically asked the panel members in a more general fashion to relate any circumstances which would cause substantial hardship to their family or employer. The types of responses did not differ significantly between counties despite the contrasting style of examination.

To ascertain their qualifications to serve as grand jurors, the panels in both counties were examined to verify that they were citizens, at least 18 years of age, residents of the appropriate county, residents of the state for at least 50 days, and able to write their name or make their mark. Another line of inquiry involved prior convictions and mental condition. In Pima County, this group of questions was asked in the same manner as any others. In Maricopa County, however, the judge said that anyone who wished to respond

in private in his chambers could do so, while cautioning the group that they should not make any assumptions if any person elected to respond in private. The judge then read four questions before asking for responses. The questions dealt with: prior convictions for treason or a felony without a subsequent restoration of civil rights, current condition of insanity or guardianship status, mental illness which would interfere with service, and status as surety on a bail bond for someone accused of a crime. None of the panel asked to respond in chambers, nor did anyone answer affirmatively when the questions were posed to the group.

In addition to gathering background information on each prospective juror in areas such as education, employment and marital status, each impanelling judge interrogated the panels on their relationships or contacts with law enforcement personnel. The panels were also asked to report any other factors or influences in their experience which might prejudice them in any way.

The inquiry into this issue was handled much more thoroughly in Pima County than in Maricopa County, where only a general question was directed to the jurors. To identify cases in which the prospective jurors would not be able to act objectively or fairly, the judge in Pima County discussed some of the issues that would likely come before the grand jury. Topics touched on by the judge in this regard were narcotics, murder, and sexual assault or child molestation. In the last instance, the judge warned the panel that they would probably be hearing very graphic, explicit testimony and asked whether any of them "would have any difficulty in hearing about such matters in detail from time to time, or would be offended by it?"[1] The judge urged the members of the panel to give serious thought to whether any personal experiences or experiences of their families would interfere with the performance of their duties as grand jurors. When two individuals indicated that they felt they could not act impartially on cases of this type, the judge raised the possibility that they could excuse themselves from the grand jury each time a case of this nature was presented. After both jurors agreed to that strategy, the judge asked the deputy county attorney, who was present at the impanelment proceeding, how frequently cases involving sexual assault or child molestation might arise. Given the deputy county attorney's estimate of 15 to 20 percent of all cases, the judge excused the two jurors.

In both counties, the judges presiding over the impanelment proceedings appeared cognizant of the potential burdens of grand jury service and yet were careful to emphasize both the importance of a representative grand jury and the contribution to the justice system made by those who serve as grand jurors. In assessing the burdens of service, one judge stated that a juror would be excused only if substantial hardship resulted. However, in both counties, the judges pointed out ways to prevent or alleviate any hardship by describing the laws forbidding punitive actions by employers, informing jurors that the foreman could excuse an individual juror from attending on a

[1] Impanelment, Pima County Grand Jury, No. 40, p. 35.

given day, and even suggesting ways in which a juror could reschedule other commitments. Jurors were excused for a variety of reasons, including serious family illness, hardship due to lost income, hardship to an employer through absence of a key staff member, and conflict between the requirements of jury duty and a lengthy vacation for which tickets had already been purchased. In instances in which the prospective juror was uncertain about the impact of jury duty but suggested that problems might arise, excuses were typically not granted.

One way in which the proceeding in Pima County differed was the judge's practice of requesting prospective jurors to obtain additional information on the impact of jury service before an excuse was granted. For example, a student was encouraged to try to rearrange his class schedule, and an employee was asked to call her boss to ascertain the actual impact of her absence. The judge's decision was deferred until later in the proceeding pending the outcome of these inquiries. As a result, the remainder of the pool could not be excused since there were still two or three prospective jurors who had not determined whether their service would cause hardship. One juror was ultimately excused, but the replacement was examined only by a general inquiry on whether he would be disqualified on any grounds discussed up to that point. When the grand jury was sworn, two members who were students were still uncertain whether they could resolve their class scheduling conflicts. The judge noted they could be replaced if they were excused at some point in the future.

Following the selection of 16 grand jurors and four alternates, the impanelling judge is responsible for instructing the jurors on their duties. In both counties, the impanelling judge provided some background information on the grand jury and its place in the criminal justice system. The distinctions between the grand jury and the trial jury were explained and the historical role of the grand jury as both sword and shield was described. The judge in Maricopa County was careful to point out that the grand jury was part of the judicial branch and was responsible to the court for its actions. In Pima County, the judge went into considerable detail differentiating the probable cause standard from one involving proof beyond a reasonable doubt and explained that, in the typical case, the grand jury would be hearing evidence from only one side.

An interesting component of the judge's remarks in Pima County concerned the preliminary hearing. The grand jurors were informed that, at the discretion of the county attorney, the preliminary hearing could be used as an alternative method for initiating charges. However, the judge told the group that

> ... for a variety of reasons, which I will not get into, ... in Pima County the number of cases that go through the Grand Jury far exceeds the number of cases that go before a magistrate.[1]

[1] Ibid, p. 13.

The judge pointed out the similarities in the function of the grand jury and the magistrate at the preliminary hearing, then noted that there are differences in the proceedings including the presence of the defendant at the preliminary hearing. The prospective jurors were told of their right to ask to hear the defendant or other witnesses. The judge tried to allay any concerns the jurors might have about this issue in the following manner:

> I hope this doesn't upset you...that the defendant is not present before the Grand Jury because he is not for...most of the matters that are presented to you, ...[although in] a preliminary hearing the defendant does have a right to be present. As I say, ...[if] the Grand Jury would like to hear from the defendant, they can, but just as a matter of course it is not usually done.[1]

The judge concluded this area of his comments by pointing out that the defendant can testify if he or she so desires, but does not have to testify if he or she does not wish to do so.

An important aspect of the instructions concerned the daily operations of the grand jury, its duties and any restraints placed on its members. To the extent possible, the impanelling judges in both counties tried to prepare the jurors for their task and let them know what to expect during their term of service. The judges also used this opportunity to caution jurors not to misuse their powers but not to be hesitant to use them if necessary. Jurors were informed of the laws governing the presence of attorneys for witnesses in the grand jury room and the limits on their participation. The jurors were notified of their right to hear evidence at the request of the person under investigation or to allow that person to testify upon his or her written request. The judges informed the jurors of their power to require that evidence which they believed would explain away the charges be presented to them. In Maricopa County, panel members were told that they should ask questions of the witnesses who appeared if they felt the questions were warranted but were cautioned to refrain from asking "needless, repetitious, or irrelevant questions."[2]

The requirements for deciding upon an indictment and returning it to the court were described to the jury, as well as the procedure for declining to return an indictment. On that issue, the jurors in Maricopa County were urged not to hesitate in refusing to vote for an indictment if they doubted that the standard of proof (probable cause) had been met. They were told they were:

[1] Ibid., p. 15.

[2] Proceedings before the 35th Maricopa County Grand Jury in Re: Impanelment, p. 67.

...performing a critical task in standing here as a grand jury between the prosecutor and the citizens of the community. You have the protection and liberty of the community and its citizens in your charge.[1]

The respective roles of the grand jury and the prosecutor were thoroughly defined in both counties. The jurors were told that the county attorney cannot tell the grand jury what he or she thinks it should do, nor can he or she evaluate the testimony or make a closing argument. The judge noted that the prosecutor cannot comment on the evidence or answer questions about a witness's testimony but explained that the county attorney did serve as legal advisor to the grand jury. Both judges offered the jurors the opportunity to direct legal questions to a judge if they could not obtain an answer from the prosecutor. The judge in Pima County cautioned the jurors against seeking legal information on their own:

> . . .you might have the idea to go look up the law on your own. We don't want you to do that. We want you to ask the County Attorney if you have any questions. Sometimes in the past others have decided that they want to better understand the law by looking up the law for themselves and that has caused some difficulty, so be sure and defer to the County Attorney for your legal expertise and advice in that regard. If he can't answer the question directly he can turn it over to me and we will try to resolve it in that fashion.[2]

In advising the grand jury on its role in making charging decisions, the judge in Pima County informed the grand jurors that the prosecutor would be asking them to select the procedure to be followed concerning the preparation of the indictment. He then described the alternative approaches and stressed the discretion available to the grand jury.

> [One] way this could be done is this: the County Attorney could bring in the witnesses before you and have them testify, give you the law in the area that the County Attorney thinks is appropriate and then let you deliberate and decide what charges and who, if any, should be indicted.
>
> ...There would be nothing wrong with that process, but it does take some time.
>
> So what most Grand Juries in Pima County have done is go along with the procedure whereby the County Attorney will prepare what they think the indictment should be with the

[1] Ibid., p. 67.

[2] Impanelment, Pima County Grand Jury No. 40, p. 91.

charges in it and possible defendants, but as I said before,...it is in no way binding upon you.

If they have prepared an indictment and suggested an indictment that Defendant A and Defendant B and Defendant C are in it, and you don't think Defendant C should be there, tell the County Attorney to remove C. That is your perogative. If you have a Defendant B and you think D should be charged, the Grand Jury may prepare an indictment to reflect that. If they brought an indictment in front of you that showed an offense of robbery and you didn't think that robbery was committed but only theft, you say no, we are not going along with the robbery in the proposed indictment, but prepare an indictment charging burglary; in other words, it is your decision. Their prepared indictment is only a suggested indictment and not binding upon you.[1]

Several times during the course of providing these instructions the judges stressed the importance of adhering to the requirement that all discussions be in the presence of the court reporter making the official record. One judge described past occurrences of off-the-record conversations which had led to successful challenges of indictments. This was given particular emphasis in Maricopa County during the instructions regarding the role of the prosecutor as legal advisor. After reiterating the point that any question directed to the county attorney must be on the record, the judge said:

> This notion of having all matters on the record is so important that I have instructed the County Attorney and his deputies who will be with you each day not even to say hello to you unless you are in the grand jury room with the court reporter present.[2]

Although the judges in both counties gave the newly-sworn grand jurors the opportunity to ask questions, there was no indication that this ever occurred in the impanelment transcripts we read. In addition to the instructions from the judges, grand juries received more specific information from prosecutors on routine housekeeping matters and the applicable statutes. We did not review transcripts of these proceedings since they largely consist of recitations of statutory material and, therefore, we do not know if jurors were more forthcoming with questions to the prosecutors than they were to the judges.

An interesting question is the effectiveness of the instructions delivered to grand juries by judges and prosecutors. In a participant-observer

[1] Ibid, pp. 71-73.

[2] Proceedings before the 35th Maricopa County Grand Jury in Re: Impanelment, p. 74.

examination of the grand jury in Harris County (Houston), Texas, Carp analyzed the length of time it took for grand jurors to comprehend their role. His findings are reported below.

Given that the Harris County grand juries routinely handled 58 cases a day, and taking into consideration their total output, Carp concluded that the first eight percent of the cases processed by any grand jury were resolved without the grand jury fully understanding its responsibilities or duties.

Although our study did not address this issue, it is certainly an important point to consider when analyzing the relative merits of the preliminary hearing (with and without law-trained magistrates) and the grand jury. It may also add perspective to the descriptions of grand jury participation in questioning witnesses and making charging decisions.

LENGTH OF TIME REQUIRED BEFORE GRAND JURORS SUBSTANTIALLY UNDERSTOOD THE DUTIES, POWERS, AND FUNCTIONS OF A GRAND JURY

Length of Time	Percentage of Grand Jurors (N = 156)
Understood prior to or immediately after first session	22
Understood after second session	27
Understood after fourth session	32
Understood after sixth session or longer	19
(Median time is somewhat more than the third session)	

Source: Carp, Robert A., "The Harris County Grand Jury: A Case Study," Houston Law Review, 12:90 (1974), p. 99.

4.3.2 Commencement and Duration of the Proceedings

In both Pima and Maricopa Counties, each case to be considered by the grand jury is introduced in a routine fashion. Typically, the presenting attorney will announce the case by name and number and recite the alleged crimes, the names of the witnesses who are scheduled to testify, and the names of the victims to alert jurors to any potential conflicts.

In Maricopa County, where the grand jury proceeding is highly formalized, a series of "admonitions" is read to the grand jury at the beginning of each day's session, including the grounds for self-disqualification. At the

outset of every case the jurors are asked whether any of these admonitions are applicable.

In the cases contained in our random sample, jurors would occasionally report the existence of possible grounds for disqualification. There was no consistent response, however; different prosecutors handled the situation in different ways. On occasion, jurors noted that they were acquainted with one of the witnesses or other key persons, but remained on the grand jury after indicating that this would not bias their decision or affect the weight given to that person's testimony. In one case in our sample, the following scenario occurred:

> The juror was uncertain whether he knew one of the people involved in the case so asked factual questions about the person. The prosecutor recessed the grand jury and met with the individual juror and the court reporter outside the presence of the other jurors. A discussion was held on the record regarding characteristics of the person involved in the case and the nature of the juror's relationship with that person once the question of identity was resolved. The juror continued to sit on the case following his assertion that he was not biased or otherwise influenced by the relationship.

Another area in which prosecutors varied was the degree to which they assisted a juror in determining whether there were sufficient grounds for disqualification. One approach was to redirect the juror's questions back to the juror by pointing out that disqualification could result only from the decision of the juror or the judge and that the prosecutor did not have the authority to excuse any juror from any particular case. A much more direct approach was taken by other prosecutors who advised jurors that, in effect, they should excuse themselves given the relationship that had been described.

As noted above, the offenses under consideration were included in the introductory announcement of each case. Strict precautions were taken in Maricopa County to avoid prejudicial language while providing the grand jury with this information. In one instance, a grand jury handling one of its first cases asked the prosecuting attorney to read the charges. The county attorney pointed out that there were no charges before the grand jury and that the proceeding was "just an investigation of possible criminal activity." Although in other cases in this county the offenses under consideration were characterized as "charges," prosecutors typically corrected themselves when referring to counts of the indictment before the grand jury had deliberated. In contrast, prosecutors in Pima County routinely announced the case in terms such as "Count 1 of this indictment concerns..."

Every grand jury receives general instructions at or near the time of impanelment regarding the substantive criminal laws they will be called upon to apply. However, counties differ in the procedures used to refresh the grand

jurors' recollection of the applicable statutes. In Maricopa County, it is office policy to ensure in every case that each juror present has heard all statutes relevant to the case. If the grand jury's records indicate that one juror has not heard a certain relevant statute, the prosecutor is instructed to read that law. Furthermore, the jurors are to be given the opportunity to hear the statutes again if they desire. In Pima County, the instructions at the impanelment are rarely supplemented, with two exceptions: (1) when a juror requests that a statute be re-read; and (2) when the statute has become applicable for the first time. In our sample of cases, prosecutors in Maricopa County were quite consistent with their stated policy, reading statutes or referencing them as having been read earlier in 99% of the cases. In Pima County, where this is more discretionary, statutes were read in less than 7 percent of the cases sampled.

These formalized procedures have an effect on the duration of grand jury cases in Maricopa County, as would be expected. However, we also found that the quantity of testimony produced for the grand jury was greater in Maricopa than in Pima County. In Maricopa County, the median number of pages of testimony was approximately seven, whereas in Pima County it was four. Greater disparity in the amount of testimony was shown in cases presented by the special units, with OCRU cases (Maricopa County) involving a median of eleven pages of testimony and CP/ECU cases (Pima County) taking a median of four pages of testimony.[1] Although pages of testimony ranged as high as 39 pages in Maricopa County and 54 pages in Pima County (for cases from the regular, not the specialized, prosecution caseload), many cases were very brief, especially in Pima County where nearly one-quarter of the cases involved only two pages of testimony. Only three percent of the cases in Maricopa County were that brief.

Given that there is little difference in the grand jury's caseload in the two counties, it is interesting to note the variation in time spent hearing testimony. When considered in conjunction with our findings that the preliminary hearing is longer in Pima County than in Maricopa County (see Section 3.3.2), this suggests that the <u>atypical</u> proceeding in each county may be more intensive or less routinized. Partly as a result of this situation, the atypical proceeding is likely to remain atypical, since each county feels their system would bog down if they reversed their practice.

[1] In Maricopa County, cases in the general grand jury caseload took an average of 25 minutes, and those presented by OCRU took 28 minutes. We are unable to infer time elapsed in Pima County by comparing pages of testimony, since we do not know what portion of the time was allocated to testimony instead of the formalized procedures described above. It is interesting to note that Carp's analysis of the Harris County (Houston), Texas, grand jury showed an average of five minutes per case for the entire proceeding, including deliberations.

4.3.3 <u>Presentation of the Government's Case</u>

Arizona grand jury proceedings are not bound by the same evidentiary standards that apply at trial.[1] This influences prosecutors' perceptions of the efficiency of the grand jury[2] and is a major factor in shaping the nature of grand jury proceedings. Prosecutors cite the ability to introduce hearsay as an advantage, since it allows them to consolidate their evidence and present only one witness who can testify to matters within his or her own knowledge as well as those communicated to him or her by others. A related factor occasionally cited by prosecutors is the use of hearsay testimony to protect the identity of an informant.[3]

<u>Testimonial Evidence</u>

The typical case heard by the grand jury in both Pima and Maricopa Counties involved only one law enforcement witness. This pattern was followed in 92 percent of the cases sampled in Maricopa County and in 95 percent of those in Pima County. The remaining 8 percent of the routine cases in Maricopa County involved two law enforcement witnesses; no civilian witnesses testified. In contrast, the remaining 5 percent of the cases in Pima County involved civilian witnesses as well as law enforcement witnesses. These witnesses were either victims or eyewitnesses.

A similar pattern occurred in cases presented by the specialized prosecution units: civilian witnesses testified in only eight percent of these cases in both counties. The relative absence of civilian witnesses is not surprising in view of the preference given to the preliminary hearing as a forum to test the credibility of witnesses.

One distinction between the cases presented by the specialized units and the regular caseload was the type of law enforcement officers testifying. Routine cases were typically presented through the testimony of a police officer

[1] See, for example, <u>State v. Guerrero</u>, 119 Ariz. 273, 580 P.2d 734 (App. 1978).

[2] It should be noted, as discussed in the preceding chapter, that hearsay is also admissible at the preliminary hearing in certain circumstances.

[3] It is interesting to note that this purpose can be accomplished at the preliminary hearing as well, although perhaps not as easily since the witness has to testify under cross-examination. In one of our sample preliminary hearings, the police officer testifying refused to answer any questions that might provide clues to the identity of an informant, even refusing to respond to questions referring to the informant as "he" until the defense attorney qualified his labelling as generic.

who had some involvement with investigating the case or making the arrest. In Maricopa County, nearly half of the law enforcement witnesses testifying in the cases in our special sample were undercover agents, reflecting the substantial number of narcotics cases handled by the OCRU unit. In Pima County there were no undercover agents; most government witnesses were investigators.

The nature of the testimony offered to the grand jury by law enforcement witnesses often involved merely a recitation of the facts contained in the police report. In some instances, the witness was not directly involved in the events being described (often an officer testified to the actions of both himself or herself and other officers involved in the case) and did not have any information beyond that in the police report. Given the standard of probable cause and the absence of cross-examination, this was generally considered sufficient evidence by the grand jury, since indictments were almost always returned. However, these factors combined to limit the grand jury's ability to question the witness effectively and rendered the transcript of little use to the defense as a discovery device.

As noted earlier in this chapter, provisions to protect the rights of grand jury witnesses have been promulgated as an important component of grand jury reform efforts. It is clear that these issues arise only in unusual circumstances in the types of cases heard by county grand juries in Arizona, since most witnesses are law enforcement officials. We did find two instances, however, in which the legal rights of the witness became a subject of discussion during the grand jury proceeding.

Although none of our randomly sampled grand jury cases involved an appearance by a witness who was a target of the inquiry or directly at risk, one witness did assert certain legal rights as described in the anecdote below.

> In a case involving assault and kidnapping charges arising out of an altercation between the defendant and his ex-wife's divorce lawyer, one witness claimed several constitutional protections. The witness was the defendant's lawyer and was an eyewitness to the altercation. The witness willingly testified to his observations but refused to answer questions regarding his conversations with the defendant, citing the attorney-client privilege. (At one point, the witness also raised a Fifth Amendment claim, but this was never carried any further.) The prosecutor asked the grand jury to have the witness appear before the Superior Court to settle the issue of privilege. The foreman then asked the witness if he would appear before the court to accept a grant of immunity and return to the grand jury at a specified date to continue his testimony. The witness agreed to follow that procedure.[1] However, the witness did not appear at Superior Court. At a later date, he returned to the grand jury and testified without claiming any privilege.

One grand jury case in our special county sample did involve a witness who was also a target. It was presented by the Consumer Protection/Economic Crime Unit in Pima County. The confusion of the grand jurors and the prosecutor's response are described in the anecdote below.

> As one witness was excused but before the next was called, a juror broke in with a question. The juror asked: "Is it customary to have a person who is also charged with one of the counts as a witness?" The prosecutor, after some confusion, answered negatively. The juror pursued the issue by asking: "This is an unusual case?" The prosecutor responded, "Yes." The target was then called and sworn in. This dialogue occurred between the prosecutor and the target/witness:
>
> Prosecutor: "...you are here today pursuant to a subpoena served upon you?"
>
> Witness: "Yes."
>
> Prosecutor: "To testify in front of the grand jury?"
>
> Witness: "Yes."
>
> Prosecutor: "Are you aware that the presentation today has to do with the affairs of fraudulent insurance claims presented by...among other things?"
>
> Witness: "Yes."
>
> Prosecutor: "And you have discussed this matter previously with Detective...of the Tucson Police Department and Detective..., correct?"
>
> Witness: "Yes."
>
> Prosecutor: "And you are aware of the possibility of the Pima County Grand Jury returning charges against you, possibly for conspiracy facilitation having to do with your role,

[1] It is interesting to note that immunity does not obviate the attorney-client privilege which was the only claim pursued by this witness.

if you will, in...fraudulent insurance claim presentation?"

Witness: "Yes, I am."

Prosecutor: "Before I ask you any questions,...I would like to read you your rights."

"You have a right to remain silent. Anything you say can and will be used against you in a court of law."

"You have the right to have an attorney present to assist you prior to questioning and to be with you during questioning if you so desire. If you cannot afford an attorney, you have a right to have an attorney appointed for you prior to questioning."

"Do you understand these rights?"

Witness: "Yes, I do."

Prosecutor: "Having now been advised of these rights, do you wish to answer questions in front of the Grand Jury regarding your arrangements with and your discussions with... with regards to these various vehicles in November of 1979?"

Witness: "Yes."

Physcial and Documentary Evidence

In addition to testimonial evidence, information may be introduced through the use of physical objects or documents. For instance, in a case involving a gun as the murder weapon, exhibits could include the gun itself and/or a report prepared by a ballistics expert who might also testify directly. Given the admissibility of hearsay to determine probable cause, it is also possible to introduce the ballistics expert's findings to the grand jury through the testimony of a police officer who summarizes the report's conclusions.

Through our case analysis we found that physical and documentary evidence plays almost no role in grand jury proceedings. Such evidence was not introduced directly in either county, nor were expert witnesses called to testify

regarding any scientific findings. However, laboratory reports were used to report results of drug analysis in a small number of grand jury cases. A lab report was part of the evidence in four percent of the Maricopa County cases and in five percent of the cases in Pima County.

The cases presented to grand juries by the special prosecution units followed this pattern as well. Although there were references in the testimony to audio-video recordings in one-third of the cases handled by OCRU in Maricopa County, that evidence was directly introduced to the grand jury on only one occasion. In that instance, the grand jury accepted the prosecutor's offer to play the recording for them. In other cases in Maricopa County, the existence of a recording was noted but no further action taken.

4.3.4 Introduction of Exculpatory Evidence

The evidence introduced in grand jury proceedings is directed toward proving the existence of probable cause; rarely, if ever, is any of the evidence exculpatory in nature. There is no requirement in Arizona that known exculpatory evidence be presented to the grand jury. Moreover, case law has held that failure to inform the grand jury of potentially exculpatory evidence is not grounds for dismissing the indictment.[1] A judge interviewed in the course of this study noted a situation in which the grand jury was not told of incriminating statements by a non-defendant, yet the indictment was held to be valid.

Although prosecutors are not required to present exculpatory evidence to the grand jury, they may offer such evidence if they are aware of it or may notify the jurors of its availability should they desire to hear it. Similarly, the grand jury itself may seek out any exculpatory evidence it believes may exist. Thus, some of the defense attorneys who were interviewed indicated that, in selected cases, they notify the prosecutor or the grand jury of the defendant's desire to testify and of the existence of exculpatory evidence.

In practice, however, exculpatory evidence is rarely presented to the grand jury. In the cases contained in our sample, exculpatory evidence was neither offered nor actually introduced by the prosecutor.

In one case, the defense attorney sent a letter to the grand jury noting its right to request additional evidence and urging it to inquire into five enumerated issues considered important to the defense. In closing the defense attorney said:

[1] See, for example, State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980).

> Be careful in your deliberations. [The defendant] is in business and regularly must deal with the public. Any criminal allegations against him or any member of his family would be injurious to his reputation and charges should not be lodged without a full exploration of the facts.

There was no reference in the transcript to this letter, and thus it was unclear whether the grand jury ever saw it. However, the points raised in the letter were all explored during the testimony before the grand jury, in part as a result of questions by the jurors.

4.3.5 Level of Grand Jury Involvement in Directing the Proceeding

Critics of the grand jury often paint it as responding to the prosecutor's direction and desires to the point of being a "rubber stamp" which takes no action on its own. Yet prosecutors who appear before grand juries on a routine basis deny that jurors are overly passive or fail to participate fully in all aspects of the proceeding. In fact, prosecutors claim that on a number of occasions, a grand jury has surprised them by pursuing areas of inquiry not covered by the prosecutor or by questioning the evidence as presented.

One way of assessing the extent of the grand jury's involvement in eliciting evidence is to consider its role in questioning witnesses. Typically, the prosecutor led a witness through his or her testimony by a series of questions. Once the prosecutor had completed this line of inquiry, the grand jury was given the opportunity to question the witness. Generally, the grand jury was not restricted in its questioning. However, in a few instances where a juror's questions ventured into irrelevant or prejudicial areas, a prosecutor would prevent the witness from responding and would inform the jury that the line of questioning was not relevant or might introduce bias. For example, this occurred when the questions focused on the suspect's prior record or the method by which the suspect was identified. This practice was not universal and in some cases the grand jury received answers to the identical questions that had been interrupted by prosecutors in other cases.

On the whole, the grand juries who heard the cases in our sample were involved to a limited degree only. Witnesses were questioned by grand jurors in 66 percent of the cases in both counties. In Maricopa County, the median number of grand jury questions per witness was only 2.4, although one witness was asked 41 questions. In Pima County, the highest number of questions asked of any witness was 29, but the median per witness was only two. Since typically only one witness testified per case, this means that grand jurors routinely asked only one or two questions in the course of the proceeding. The bulk of testimony was provided in response to questions asked by the prosecutor. In one-half of the cases examined in Maricopa County, the prosecutor was responsible for eliciting roughly 94 percent of the testimony;

in Pima County the comparable figure was virtually 100 percent. In only 25 percent of the cases did the grand jury direct more than 25 percent of the testimony in Maricopa County or more than 20 percent in Pima County. Grand juries hearing cases presented by the Consumer Protection/Economic Crime Unit in Pima County were slightly more active, asking a median of five questions per witness and directing 22 percent of all testimony.

In both counties, the stated policy and observed practice is to dismiss the witness after the prosecutor and jurors have completed their questioning. The grand jury is then provided with the opportunity to ask questions of the prosecutor. These questions are technically limited to issues of law, but on occasion the jurors will interject a question on a factual issue. We observed that if jurors asked factual questions, prosecutors quite consistently declined to answer and instead offered to recall the witness.[1] Two examples show the strict adherence to this requirement.

> A juror could not recall the age of a suspect and asked what it was after the witness had been excused. The prosecutor simply responded that the question was a factual one and recalled the witness.

> After completion of testimony in one case, a juror noted that the witness had stated that certain events occurred in one year whereas one of the two prosecutors presenting the case had mentioned a different date in announcing the case and the applicable laws. The witness was recalled to clarify this issue.

Although routine factual questions were typically addressed by recalling witnesses, there were occasional problems with other types of questions. One area of inquiry which was sometimes explored by grand jurors through questions to the prosecutor involved case strategy. Questions such as "Why was this defendant charged and not this person?," "Why was this witness used to present this evidence?," and "Who decided to charge this offense and why?" posed particularly sensitive problems for prosecutors. In some circumstances, these questions may raise legal issues and therefore be appropriate for the prosecutor's response. On the other hand, the issues may be entirely a matter of fact and not proper questions for the prosecutor. However, if the issues are related to judgments made by the prosecutor's staff, recalling the witness may not serve any purpose as he or she may not be able to answer the jury's questions. For the most part, prosecutors dealt with situations of this type by pointing out the options open to the grand jury if it

[1] Since the witnesses are told to wait outside after they are excused, there is no difficulty in recalling them to the grand jury room.

disagreed with the strategy adopted by the prosecutor but declining to explain the reasons behind the strategy.

Even when the grand jury's inquiry clearly involves issus that are legal in nature, the prosecutor must be careful to avoid infringing on the discretion of the grand jury. Particularly when facing questions regarding the nature of the charges, prosecutors were careful to point out that it was the responsibility of the grand jury to detrmine exactly which offenses should be charged.

The grand jury sought legal advice from the deptuty county attorney with some frequency in the cases sampled. At least one legal question was posed in 29 percent of the cases studied in Maricopa County and in 20 percent in Pima County. The number of questions asked was as high as 19 in one case in Maricopa County and six in Pima County, wereas the averages were 1.4 and .6 respectively. Although the impanelling judges in both counties pointed out that the grand jury could seek legal advice from the court, this never occurred in any of the cases sampled.

4.3.6 Deliberations

Once the grand jury's questions have been answered, the jurors are ready to deliberate. The procedures followed in the two counties differ significantly at this point. In Pima County, the grand jury deliberates on the draft indictment as prepared by the prosecutor. In Maricopa County, a two-stage deliberation process is followed. The grand jury is either directly instructed (or advised to recall earlier instructions) that they have three options at this point: to recall any witnesses, to request additional evidence, or to request a draft indictment. In 4 percent of the cases in Maricopa County, further testimony was provided before the draft indictment was requested. The anecdote below illustrates the complexities of the prosecutor's role in advising the grand jury on the legal issues relating to the possible charges and provides an example of the circumstances in which a witness might be recalled.

One case involving an inexperienced grand jury hearing only its third case illustrates the interaction between members of the grand jury and the prosecutor as legal issues are explained and charging decisions formulated. The inexperience of the grand jury is an important factor, since questions were asked which were not asked by more seasoned jurors. Following the standard practice in Maricopa County, the prosecutor opened the presentation by informing the grand jury that the statutes governing burglary and theft were relevant to the case and then proceeded to read those laws verbatim. The grand jury interrupted the prosecutor on several occasions to clarify the legal definitions of theft and burglary. To assist them, the prosecutor described a hypothetical set of facts and distinguished which facts would support a charge of burglary and which would constitute theft. At one point, a grand juror asked a question about the penalties applicable for each crime. The prosecutor declined to answer, noting that the penalty was not relevant to the determination of probable cause. The jurors did not seem to recognize that theft and burglary were alternative charges and that it was their job to ascertain the appropriate charge. An additional factor contributing to their confusion was the fact that either a felony or a misdemeanor could be charged. One juror asked the prosecutor to read the charge, to which the prosecutor responded that there was no charge at that point, only "an investigation of possible criminal activity."

Following the testimony of the witness, the grand jury continued to raise legal questions on the definitions and levels of the optional charges. When a factual question was raised regarding the value of the items alleged to have been stolen, the prosecutor did not answer the question himself, but offered to recall the witness. At that point, the grand juror did not take him up on his offer, but rephrased the question. Still not fully grasping the grand jury's role, a juror asked, "He's being charged with a felony, isn't he?" To this the prosecutor replied, "That's up to you."

The grand jury then retired to deliberate but returned with further questions. The prosecutor once again attempted to explain the alternatives by stating that if the grand jury found certain facts to be true, the charge would be burglary, whereas if another fact pattern was believed to be true, then the proper charge would be theft. Throughout this series of explanations, the prosecutor stressed that he was not implying that the evidence showed any of these facts, only the legal consequences of the grand jury believing certain facts. A member of the grand jury noted that certain questions should have been asked of the witness, but then proceeded to ask the prosecutor those questions. At that point, the witness was recalled. Following additional clarification of their options, the grand jurors deliberated once more, and thereupon requested a draft indictment.

Difficulties over the offenses to be charged may arise following the indictment as well as before. If the grand jury returns an indictment which the prosecutor feels is legally flawed, a decision must be made whether to inform the grand jury of the problem and how to resolve the problem. The prosecutor may need to determine whether the grand jury made a mistake or if the jurors acted intentionally. To address these issues without violating the grand jury's independence or the secrecy of the deliberations is a very sensitive task. The following example illustrates how one prosecutor approached this problem.

The prosecutor originally proposed these charges: Count 1--unlawful possession of a narcotic drug--defendants A, B, and C; and Count 2--unlawful possession of marijuana--defendant A. After the conclusion of testimony, the prosecutor noted that the drug in question was classified by law as

dangerous not narcotic. The indictment returned by the grand jury charged: Count 1--unlawful possession of prescription-only drug--defendants A, B, and C; Count 2 --unlawful possession of marijuana--defendant A; and Count 3--unlawful possession of dangerous drug--defendant C.

The prosecutor tried to clarify what the grand jury had decided in this case. He was concerned specifically with Count 1 which involved all three defendants. When the grand jury affirmed the indictment as announced, the prosecutor stated:

> I have to tell you as a matter of law that those barbiturates are a dangerous drug rather than a prescription drug.

The grand jury foreman noted that several questions had been posed to the witness on just that issue and the witness had repeatedly testified that the drug was a prescription drug. To this the prosecutor responded by asking:

> Does this fact create any confusion...in your mind such that you would not wish to...proceed as you have proceeded? In other words, would this cause you to want to make any changes?

The foreman asked whether the prosecutor was referring to any changes in the type of drug. The prosecutor responded by repeating his statement that the drugs were classified as dangerous, not as prescription drugs, by the statute.

The grand jury raised the question of what could be done when the testimony was in error. The foreman noted that:

> You can't change what somebody said. If in fact he said they were prescription drugs, you can't change it and say they are dangerous drugs.

The prosecutor answered:

> Perhaps I should do this. I have informed you... what I have informed you. This is, the yellow pills, the barbituates, are by law...dangerous rather than prescription. Perhaps what I should do now is [name of the court reporter] and I should leave the room and you should discuss this among yourselves and you can decide what you want.

Before the grand jury began to deliberate there was further discussion about whether the witness had testified that the drug was prescription or dangerous and what options were available to the grand jury if the testimony was in fact inaccurate. One juror asked:

> Is this going to jeopardize anything...with the official record or anything like that? It is not going to hurt the case or anything?

The prosecutor responded:

> Don't even consider that.

The grand jury then deliberated and returned an indictment that contained charges identical to those announced by the prosecutor at the conclusion of the testimony.

Most cases are very routine and result in indictments on the charges proposed by the prosecutor. Total time spent in deliberations in Maricopa County averaged 4.4 minutes per case.[1] Based on our case flow analysis, we found that indictments were returned in Maricopa County in less than 1% of the cases presented to the grand jury. In Pima County, the comparable figure was 2%. In all of the cases sampled, the grand jury voted to return an indictment on all charges. In approximately 95% of the cases in Maricopa County and 90% of those in Pima County, the vote was unanimous. In cases presented by the special prosecution units, the grand jury voted unanimously 92 percent of the time in Maricopa County, but only 76 percent of the time in Pima County. The frequency of dissenting votes is displayed below.

Table 4.4

DISSENTING VOTES

Number of Dissenting Votes	Maricopa County	Pima County	Maricopa County (OCRU)	Pima County (CP/ECU)
0 dissenting votes	94.8%	90.5%	92.0%	76.0%
1 dissenting vote	1.3	5.4	--	16.0
2 dissenting votes	1.3	2.7	8.0	4.0
3 dissenting votes	1.3	--	--	4.0
4 dissenting votes	1.3	1.4	--	--

The secrecy of deliberations prevented us from gaining much information on the reasons for dissenting votes. In fact, some of the cases in which at least one juror voted against the indictment appear to be very routine, i.e., they involved few pages of testimony and few if any questions were directed either to the witness or the prosecutor. However, it is clear that in some of these cases the jurors had some difficulties with the case before commencing deliberations. It is interesting to note that the case in Maricopa County in which a witness was asked 41 questions (the highest recorded in recorded in our sample from that count) involved three disseting votes.

[1] In his study in Harris County, Texas, Carp found that dissenting votes occurred in only 5 percent of all cases. He also noted that the frequency of dissenting votes declined over the length of the grand jury term. See Carp, op. cit.

Likewise, the most questions asked of any witness in the routine cases in Pima County was 29; the vote in that case was nine to four. In the latter case, the defendant was charged with breaking into the home of a former model who allegedly walked by windows in her house in varying stages of undress. The jurors repeatedly questioned the testifying officer to determine whether police had explored the possibility that the victim had enticed the defendant into her house.

Questions regarding legal issues were also fairly common in cases in which at least one dissenting vote was recorded. In both counties, the cases with the highest number of legal questions involved non-unanimous decisions. The case summarized above in which there was clearly a great deal of confusion on the part of the grand jury regarding the type of drug also involved a dissenting vote.

In Maricopa County, we were able to identify a small number of cases in which the grand jury refused to return an indictment.[1] For the most part, these were routine cases and involved charges such as embezzlement, kidnapping and sexual assault, murder, and forging prescriptions. Although we could not identify the specific reasons for the grand jury's refusal to indict since the deliberations are secret, and the cases were not significantly different from others on their face, there were some clues to the grand jury's reactions to cases based on the questions they asked. Two examples are described below.

> The grand jury heard testimony by a police detective that the defendant and the victim were discovered when police approached a suspicious car and the victim jumped out of the car claiming she had been raped. The officer testified that the victim stated she had been drinking and was hitchhiking when she accepted a ride by the defendant. The officer further summarized her account of the sexual contact with the defendant and her claims that he struck and threatened her several times. The grand jury asked four questions concerning the suspect's version of the incident (he claimed the sexual activity was consensual), the lack of any weapon, and the ages of both victim and defendant. The grand jury voted to terminate their inquiry during their first deliberation.

> One case involved a charge of theft by embezzlement against a 16-year-old (at the time of the crime) employee who failed to deposit one day's receipts consisting of an estimated $500 in cash and a small number of checks. At the time of the investigation, the father of the suspect told police she was out of state in a special disciplinary school. No further

[1] These cases were not part of our case records sample, but were specifically identified for this purpose.

> for a year until the victim notified police that the suspect was back in town and had approached the victim with an offer of restitution. When questioned by police, the suspect admitted committing the crime.
>
> The jurors asked 13 questions of the witness including specifics on the discovery of the theft; the status of the suspect as an adult or a juvenile; the nature of the school she attended; reasons for the long delay; and reasons that the offer of restitution was rejected. The witness was excused, and the grand jury asked nine legal questions focusing on the distinction between adults and juveniles and the issue of delay. One series of questions was aimed at determining why there was an additional delay of over six months between the suspect's return to the state and the filing of charges. When the questions turned to factual issues about the school, the witness was recalled and asked ten more questions on similar topics as before. After closing with more questions on the delay and whether it could have been avoided, the grand jury retired to deliberate. They then announced their decision to end the inquiry without an indictment.

In one case where only ten jurors were present and nine could not agree on an indictment, some of the jurors suggested to the prosecutor that the case be resubmitted at a later date when more jurors were present. The prosecutor told them this would be potentially prejudicial as some of them would already have heard and discussed the case. The prosecutor was then asked whether the case would be presented to another grand jury, but no definitive answer was given. Despite the grand jury's dissatisfaction with the alternatives, they were unable to agree on an indictment, so the inquiry was terminated.

4.4 Efficacy of the Grand Jury as a Screening Mechanism: Immediate and Ultimate Outcomes

4.4.1 The Determination of Probable Cause

The grand jury screens cases using the same legal standard as that used by the magistrate at the preliminary hearing--probable cause (defined in detail in Section 3.4.1). Although perhaps this standard is difficult to describe for citizens asked to serve as grand jurors, the judges handling the impanelment process in both counties were careful to try to explain it thoroughly to the jurors. In Pima County, the judge defined probable cause as "more than fifty-fifty," but less than the standard of proof beyond a reasonable doubt as required in trials.

Although we examined a few cases in one county in which the grand jury declined to issue an indictment, all indications are that this is a very rare event. From the 500 random cases discussed in Chapter 2, we estimate that no true bill was returned in less than 1 percent of the cases presented to the grand jury in Maricopa County and in only 2 percent of those in Pima

County. This is not totally surprising, given that cases deemed by prosecutors to be in any way shaky or weak almost always go to the preliminary hearing.

The grand jury has the authority to play a larger screening role than merely determining whether probable cause exists for a specified set of charges and defendants. Technically, the grand jury can indict people not named by the prosecutor and indict on different or additional offenses than those suggested by the prosecutor. Unlike the magistrate at the preliminary hearing, the grand jury is not in any way bound by the case as presented by the police or the prosecutor. However, in practice, such independence is almost never asserted. The grand jury added a new defendant in only one case (this was a state grand jury case and is described in Section 5.2.3 in the next chapter). Charges contained in the indictment were different from those proposed by the prosecutor in only one case. This occurred as a result of a misunderstanding of the law by the grand jury, which ultimately reissued the indictment so that it was consistent with the prosecutor's proposal.

4.4.2 Judicial Review of the Grand Jury Proceeding

Challenges to grand jury proceedings are governed by the new Rules of Criminal Procedure. Under the Rules, an indictment can be attacked on two grounds:

- an insufficient number of qualified grand jurors concurred in the indictment; or
- The defendant was denied a substantial procedural right.

Challenges by the defendant must be filed after the indictment is returned but no later than 25 days after the transcript and minutes have been filed. Challenges are made via a motion that the case be remanded for a new finding of probable cause. There is no provision in Arizona law for an indictment to be dismissed with prejudice to its resubmission. Statistics collected by the court in Maricopa County in 1980 indicated that remands are ordered in approximately 1% of all cases.

The first ground encompasses attacks on the panel as a whole as well as on individual jurors under other provisions of the Rules.[1] Challenges to the panel as a whole may only be made on the basis that the law was not followed when the panel was drawn or selected. A successful claim against the panel results in that grand jury being discharged. The case at issue would then be heard by a different grand jury (or, at the prosecutor's discretion, could be handled at a preliminary hearing).

[1] Arizona Rules of Criminal Procedure, Rule 12.3.

An individual juror may be challenged on his or her qualifications to serve on the panel or in a particular case. The remedy in this situation is either discharge of the individual from service on the panel or exclusion from deliberating on a particular case. It is important to note, however, that a successful challenge to an individual juror does not necessitate a new probable cause determination if there were a sufficient number of other unchallenged jurors who heard the case.

The second ground for relief includes denial of a substantial right resulting from failure to comply with other subsections of Rule 12. Practitioners indicated a number of common reasons for successful challenges to grand jury indictments. One of the most frequent areas of challenge in recent years has been off-the-record activity. In the Wilkey case cited previously, a remand was ordered after the court identified numerous off-the-record contacts between the jurors and the prosecutor and the jurors and witnesses.

Remands have been ordered on other grounds as well. Respondents suggested flaws such as inaccurate instructions on the law, answers by the prosecutor to factual questions, or perjury of material evidence would be likely grounds for a successful attack on the indictment. Similarly, prejudicial testimony which might include reference to a prior record, or remarks by the prosecutor which reflected an opinion or might inappropriately influence the grand jury, would also be issues for a remand motion. Court rulings have made it clear, however, that indictments cannot be challenged on the basis of the legal sufficiency of the evidence. Numerous decisions have reiterated the point that the weight and sufficiency of the evidence is a matter for the grand jury and is not within the purview of the court.[1]

One of the cases in our sample illustrates the issues involved in remands. This case is described below:

> The defendant was originally charged by information with sexual assault on a child under 15 years of age. The defense contended that the alleged victim was not under 15 years of age and at the last day on which the trial could be held (almost one year after the information was originally filed) the state sought to amend the information to delete that portion of the charge. After the court denied the state's motion, the information was dismissed without prejudice.
>
> The following month, the prosecutor presented the case to a grand jury and called the victim as the state's only witness. After an indictment was returned, the defense filed a motion asking that the case be remanded for a new determination of probable cause. In this motion, the defense claimed that "a substantial procedural right" had been denied by the prosecutor's actions during the course of the grand jury proceeding.

[1] State ex rel Preimsberg v. Rosenblatt, 112 Ariz 461, 543 P.2d 773 (1975).

One of the defense claims was that the prosecutor allowed the victim's testimony that she was 13 to stand, knowing that she was actually 18. The defense argued that the questions asked by the grand jury showed that they were influenced by the victim's age, and further claimed as prejudicial the prosecutor's remarks which indicated faith in the testimony of the witness. Excerpts from the grand jury transcript were quoted in the defense motions as support for these claims. A juror, asking why the victim was called as a witness, had said:

> Why subject her to this kind of questioning?...[Was it done] just for effect or what? Why submit this poor little kid to something like this?

Although one of the prosecutors present had tried to sidestep this line of questioning by stating that it was a decision made by the prosecutor's office without providing any reason for the decision, the second prosecutor at the proceeding had gone further and offered this explanation:

> Well, unfortunately, in order to bring a case like this to trial, we have to find out how a witness is going to react before questioning before a number of jurors, and unfortunately this case has to go to trial before a jury unless the jury is waived by the defendant. In other words, to determine whether or not we are going to go forward with it, we have to determine whether or not the witness is in fact willing to come forward before a jury and relate facts to the case. It is not for effect. It is simply to determine how the witness is going to be in front of a jury....

The defense also alleged error in the prosecutor's response to the grand jury's inquiry about the length of delay between the offense and the presentation of the case to the grand jury. The prosecutor had responded by telling the grand jury that there was a reason for the delay but that he was unable to inform the grand jury of that reason.

In its response to the defense's motion for remand, the prosecutor's office claimed that the victim's age was not an established fact as she was a Vietnamese orphan, and defended its action regarding the victim's testimony on the grounds that the victim believed she was 13 and that the state could not conclusively prove otherwise. The prosecutor's brief additionally claimed that neither the issue of the victim's age nor the prosecutor's justification for calling the witness improperly influenced the grand jury and, furthermore, that none of these constituted the denial of a substantial procedural right. The court granted the motion for a remand, specifically noting that it did so by reason of the prosecutor's comments. The victim's age was clearly excluded as grounds for the remand. In its decision, the court ordered that the case not be submitted to the same grand jury. When the case was refiled, a social worker testified but the victim did not.

4.4.3 Ultimate Outcomes

Long accused of being a rubber stamp, the grand jury has been charged with returning indictments in cases without merit. Defense attorneys critical of the grand jury point to its non-adversarial nature and claim that cases which pass the grand jury screen could not withstand a more stringent review. However, our analysis of the cases presented to the grand jury in Arizona indicates that most cases ultimately result in conviction, not in acquittal or dismissal, as illustrated in Table 4.5. Convictions on one or more charges were obtained largely through a plea of guilty; in both counties 71 percent of the cases in which an indictment was returned were resolved in this manner. Jury or bench trials led to convictions on at least one charge in four cases (6%) in Maricopa County and in two cases (3%) in Pima County. In our cases from Maricopa County, the defendant was found not guilty in only three cases (4%). Only one defendant (2%) was acquitted following indictment in Pima County.

Table 4.5

ULTIMATE DISPOSITION OF GRAND JURY CASES*

Outcome	Maricopa County N	Maricopa County %	Pima County N	Pima County %
Dismissed	14	19%	17	25%
Pled	51	71	48	71
Convicted following bench or jury trial	4	6	2	3
Acquitted following bench or jury trial	3	4	1	1
TOTAL	72	100%	68	100%

*Data were available on only a portion of the defendants in our case records sample.

A significant portion of cases in both counties was dismissed after the indictment was returned--14 cases (19%) in Maricopa County and 17 cases (25%) in Pima County. These dismissals include cases in which the plea negotiation process was initiated post-indictment and cases in which the prosecutor unilaterally decided against the value of continuing the prosecution. In Maricopa County, it should be remembered that most negotiations take place prior to or on the date set for the preliminary hearing. In Pima County, there appears to be a conscious decision to obtain an indictment before negotiating in most cases.

These findings highlight the extent to which prosecutorial screening decisions control both the timing and the outcome of many cases. Very few cases

in our samples even went to trial--seven (10%) in Maricopa County and three (5%) in Pima County--thus removing that mechanism from playing an important role in the outcome of most cases. Given the control exercised by the prosecutor, the quality of independent screening mechanisms remains important; they should not be judged solely on their effect on the ultimate outcome of a case.

4.5 Summary

The decision to use the grand jury is not as closely tied to specific criteria or benefits as is the choice of the preliminary hearing. Instead, the grand jury may be used as a matter of routine practice (in Pima County) or for reasons of efficiency or desire to avoid the preliminary hearing (in Maricopa County). Neither is there a readily definable offense type linked to grand jury usage, as is more clearly true in regard to the preliminary hearing.

Although handling a fairly diverse set of cases, grand jury proceedings are quite predictable. In both counties the proceedings are perfunctory, typically involving only one law enforcement witness and essentially no physical or documentary evidence. The majority of testimony is developed through questioning by the prosecutor with the grand jury playing only a minor role. The vote is almost always unanimous. Although most cases in both counties involve single defendants and single counts, there are a good share of cases with more than one suspect and multiple counts. Several key characteristics are contained in Table 4.6.

What is most striking in these comparisons is the fact that, despite the differences between the two counties in procedures followed in grand jury proceedings, there is little difference in the behavior of the grand juries. Given that Maricopa County has adopted procedures specifically designed to foster grand jury participation in making case development and charging decisions and to encourage grand jury independence, it is somewhat surprising to see that Maricopa County grand jurors do not question witnesses significantly more often than jurors in Pima County. Maricopa County grand jurors do seem to ask a few more legal questions than are posed to the prosecutor in Pima County, but the difference between the two counties is not that great.

These findings should not be interpreted as indicating that the formalized procedures followed in Maricopa County are meaningless. Any number of factors might contribute to this situation. In Maricopa County, grand jurors hear only a select portion of cases; most others involve a preliminary hearing or a waiver. It is possible that there are characteristics of these cases that shape the nature of the grand jury proceeding. Moreover, as the communities of Tucson and Phoenix differ substantially, so may the characteristics of the grand jurors. All we can state is that the formalized proceedings of Maricopa County do not have a readily identifiable effect on grand juror behavior, whether positive or negative.

Table 4.6

SUMMARY COMPARISON OF GRAND JURY CHARACTERISTICS

Characteristics	Maricopa County	Pima County
Percent of cases with one defendant	80%	78%
Percent of cases with one count	59%	55%
Percent of cases whose only witness was a law enforcement officer	92%	95%
Percent of cases with any civilian witnesses	0%	5%
Average minutes in session	25	N/A
Average minutes in deliberation	4	N/A
Median pages of testimony	7	4
Median number of questions per witness asked by grand jury	2.4	2.0
Median percentage of testimony developed through questions by the prosecutor	94%	100%
Percent of cases with at least one legal question	29%	20%
Percent of cases in which vote was unanimous	95%	90%

CHAPTER FIVE

THE STATE GRAND JURY IN ARIZONA

In addition to its role in screening cases to determine whether there is probable cause to hold the defendant to answer at trial, the grand jury has the potential to perform a more active role in case development. With its broad subpoena powers and ability to compel testimony, it can conduct far-reaching inquiries into such areas as organized criminal activity and official corruption. Although it is rare for a grand jury to conduct an inquiry largely on its own initiative, the grand jury may be used proactively in case development to help establish that a crime was committed and to help identify those who may have been involved in its commission. In such instances, the grand jury is used to refine a partially developed case by, for example, pinning down testimony of uncooperative witnesses and/or compelling immunized witnesses to testify against others involved in a criminal enterprise.

In an attempt to examine the operations of an investigative grand jury, Arizona's State Grand Jury was included within the scope of this study. Given the types of cases handled by the State Grand Jury (the attorney general's jurisdiction encompasses white collar crimes such as land and securities fraud and political corruption), we had hoped to study the use of immunized testimony, the power to compel testimony, and procedures for protecting the rights of witnesses. We were largely unsuccessful in achieving these goals, however, since Arizona's State Grand Jury was not used in an aggressive investigative fashion to any great extent. Rather, it was more of a hybrid between an investigative and a screening body. Typically, the State Grand Jury heard cases developed by the prosecutor and on occasion, as part of the screening decision, refined the final charges which were incorporated into the indictment.

Nevertheless, cases heard by the State Grand Jury were more complex and involved different types of evidence than cases generally presented to the county grand juries. Furthermore, although in practice the cases submitted to the State Grand Jury rarely generated questions regarding right to counsel, refusal to testify, immunization and contempt, the Attorney General's Office has developed procedures for responding to these and other situations which may arise. Therefore, in this chapter we discuss the jurisdiction of the Arizona State Grand Jury, the nature of the grand jury's role in screening complex cases involving white collar crime, the differences between this role and an investigative one, and procedures which may be used in an attempt to minimize the types of challenges that are sometimes associated with an investigative grand jury proceeding.

5.1 Jurisdiction and Utilization of the State Grand Jury

The State Grand Jury in Arizona was created by legislation enacted in 1976 largely as a result of the efforts of the state attorney general. The impetus for this legislation arose following a series of highly publicized land and securities frauds which resulted from ineffective federal regulations and lack of adequate state enforcement. Another factor contributing to the formation of the State Grand Jury was the awareness that multi-county cases (such as these fraudulent schemes) posed particular law enforcement problems since no office had sole jurisdiction over them. Despite these factors, the State Grand Jury was not created without opposition. Resistance to a statewide grand jury stemmed in part from concern that it would infringe on matters traditionally within local control. This concern was a factor in the legislative decision to confer limited jurisdiction on the State Grand Jury.

The statute creating the State Grand Jury specifically enumerated several types of matters within its jurisdiction. Within the Attorney General's Office, the Special Prosecutions Section (later Division) was created with a mission to investigate and prosecute "white collar crime." The Division concentrated on crimes such as land fraud, securities fraud, political corruption, consumer fraud, and business and tax fraud which had not been extensively prosecuted in the past. In recent years, the Attorney General's Office has increased the resources allocated to combatting organized crime and racketeering in addition to its efforts in the area of white collar crime.

In the past, however, Special Prosecutions Division staff refrained from using a number of the more aggressive investigative techniques available to them. As reported by the former chief counsel, the Office focused its efforts on cases in which knowledge of the alleged crime already existed and investigation was needed only to identify the perpetrators and gather the evidence necessary for conviction. Cases were identified primarily through persons who had been defrauded and filed a complaint. (On a few occasions, cases were initiated based on a review of newspaper ads which appeared to make false claims.) A proactive approach to case development was not generally adopted except for street crimes, particularly fencing where sting operations were used successfully.

A different approach to prosecution will be necessitated by the new mandate to combat organized crime. Here, ascertaining that a crime was committed will be more difficult, and more aggressive techniques will be needed in order to prosecute particular targets. At the time of our study, the Division planned to make more extensive use of undercover agents, search warrants, court-ordered electronics surveillance, and paid informants in its fight against organized criminal activity. It also planned to make more frequent use of certain mechanisms commonly associated with the investigative function of the grand jury. These include, but are not limited to, grand jury subpoenas, compelled testimony, and grants of immunity. It was

hoped that these techniques, coupled with the threat of later impeachment or prosecution for perjury, would result in witnesses testifying against others involved in criminal organizations.

As noted above, since these methods were used only on occasion in the past, we were unable to study the investigative role of the grand jury in Arizona. Nevertheless, by examining the State Grand Jury we were able to observe the implementation of mechanisms designed to forestall any challenges on grounds such as bias, coercion, or suggestion by the prosecutor to grand jurors or witnesses, issues which are often associated with investigative grand juries. The Special Prosecutions Division has developed a manual and established routine procedures to guide the presentation of cases to the grand jury. While these procedures address issues which admittedly would be expected to arise infrequently given the nature of the cases typically processed, the aim of the attorney general's staff was to develop an "issue preclusion" approach specifically to avoid flaws in any indictments returned by the State Grand Jury. (Unfortunately, no data are available on the extent to which cases are remanded for a new determination of probable cause as a result of a faulty indictment.) In the following discussion of the operations of the State Grand Jury, we include references to procedures followed as part of this "issue preclusion" strategy, since they reflect one jurisdiction's attempts to ensure that the proceedings are fair and impartial and free from procedural error.[1]

5.2 Operation of the State Grand Jury

In this section, we provide an overview of the types of cases presented to the State Grand Jury by examining the nature of the crimes under consideration and by assessing case complexity using indicators such as the numbers of defendants and counts. We then describe the method used by prosecutors to introduce each case to the jurors, the grand jury's involvement in obtaining evidence, and the evidence actually presented. Finally, we examine the process and outcome of the jury's deliberations.

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[1] It is interesting to note that the care taken to avoid any procedural errors, and therefore the possibility of remand, is directly related to Arizona's requirement of a verbatim record of the proceedings. Although Division staff perceive the grand jury transcript as essential in ensuring fairness (one respondent commented that "without a record the opportunity for abuse is astronomical") prosecutors also note that the formalization introduces some rigidity into the grand jury room. The consequences of this were described by an attorney formerly with the Special Prosecutions Division and now with the U.S. Attorney's Office. He pointed out that the federal transcript does not typically include routine communications between the prosecutor and the grand jury (such as "housekeeping" tasks or scheduling). His perception was that there was not the sense in the federal grand jury that a misspoken phrase or even word might threaten the indictment. In the opinion of this prosecutor, the result was a more relaxed, comfortable grand jury.

5.2.1 Overview of the State Grand Jury's Caseload

Based on data from our examination of 23 cases presented to the State Grand Jury between July 1, 1979 and June 30, 1980, we found that these cases differed in some but not all ways from the typical case at the county level. As expected, the State Grand Jury's caseload involved more complex and time-consuming cases than the caseloads of the county grand juries.

From commencement of the proceeding through deliberations, the median time for State Grand Jury sessions was 91 minutes.[1] In comparison, the typical county-level[2] case took an average of 25 minutes for routine cases in Maricopa County. (In part this is attributable to the formalized procedures developed by the Special Prosecutions Division, which will be described subsequently.) Cases ranged from 35 minutes to 347 minutes (nearly six hours). In approximately 22 percent of the cases, the proceeding took place over the course of two or more days.

State Grand Jury cases more closely resembled county cases in the number of defendants charged. For the most part the State Grand Jury was considering charges against single defendants, not examining criminal enterprises involving several individuals. In approximately three-quarters of the cases (74%) there was only one defendant included in the draft indictment presented by the prosecutor to the State Grand Jury. In another 13 percent of the cases, two or three defendants were included. In the remaining cases (13%) five or more defendants were included, with the largest number of defendants in a single case being 14.

The complexity of State Grand Jury cases was most clearly demonstrated by the types and numbers of offenses charged in the indictments issued. Although most cases involved single defendants, each defendant was typically charged with multiple counts of offenses stemming from fraud, deceit, or illicit business dealings. Of the 23 cases presented to the State Grand Jury, all but four involved combinations of offenses. Since most cases involved charges in a number of categories of offense types, it was impossible to classify cases by offense types. (That is, one case might have involved charges of securities fraud, theft, and forgery, whereas another involved theft, embezzlement, and forgery.) Table 5.1 shows the different offenses charged in indictments in the cases studied.

[1] Nine cases out of 23 sampled were missing data on the time elapsed during the proceeding.

[2] Even the cases handled by the Organized Crime and Racketeering Unit (OCRU) in the Maricopa County Attorney's Office averaged only 28 minutes. Data on case processing time were unavailable in Pima County. However, an examination of relative transcript length indicated that the grand jury proceedings in Pima County were shorter than those in Maricopa County.

Table 5.1

TYPES OF OFFENSES CHARGED IN STATE GRAND JURY CASES

Offense	Number of Times Alleged*
Theft	14
Fraudulent schemes and artifices	9
Forgery	6
Conspiracy	6
Falsifying corporate records	4
Securities fraud	3
Trafficking in stolen property	2
Embezzlement	3
Failure to file state tax	2
Failure to remit state tax	1
Obstructing investigation	1
Perjury	1
False pretense	1
Fraudulent use of credit card	1
Illegal enterprise	1
Fraud	1
Filing false financial statement	1

*These figures do not indicate the number of counts per offense. Instead, they reflect the number of cases that included at least one count of each offense.

Table 5.2

COUNTS PER INDICTMENT

Number of Counts in Indictment	Number of Cases
1 - 3	4
4 - 6	3
7 - 9	1
10 - 12	5
13 - 15	1
16 - 18	0
19 - 21	3
22 - 24	4
29	1
45	1

Only two out of 23 cases had a single count in the indictment. At the other extreme, one defendant was charged with a total of 45 counts--one count of theft and 44 counts of fraudulent use of a credit card. Yet another large case was based on 15 counts of failure to remit state taxes and 14 counts of failure to file state taxes. Table 5.2 displays the data on number of counts per case.

In summary, State Grand Jury cases generally took longer and were concerned with different types of criminal activity than were cases presented to the county grand juries. The nature of the State Grand Jury proceedings is described below.

5.2.2 Presenting Cases to the State Grand Jury

Procedures followed at the State Grand Jury to initiate each day's activities and the presentation of evidence in individual cases reflect the formalization and careful attention to avoiding error that are central themes in the Division's "issue preclusion" approach. After handling routine housekeeping issues, the prosecutor announced the matters to be presented during that session and delivered a standardized warning to the grand jury to "disregard all evidence and exhibits previously presented to you with regard to other inquiries conducted by you."[1]

Each case was introduced by the prosecutor who read the applicable statutes and presented a copy of the statutes read to the grand jury clerk. In determining which statutes to read, Division policy suggested two considerations: issue preclusion and common sense. Presenting attorneys were reminded that the reading of one statute may necessitate the reading of another. For example, it was necessary to read relevant definition statutes when presenting the substantive statute. The conspiracy statute must be accompanied by the overt act statute. On the other hand, punishment portions of statutes were not to be read, nor was it generally necessary to read statutes governing affirmative defenses. Presenting attorneys were warned to be very careful

[1]One of the responsibilities of the prosecutor in commencing a grand jury proceeding was to ensure that a sufficient number of jurors were present. Although by law a quorum is composed of only nine jurors, prosecutors were discouraged from proceeding with less than 12 jurors. Since State Grand Jury cases may span several days of testimony and only those jurors who have been present for the complete case may deliberate, the practice of proceeding with at least 12 jurors allowed for attrition over time as well as for instances of juror disqualification in individual cases. In the latter situation, the procedure parallels that discussed in Chapter 4.

in determining which statutes to read, since errors arising from these decisions were the most common ground for remand.[1]

The State Grand Jury's role in an inquiry was generally limited to reviewing testimonial and physical or documentary evidence for probable cause in the cases included in our study. There was minimal grand jury involvement in the exercise of the subpoena power. Due to a series of legal rulings, the attorney general believed he had the authority to issue subpoenas without first consulting with the grand jury. Upon request by the attorney general, the State Grand Jury assignment judge (also the presiding judge in Maricopa County) issued an order explicitly recognizing the authority of the Attorney General to issue subpoenas under certain conditions.[2] However, this procedure was declared illegal by the Arizona Supreme Court which ruled that the Attorney General does not have the power to "subpoena witnesses and documents before the state grand jury without the prior consent of the grand jury" and invalidated the judge's order.[3] Although this situation poses interesting questions for the future direction of the State Grand Jury, since prosecutors anticipate considerable delays from the new requirements for grand jury participation, the following discussion of the evidence presented to the State Grand Jury reflects the situation as it existed when prosecuting attorneys, not the grand jury, issued the bulk of the subpoenas.

Testimonial Evidence and the Rights of Witnesses

According to our analysis of case records, 78 percent of the cases presented to the grand jury had one law enforcement official or investigator as a

[1]The practice of reading relevant statutes as part of the introduction in every case contributed to the greater length of State Grand Jury proceedings compared to those of county grand juries. Although Maricopa County prosecutors enumerated the applicable statutes in each case, their procedures were designed to ascertain whether each juror had heard each statute or wanted to hear it again rather than reading the full text of the statute in every case. Of course it should be noted that the statutes for burglary or robbery are more readily understood by lay jurors than those dealing with securities fraud or conspiracies.

[2]Order dated October 23, 1978 entitled "In the Matter of State Grand Juries." The order allowed subpoenas to be issued under these requirements: the purpose for the subpoena must be in furtherance of matters cognizable by a State Grand Jury; a State Grand Jury must be duly impanelled and in existence at the time of the issuance of the subpoena; the return day must be for a day that the State Grand Jury is scheduled to sit; and a case "status sheet" must exist for the matter and an investigative number must have been issued prior to assigning a State Grand Jury number to the subpoena.

[3]Decision of the Supreme Court, State of Arizona in Special Action No. 15780-SA, Samuel Gershon v. The Honorable Robert C. Broomfield and the State of Arizona, February 19, 1982.

witness; 13 percent had two such witnesses and 4 percent had more than two. These witnesses were, in all cases, employed by the Attorney General's Office or other state agencies. This pattern of a single law enforcement witness resembles the majority of cases before county grand juries. In only one case was no government employee called as a witness. On the other hand, civilian witnesses testified in only 22 percent of the cases. These witnesses cannot be categorized as eyewitnesses in the typical sense of the word, i.e., they did not observe a single event as is the case in street crimes. Nor were many of these witnesses victims of the crimes under investigation. Instead, they were generally involved in some type of professional relationship with the individuals being investigated, e.g., as employees, bookkeepers or accountants.

Only two of these civilian witnesses were suspects at the time of the investigation (these witnesses appeared in the same case). Under Arizona law, only witnesses under investigation by the grand jury may have counsel present inside the grand jury room. Moreover, there is no requirement that a witness receive notice of his or her constitutional rights prior to testifying before a grand jury even if the witness is a suspect. Under the Division's interpretation of the law, an attorney accompanying a witness inside the grand jury room is restricted to communicating only with the witness and faces the possibility of immediate expulsion by the foreman for any communication or attempted communication with any other persons present. As part of their issue preclusion approach, Division attorneys notified witnesses of their legal rights and described the limited role available to counsel for witnesses where they believed such notice was warranted.

Below we summarize the case in our sample which illustrates the procedure followed when a suspect testified before the grand jury:

The case involved allegations of trafficking in stolen property. The two suspects who testified were employees of the company from which the property had been stolen. The primary target of the inquiry was the person who allegedly purchased the material from the witnesses.

After one of the employees was sworn in as a witness, the assistant attorney general presenting the case asked his name. Following the reply, the prosecutor gave the following warning:

> Before we go any further, I would like to give you an admonition. Sir, you are under investigation by this grand jury. That fact alone does not relieve you of your obligations to testify fully and truthfully before this grand jury. However, you also have a constitutional right to remain silent and not answer questions which you believe would incriminate you. This is a personal right, only you can decide when you should claim your right not to answer a question and to remain silent. No one else can exercise this right for you.
>
> When you do answer the questions, you must do so honestly. If you lie to this grand jury you can be charged with the crime of perjury. All the answers you give the grand jury can be used against you in a later proceeding if the answers incriminate you.
>
> You also have a right to have an attorney present with you in the grand jury room. If you cannot afford one, the court will appoint an attorney for you. You will not be permitted to speak to anyone in the room other than your attorney.

The following exchange then occurred:

> Assistant Attorney General: "Do you understand all this?"
>
> Witness: "Yes."
>
> Assistant Attorney General: "Do you want to have an attorney present with you?"
>
> Witness: "No."

The prosecutor proceeded to question this witness in detail about the contents of a letter which reflected an understanding between the prosecutor and the witness that, if indicted, the witness would be allowed to plead guilty to a single specified count in exchange for full cooperation. In conjunction with that line of questioning, the witness was questioned to determine that he understood the role of the judge and the judge's sentencing authority.

The witness then proceeded with his testimony. At no time did he refuse to answer any questions nor in any way challenge the proceeding.

The anecdote above illustrates the precautions taken when the prosecutor has determined that a witness is also a suspect. An even more sensitive situation arises when a witness feels at risk as a suspect or fears possible self-incrimination and desires to be accompanied by an attorney but is not labelled a suspect by the prosecutor.[1] Prosecutors interviewed in the course of this study conceded that there was a potential opportunity for error or inequity in allowing only suspects to have counsel present in the grand jury room, given that the definition of who was a suspect was controlled by the prosecutor. The only instance in which this issue arose in our sampled cases is described in the anecdote below.

[1] This issue can arise only in those jurisdictions allowing selected categories of witnesses to bring an attorney into the grand jury room with them. Clearly if the law forbids any attorney from accompanying his or her client into the grand jury room or allows all witnesses the right to counsel, the problem of defining who is or is not at risk is irrelevant.

Under the provisions of certain student loans given by the state of Arizona, the recipient promises to engage in the profession for which he or she has been trained for a specified number of years in Arizona following graduation or to reimburse the state. The recipients are required to make annual reports to the state indicating their in-state place of business. This case involved an inquiry into a recipient alleged to be filing false information on these forms and thereby defrauding the state. On the forms, the recipient/target indicated he was in business with another named individual. That individual (a schoolmate of the recipient/target) and his wife were called before the grand jury.

A discussion was held outside the hearing of the grand jury before the case began. The prosecutor opened the discussion by announcing that the witnesses' attorney wanted to make a record concerning the appearance of his clients before the grand jury. The private attorney requested that he be allowed to be present with his clients in the grand jury room. He indicated that one of his clients, who had been named as a partner by the recipient/ target, had been led to believe by investigators' questions that he might be accused of a crime.

The witnesses' attorney stated his position that, if he were not allowed to accompany his clients, any statements which turned out to be incriminating could not be used against them. Furthermore, he pointed out that the marital privilege might be applicable to questions asked of his clients and expressed concern that they, as laymen, would not be sufficiently knowledgeable to assert their privilege.

The prosecutor replied:

> At this time they are not under investigation by this grand jury and the state presumes, like any other witness, they will testify...truthfully, they will not perjure themselves, nor will they give any false statements. [Their attorney] has been informed that he may wait outside the grand jury room should there be any necessity for his clients to leave the grand jury room and seek his advice or counsel.

The prosecutor, the court reporter, and the first witness entered the grand jury room and testimony commenced. Neither witness claimed a privilege, refused to answer any question, or left the grand jury room to consult with the attorney.

The fact that suspects are rarely called before the grand jury was in line with Division policy which discouraged calling them as witnesses unless immunity was to be granted. The concern over calling suspects without granting immunity stemmed from the desire to avoid prejudicing the grand jury by forcing suspects to appear simply to assert their Fifth Amendment privilege against self-incrimination. Despite the fact that none of the witnesses in our sampled cases claimed the Fifth Amendment privilege or refused to answer any questions, the Division has developed procedures to be followed in the event that this does occur. According to Division policy, the

prosecuting attorney would instruct the jurors in the following manner, prior to their second deliberation:[1]

> The state alone must show probable cause exists to believe the subject(s) of the investigation committed alleged offense(s) with evidence that the state itself presents.
>
> Therefore the subject or any witness is not required to testify. The decision on whether to testify is left to the witness acting with the advice of his attorney.
>
> You must not conclude that the witness is likely to be guilty of the alleged offense(s) because he does not testify. You must not discuss this fact or let it affect your deliberations in any way.

Division policy extended this concern to cases in which a suspect declined to be interviewed. If such information "slips out," the grand jurors were to be instructed to disregard it. As noted, since the preponderance of witnesses were law enforcement officials or other government employees, the likelihood that such issues would arise was slight.

Following questioning by the prosecuting attorney, the grand jurors were given the opportunity to ask questions of each witness. In 13 percent of our cases, the grand jury did not ask any questions of any witnesses. On the other end of the scale, one witness was asked 96 questions by the grand jurors. The median number of questions per witness was 11. However, these questions elicited only a small portion of the total testimony. In half the cases examined, the prosecutor's questions developed 90 percent of the testimony. In only 25 percent of the cases did the questioning by the jurors result in over 20 percent of all testimony.

Once the State Grand Jury and prosecuting attorney have completed their questioning, the witness is excused. Before leaving the grand jury room, the following admonition is generally given:

> A person commits unlawful grand jury disclosure if such person knowingly discloses to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding which is required by law to be kept secret, except in the proper discharge of his official duties or when permitted by the court in furtherance of justice.

[1] The State Grand Jury follows a double deliberation procedure similar to that of Maricopa County described in Chapter 4. More detail on the State Grand Jury's deliberations is provided below.

Unlawful grand jury disclosure is a class two misdemeanor. In other words, you are hereby admonished that you must not disclose or discuss your testimony with any person other than the assistant attorney general in this matter and your own attorney if you have one.

Physical and Documentary Evidence

In addition to the testimony of witnesses, the prosecutor may introduce physical or documentary evidence to the grand jury. The Rules governing the county and the State Grand Jury differ in this regard. A county grand jury is not required to file the physical evidence presented to the grand jury with the indictment. For the State Grand Jury, Rule 12.25(A) of the Rules of Criminal Procedure requires that all physical evidence "presented to or considered by" the grand jury be filed with the clerk of the Superior Court in the same manner as the transcript of the proceedings.[1]

According to our case records data, documents, notes, and checks were the most common forms of physical evidence introduced. In more than three-quarters (78%) of the cases sampled, some form of documentary evidence was presented to the State Grand Jury. This statistic reflects the heavy emphasis placed on land and securities fraud and other "economic" crimes. In addition, handwriting exemplars were introduced in 13 percent of the cases; in another four percent, the results of handwriting analyses were noted. As might be expected given the types of cases presented to the State Grand Jury, weapons, fingerprints, blood samples and contraband were not entered as evidence before the State Grand Jury. In a few instances, photographs, audio- and video-recordings were presented. (Each was introduced in approximately nine percent of the cases sampled.)

Exculpatory Evidence

Division attorneys were advised that they are to present "clearly exculpatory evidence" to the grand jury, in accordance with ABA Criminal Justice Standard §36B, the Prosecution Function. The issue is most likely to arise when a potential defendant learns of the grand jury investigation and his or her counsel makes a written request to present exculpatory evidence.

Division documents indicated that case law is divided on this issue. For example, a number of courts have ruled that prosecutors must disclose exculpatory evidence, basing their arguments on either statutory or due process

[1]The Rule does not specify whether the original or a copy of the original evidence should be filed. The Division's suggested procedure was to use copies. Attorneys were instructed regarding procedures to be followed in order to identify and maintain the evidence properly.

grounds.[1] Court rulings have also established a Fifth Amendment right to an independent and informed grand jury, where by "informed," courts have held that jurors must be made aware of exculpatory evidence.[2] On the other hand, in several recent cases the courts have ruled that the prosecutor need not present all exculpatory evidence. Particularly relevant to the State Grand Jury, the Arizona Supreme Court recently ruled that:

> ...The contention that a grand jury must consider all exculpatory evidence misreads the grand jury's primary function of determining whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it.... Any more would put grand juries in the business of holding minitrials....[3]

The Division has set forth the following procedural guidelines for responding to defense attorneys' requests to present exculpatory evidence:

1. Determine exactly what the evidence is and how the defense attorney proposes to present it.

2. Interview proposed witnesses prior to their appearance before the grand jury. Review documentary evidence for authenticity.

3. Evaluate the evidence to determine whether it is exculpatory and whether it should be presented. Wherever possible, preclude the issue of "failure to present exculpatory evidence."

The written guidelines stressed that any investigation is a search for truth and that understanding a suspect's defenses before indictment can help in that search.

In the event that the person under investigation wished to appear, prosecuting attorneys were referred to Rule 12.6 of the Arizona Rules of Criminal Procedure, which states that a person under investigation may be permitted to appear before the grand jury upon written request. The prosecutor had two options if such a request was made. First, the person under investigation may be subpoenaed to appear before the grand jury. Second, the grand jurors

[1]The leading case cited is Johnson v. Superior Court of San Joaquin County, 124 Cal. Rptr. 32, 15 Cal.3d 248, 539 P.2d 792 (1975). See also Strehl v. District Court of Salt Lake County, 558 P.2d 597 (Utah S. Ct. 1976).

[2]Among the cases cited are Ex Parte Bain, 121 U.S. 1 (1887), and United States v. Dionisio, 410 U.S. 1 (1973).

[3]State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980).

may be informed of the request and asked if they wish the potential defendant to appear. If the grand jurors wish, they may decline the request. Tactical considerations generally dictated which approach was followed.

In discussions with Division staff, it became clear that even with the existence of written guidelines, the issue of whether or not to present exculpatory evidence caused a great deal of confusion. Although Division policy encouraged presentation of everything that is significant and exculpatory, it was sometimes difficult for attorneys to decide what met these criteria. For example, if a witness's statement contains both damaging and exculpatory information, should it be introduced? Should the prosecution consent to defense requests that polygraph results be presented? Since polygraph results may be tailored or may vary depending on the conditions surrounding test administration, should the prosecutor offer his own polygraph results in turn or call an expert witness to comment on the results? Another problem in this regard was actually recognizing what may be exculpatory. Without knowing what the defense strategy was going to be, some small fact or piece of evidence which might well become the essence of the defense at a later point in time was likely to go unnoticed by the prosecutor, in the opinion of those interviewed.

The former chief counsel of the Division believes that the issue of exculpatory evidence must be viewed in the context of the role of the grand jury. If one defines the grand jury proceeding as a probable cause hearing and not a "search for the truth to a moral certainty," then a balancing test is neither possible nor reasonable. Having to present exculpatory evidence places the prosecutor in the difficult position of performing three roles: prosecutor, legal advisor to the grand jury, and defense counsel. Furthermore, while the state puts on as much of its case as it wants, it is required to put on only a portion of the defense's case. Since this is inherently unfair, in the opinion of this prosecutor the only question that should be asked of the grand jury is whether the state's case is strong enough to support formally charging the defendant.

In reality, presentation of exculpatory evidence rarely occurred. In our sample of cases, we found no instance in which the prosecutor notified the grand jury of exculpatory evidence which it could request to hear. Nor did we find instances in which the prosecutor presented a witness or documentary evidence that was clearly designated as exculpatory. However, in one case, a target's statement was introduced and the question arose whether the target would testify. We summarize this case below:

> In an investigation of several suspects alleged to have engaged in fraudulent schemes to sell gems, the prosecutor introduced a copy of a transcript of an interview with one of the targets. The interview had been conducted by an investigator who had placed the target under oath before beginning the interview.

> The prosecutor wanted to avoid any claim that he used only incriminating portions of the target's statement. Therefore, he informed the grand jury:
>
> Since this interview was of someone who is under investigation, I think it might be incumbent upon us to let the jury know what the whole interview says.
>
> He proposed that he play the role of the investigator and ask the questions as they were transcribed and the witness read the answers given by the target.
>
> After the entire transcript was read in this fashion, a member of the grand jury asked whether any of the suspects were going to testify before the grand jury. The prosecutor replied that his office was not going to call any suspects as witnesses and noted that he was unsure whether any of the suspects were aware that an investigation was underway.

The fact that suspects were sometimes unaware of an investigation made it impossible for them to make any requests to testify or to submit exculpatory evidence. There is no provision in Arizona law requiring that suspects be notified of an ongoing investigation. This anecdote also demonstrates the prosecutor's dilemma when faced with questions about a suspect's availability to testify. The prosecutor did not want to infringe on the grand jury's right to call witnesses or request evidence. However, he wanted to avoid the scenario in which a suspect appeared in response to a subpoena and claimed the privilege against self-incrimination, since it might have prejudiced the grand jury against that suspect. In the anecdote above, the prosecutor responded to the grand juror's question and then dropped the matter without making any suggestions to the grand jury which might raise charges of improper influence of the grand jury process.

5.2.3 Case Conclusion and Grand Jury Deliberation

After all the witnesses and evidence have been introduced, the prosecutor generally asked the grand jurors if they had any remaining legal questions concerning the matter under investigation. The prosecutor was encouraged to call a recess in the event that he or she could not answer any such questions. Analysis of case records data revealed that jurors asked legal questions in over half (52%) of the cases sampled. The average number of questions asked was 2.5, with the range being from 0 to 12.

The type of legal questions asked varied from fairly routine requests for redefinitions of statutes to an unusual case in which a series of questions focused on the procedure by which the grand jury could add a defendant to the indictment. (This case is discussed in detail later in this section.) Other questions concerned the applicability of various laws to certain acts, particularly where a case involved charges of conspiracy. Questions of this

type often bordered on factual questions and required the prosecuting attorney to exercise considerable caution in formulating answers. For the most part, only questions of law were addressed, with prosecutors recalling witnesses whenever necessary rather than answering any factual questions directly.

Once the prosecutor had presented the evidence and the jurors had asked the prosecutor any legal questions they might have had, the State Grand Jury was ready to deliberate. Occasionally, complex grand jury investigations continued for two or more sessions. Only those panel members who had heard the entire case presentation could participate in the deliberations. If a grand juror missed a portion of a session, he or she was excused from attending any further sessions on the matter.

The prosecuting attorney concluded the presentation of the case with a statement of this type:

> Ladies and Gentlemen, this concludes the evidence I have to present at this time. It is now time for you to determine what you wish to do next. Your options include: calling more witnesses or evidence, ending this inquiry, or pursuant to A.R.S. §21-408 requesting that the Attorney General's Office prepare a draft indictment for you to consider.

As with the Maricopa County Attorney's Office, the procedure followed by the Special Prosecutions Division thus provided for two grand jury deliberations. The first allowed the grand jurors to decide whether they wished to hear more evidence, end the inquiry, or request a draft indictment. The second, assuming the grand jury exercised the last option, gave the jurors the opportunity to determine whether probable cause existed to return a specific indictment.

If the grand jurors requested that additional witnesses be called or evidence presented, Division policy required that the prosecuting attorney fulfill their requests. In our case records sample such a request was made in only one instance. In the event that a draft indictment was requested, the prosecuting attorney typically read the jurors a statement such as this:

> The draft indictment is simply that. A draft. It can be changed in any manner you desire. Charges may be added or deleted from any count. You should feel free to request me to draft any changes you want if there are any.

After the draft indictment was read but before leaving the grand jury to deliberate on the charges, the prosecuting attorney was expected to instruct the grand jurors about several legal matters. The following statements were generally read verbatim:

Before retiring from the jury room so you can consider the draft indictment, I wish to instruct you on the following legal matters:

1. The draft indictment is not evidence against the suspect(s).

2. It is your duty to determine the facts, and to determine them from the evidence received by this grand jury.

3. It is my duty to render legal advice to you. I have not purposely said or done anything in the presentation of this matter to you which is to be construed by you as an indication of my opinion as to any fact. If you feel I have done so, completely disregard those indications. You are the sole judge of the facts.

4. You are to apply the law to the facts and in this way decide whether or not there is probable cause to believe that the offense(s) (has) (have) been committed and whether there is probable cause to believe the potential defendant(s) committed (it) (them).

5. You must not speculate or guess as to any fact. You must not be influenced in your deliberations by sympathy or prejudice.

6. If there is more than one potential defendant listed in the draft indictment you must consider the charge against each potential defendant separately. You must give due deliberation as to each potential defendant in each count. You must not be prejudiced against one potential defendant if you should find probable cause with respect to another potential defendant.

7. Therefore, considering only the evidence presented in this matter, the assignment judge's instructions at the impanelment, and your common sense, you are to determine whether or not there is probable cause to believe that the potential defendant(s) committed the offense(s) set forth in the draft indictment.

The prosecuting attorney concluded with these words:

> If there are no legal questions, I will now leave the draft indictment with you and retire from the grand jury room, so you can deliberate.

Occasionally, the grand jurors inquired whether additional persons or counts might be added, whether certain individuals or counts might be deleted, or

why certain individuals were or were not named in the draft indictment. In such cases, prosecutors were advised to remind the grand jurors of their right and duty to return an indictment if they found probable cause against any particular individual. Furthermore, prosecutors typically instructed the grand jury that:

> The naming of persons at the beginning of this session as possible subjects of an investigation is not to be construed in any way as an opinion or recommendation of the attorney general that there is or is not probable cause as to those named persons. That is a State Grand Jury function.

Should the grand jurors wish to change the draft indictment, the prosecuting attorney was instructed to call for a recess and redraft the indictment as requested.

In the cases sampled, we found that the average number of minutes spent in deliberation per case was 11 (standard deviation = 10), significantly greater than the time spent in deliberating at the county level. In one case, the jurors deliberated for only one minute, whereas the longest period of deliberation was 40 minutes. In all but one of the cases sampled, the grand jurors voted unanimously to return a true bill; three jurors voted against the indictment in that one instance. In the case summarized below, a defendant was added in the final indictment.

A case with five individuals suspected of fraud in the sale of estate gems was presented to the grand jury. All named suspects owned or were employees of a single corporation. This case was unusually lengthy and involved a total of 29 counts, with each suspect charged with a different combination of offenses.

During the presentation of evidence, the grand jurors exhibited confusion as to which allegations applied to which suspects. The prosecutor was asked to clarify which suspects committed which offenses. The prosecutor defined the grand jury's role and the attorney general's role and pointed out that it was the responsibility of the grand jury to make exactly those determinations. He was careful to stress that when the prosecutor named individual suspects, this should not be interpreted as an opinion or a recommendation.

Later in the proceeding the grand jurors commented that there was a sixth person whom they might wish to indict. (This person was involved with the corporation in a capacity similar to those whom the prosecutor had included within the scope of the inquiry and had been mentioned in the evidence which had been introduced. The involvement of this person in the fraudulent acts that were the subject of the indictment was not noticeably greater or lesser than that of the other targets. This person was not a witness before the grand jury.) The prosecutor's response was only "no comment." A grand juror started to ask why the attorney general had not identified this person as a suspect. The prosecutor interrupted to state that any questions about evidence that might or might not exist must be directed to a witness, not the prosecutor. He offered assistance in identifying a witness who might be able to answer the questions, but pointed out that sometimes answers might not be available.

The grand jury dropped the matter until the time for deliberations arrived. At that point, they discussed the mechanics of adding a defendant to the draft indictment. When the final indictment was returned, six individuals were charged--the five originally named by the prosecutor and the sixth added by the grand jury. All six defendants were ultimately convicted of at least one charge in the indictment.

In all other cases, the grand jurors returned an indictment containing the number of defendants and charges as proposed in the prosecutor's draft.

5.3 Summary

This examination of the State Grand Jury has given us a somewhat broader, although not substantially different, perspective on the grand jury than was gained by studying the grand jury at the county level. At the time of our study, both served essentially screening functions; the full investigative potential of the grand jury system had not yet been realized in Arizona. Nonetheless, there were differences in the nature of the State Grand Jury and the county grand juries, even though both performed a similar role. The proceedings differed in length, the use of physical evidence, and the complexity of the resulting indictments, among other things.

Many prosecutors have suggested that the preliminary hearing would be so inefficient as to be unworkable as a screening device for complex white collar crimes. Clearly, we were unable to study this hypothesis in Arizona, since the preliminary hearing was not used at the state level for cases of this type. However, it is important not to overlook the potential of the grand jury as a screening device in complex cases and as an investigative tool in any comparison of the roles of the grand jury and the preliminary hearing in case processing.

CHAPTER SIX

SUMMARY AND CONCLUSIONS

As noted in the introduction to this report, this study had several purposes:

- to examine the reasons underlying prosecutors' choice of different modes of case screening;
- to compare the grand jury and the preliminary hearing with respect to efficiency, due process safeguards, and efficacy;
- to examine the manner in which enacted reforms actually are implemented; and
- to explore the use of the grand jury in complex cases.

In order to address these questions, we chose to examine multiple jurisdictions within a single state. Thus, we could look at natural variation between jurisdictions while holding constant the legal framework--e.g. laws, rules of procedure, and overall court structure--within which the study sites operated. Arizona was selected as the state in which to conduct the study for a number of reasons, the most important of which was the sharply contrasting pretrial screening procedures utilized in its two largest counties. Our methodology included interviews with respondents in the criminal justice system, as well as analysis of case records. With the cooperation of local authorities, we were fortunate enough to be given access to grand jury as well as preliminary hearing transcripts. The former, which are ordinarily closed to the public, were essential in accomplishing our research objectives.

In the preceding chapters, we described in detail the use of the preliminary hearing and grand jury in Pima and Maricopa Counties and the rationales offered by prosecutors for choice of one or the other proceeding. We also described the use of the grand jury in prosecuting more complex cases at the state level. In this chapter, we summarize our findings briefly, drawing a more direct comparison between the two competing screening procedures. We conclude with a discussion of several important research and policy implications which have relevance for legislators, rule-makers, practitioners, and

members of the academic and research communities. Included in this discussion are a number of suggestions for future research.

6.1 Summary Comparison of the Preliminary Hearing and Grand Jury in Arizona

Our analysis revealed that even districts operating under a single legal framework can develop widely different approaches to case screening. In Maricopa County, the vast bulk of the cases are scheduled for the preliminary hearing, although a sizable number (3,135 or 36% of cases passing initial screening) of these hearings are waived either with or without an accompanying plea. In Pima County, the majority of the cases go to the grand jury (74%), with only a small fraction of the cases being presented to the preliminary hearing. In both counties, the reasons offered by prosecutors for choosing one or the other proceeding center around such considerations as perceived efficiency, the opportunity to test witness credibility, and preservation of testimony. In actuality, the basic differences between sites appear to be a reflection of local norms and customs. These patterns of doing business in the local court system are so well-established that respondents are hard-pressed to remember their origins or to conceive of alternative approaches.

The rules governing the preliminary hearing in Arizona may be summarized briefly as follows:

- The preliminary hearing must be held within 10 to 20 days of the defendant's initial appearance in court, depending on his or her custody status. While both the lower (justice) court and trial (superior) court have jurisdiction over preliminary hearings, the bulk of such proceedings are heard in lower court.

- Justices of the peace need not be lawyers. Thus, the "lay grand jury" may have as its counterpart the "lay justice."

- The justice need hear only such evidence as he or she feels is necessary to establish probable cause. At the close of the prosecutor's case, including defense cross-examination, the justice must determine and state for the record whether the prosecutor has established probable cause. The defendant may then make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The justice may refuse to allow such evidence if he or she feels it would be insufficient to rebut the finding of probable cause.

- Although hearsay is allowed in the preliminary hearing, there is a limitation. Counsel must demonstrate that there are reasonable grounds to believe that the witness whose evidence is introduced through hearsay will be available for trial.

- No evidence may be challenged on constitutional grounds. In addition, the prosecutor does not have to establish foundation when introducing physical or documentary evidence. Otherwise, trial rules of evidence apply.

- Unlike the grand jury indictment, a probable cause determination made by a judge or justice of the peace may be overturned on the grounds that insufficient evidence was presented to support the finding. Nothing precludes resubmission of the case to another preliminary hearing session or the grand jury, however.

- The preliminary hearing transcript is a matter of public record and includes all testimony, objections, and court rulings.

In practice, the preliminary hearing had the following characteristics:

- Most cases involved one defendant. One count was alleged in 76 percent of the cases in Maricopa County but only 51 percent of the cases in Pima County.

- The mean number of witnesses in Maricopa County was slightly under two per case whereas it was slightly over two per case in Pima County.

- The defense exercised its right to cross-exmaination quite extensively. The defense elicited 61 percent of the testimony in Maricopa County and 57 percent of it in Pima County.

With respect to the grand jury, Arizona has both innovative and traditional requirements. Summarizing briefly,

- Every aspect of the grand jury proceeding must be recorded, excluding grand jury deliberations. This includes all witness testimony, and any exchanges between jurors, witnesses and/or prosecutors. Recent case law reinforces and extends the statutory requirement, allowing nothing to be said "off the record" within or outside the grand jury room itself and effectively eliminating informal interaction between prosecutors and jurors.

- Grand jury transcripts are to be made available to the prosecutor and defendant within 20 days following the return of the indictment. Upon motion of any party showing good cause, however, the court may limit disclosure required by this rule when it finds that (1) the disclosure would result in a risk or harm outweighing any usefulness of disclosure to any party; and (2) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

- Arizona is one of only 15 states which allows witnesses to have counsel present in the grand jury room. In Arizona such representation is limited to target witnesses, i.e., prospective defendants. The law does not, however, require that the target be notified of the impending proceeding and prosecutors rarely, if ever, do so in the typical case. If defense counsel is aware of the upcoming grand jury proceeding, he or she may request to have the target testify. In the rare event that this occurs, the grand jury is not required to allow the target to testify.

Table 6.1 summarizes the results of the case records analysis, focusing on key characteristics of both the preliminary hearing and the grand jury. As can be seen, the vast majority of cases in both jurisdictions involved a single defendant; there was little variation by type of proceeding. On the other hand, there was a sharp differential in the number of counts charged. For example, preliminary hearing cases in Maricopa County involved a single count in three out of four cases; grand jury cases presented by the Organized Crime and Racketeering Unit (OCRU), in contrast, typically involved multiple counts. These patterns reflect differential use of these proceedings: the preliminary hearing is used for routine case screening, whereas the grand jury is used for the more complex and sensitive OCRU caseload. There was less of a discrepancy in Pima County on this variable, although single count cases were also more prevalent at the preliminary hearing than in either grand jury setting.

Preliminary hearing cases in both sites were apt to employ two witnesses in a typical case, at least one of whom was likely to be a civilian. In contrast, the grand jury typically heard only one witness--a law enforcement officer or investigator. Neither forum was likely to have defendants/targets testify, however. Thus, due process protections designed to protect the rights of such witnesses at the pretrial screening stage were largely moot in such cases.

Preliminary hearing cases also involved many more pages of testimony than did grand jury cases. In Maricopa County, this discrepancy was reduced somewhat

Table 6.1

SUMMARY OF KEY FINDINGS FROM THE CASE RECORDS ANALYSIS

	MARICOPA COUNTY			PIMA COUNTY		
	Preliminary Hearing (N = 75)	Grand Jury (routine) (N = 75)	Grand Jury (OCRU) (N = 25)	Preliminary Hearing (N = 84)	Grand Jury (routine) (N = 74)	Grand Jury (CECU) (N = 25)
1. Percent single defendant cases	89%	80%	80%	81%	78%	80%
2. Percent cases with one count	76%	59%	20%	51%	41%	44%
3. Mean witnesses per case	1.7	1.1	1.0	2.3	1.1	1.0
4. Percent cases with civilian witnesses	67%	0%	8%	92%	5%	8%
5. Percent cases with targets/ defendants testifying	4%	0%	0%	4%	0%	4%
6. Median pages of testimony per case	28	7	11	39	4	4
7. Median pages of testimony controlled by prosecutor	12 (43%)	6.6 (94%)	11 (100%)	20 (51%)	4 (100%)	3.1 (78.%)
8. Percent cases with physical/documentary evidence introduced directly	7%	0%	4%	7%	0%	0%
9. Percent cases with offer of proof/exculpatory* evidence	8%	0%	0%	14%	0%	0%
10. Percent cases with no probable cause found**	3%	0%	0%	6%	0%	0%

*Excluding target testifying.

**As reflected in this table, none of the grand jury cases in our random sample resulted in a "no bill." However, our caseflow estimates for all cases, displayed in Table 2.2, indicate that no bills are returned in less than one percent of the grand jury cases in Maricopa Count, and in approximatley two percent of the cases in Pima County.

when the portion of the transcript devoted to defense questioning was subtracted from the total. In Pima County, this was not the case. Even discounting the portion of the testimony generated by defense counsel's questioning, prosecutor-directed testimony at the preliminary hearing was five or six times greater than that presented at the grand jury. This probably reflects the fact that the preliminary hearing was used only rarely in this jurisdiction, particularly when the prosecutor wished to test the credibility of witnesses on the stand and/or to preserve their testimony for use at trial.

Obviously, defense counsel made extensive use of their opportunity to cross-examine witnesses at the preliminary hearing: they controlled upwards of one-half of the testimony presented. They were unlikely to make an offer of proof, however. Such an offer was made in only eight percent of the cases in Maricopa County and 14 percent in Pima County. No exculpatory evidence (apart from the target's testimony in one case) was introduced by the prosecutor to the grand jury in either county, but, as noted in the discussion in Chapters 4 and 5, there is no clear mandate that they do so.

Neither forum was likely to terminate in a finding of no probable cause. Furthermore, as noted in Chapter 4, grand jurors did not play a very active role in the proceeding. Grand jurors typically asked only two questions of the witnesses per case, deliberations were relatively brief, and the decision of the jurors was almost always unanimous.

Despite the fact that the special prosecution units in both counties reported using the grand jury for "investigative" purposes, the table illustrates the similarity between cases brought by these units and other more routine grand jury cases. By and large, the use of the grand jury at the county level in Arizona was fairly rote.

We also examined use of the State Grand Jury in Arizona. While the State Grand Jury was not used as aggressively as an investigative tool at the time of our study, it did allow us to explore grand jury operations in more complex cases. In general, we found that the proceeding lasted somewhat longer (91 minutes), typically involved multiple counts, and had physical evidence introduced more frequently (in 78 percent of its cases) than did the county grand juries. As discussed in Chapter 5, the Special Prosecutions Division of the Attorney General's Office has also established a number of guidelines for case presentation that are designed to avoid procedural error. These may be useful to others desiring to formalize the grand jury proceeding.

6.2 Conclusions

We believe that our limited focus on a single state was amply rewarded. By holding constant the legal framework within which the study jurisdictions operated, we were able to explore the natural variation between them. Thus, despite our concentration on Arizona, or more properly because of it, we believe our findings suggest a number of important conclusions which may be useful to policymakers, practitioners, and other researchers. These are summarized in the remainder of this section.

6.2.1 Choice of Proceeding

Nothing is so inherent in the real nature of either proceeding as to preclude using the grand jury or the preliminary hearing for the same screening related purpose. Often, the same rationale governs the choice of different proceedings. For example, when Pima County wishes to test a case involving sensitive political issues (e.g., a case involving alleged police brutality) it will often look to the preliminary hearing as a forum. The perceived advantages of this approach include the fact that the preliminary hearing is a public hearing and apparently outside direct prosecutorial control, thus giving the appearance that the decision to prosecute has been independently ratified. (Similarly, if charges are dismissed at this point as a result of a finding of no probable cause, the decision will have been made in a public forum and not in the secret grand jury proceeding.) In contrast, Maricopa County prefers to involve the community in such cases and is apt to present them to the grand jury.[1]

Essentially, each county has chosen to prosecute its atypical cases through its atypical screening mechanism. In Pima County, the grand jury is the routine screening mechanism and is perceived to be under the direct control of the prosecutor. Therefore, when in doubt about the strength or due to the sensitivity of the case, the preliminary hearing is the preferred screening mechanism. In Maricopa County, where the preliminary hearing is the routine pretrial screening procedure, major felonies and other complex or sensitive cases are likely to go to the grand jury.

Another rationale which may be offered for utilization of either proceeding involves protection of government witnesses. Protection may be very important when the witness is testifying against others involved in an organized criminal enterprise or when the witness has infiltrated such an enterprise as an undercover agent. Historically, one justification for grand jury

[1] This is the approach typically followed by most jurisdictions.

secrecy has been to protect the identity of such witnesses, thereby avoiding the possibility of intimidation or actual harm.[1] In both Pima and Maricopa Counties, however, prosecutors favored the preliminary hearing when the witness was considered to be in danger. Prosecutors in both sites stated that, since preliminary hearing testimony may be preserved for use at trial, having witnesses testify at the preliminary hearing removes one of the primary motivations for tampering with them: preventing damaging testimony at trial. At the same time, the preliminary hearing testimony provides some backup for the state should a witness not be available to testify at trial for any reason.

Sometimes, two different proceedings are used to handle similar cases for dissimilar reasons. For example, in Maricopa County, sexual assault cases are expected to go to the preliminary hearing in order to test the credibility of witnesses, assess case strength and preserve testimony. In contrast, Pima County prosecutors prefer the grand jury for such cases, since use of that proceeding prevents the victim-witness from having to confront the defendant and submit to cross-examination twice: once at the preliminary hearing and again at trial.[2] Given the strong victim-witness program in that jurisdiction which helps guarantee the cooperation of witnesses, testing the credibility of witnesses or preserving testimony are not major concerns except in cases involving young children. In these cases, the preliminary hearing is often selected as the screening mechanism.

The necessary conclusion is that these processes in actuality do not supply any unique benefits or disadvantages with respect to their screening functions. They are what prosecutors want them to be. Furthermore, the choice of proceeding is affected more by "local legal culture" and perceived corollary benefits than by the nature of the proceeding per se.

Local norms and historical practices of segments of the criminal justice community (prosecutors, judges, and the defense bar) have a more important relationship to, and effect on, the relative advantages of the grand jury and the preliminary hearing than do formal laws and rules. Our analysis revealed that even jurisdictions operating under a common legal framework--statutes, criminal procedures, and court rules which define legal operations--can elect widely different mechanisms for pretrial screening, and that it is virtually impossible to attribute these differences to something other than "local legal culture."

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[1] See, for example, United States v. Proctor and Gamble Co., 35 U.S. 677 (1958).

[2] These decisions parallel the typical choice of proceeding in each district. What is interesting is that each jurisdiction offers a unique, carefully considered rationale for handling these special types of cases in different ways.

By local legal culture, we mean the informal norms, values and attitudes of the individuals and groups within the criminal justice system, and the informal rules and procedures adopted by them. In part, these expectations reflect the cultural characteristics of the community--including demographics, racial and ethnic mix, prevailing community attitudes, and local history. They are also shaped by the distribution of political and personal power among the various individuals and groups within the system, and by patterns of communication and cooperation which have developed over time. Our study revealed that local norms and procedures can become so embedded that the individuals involved cannot offer a clear picture of when, why, or how current practices developed, nor can they conceive of adopting another approach.

Like others before us, we use the term local legal culture to explain the observed differences between jurisdictions because laws and legal structures and differential resource constraints do not afford a ready explanation. While Maricopa County has more magistrates than Pima County, it certainly does not have a sufficient number to accommodate the preliminary hearing caseload without a significant proportion of hearings being waived. On the other hand, were Maricopa County interested in using the grand jury more frequently, additional grand juries could be impanelled. In essence, prosecutors in each county have developed different procedures for handling cases in what they perceive to be an efficient and predictable manner. In each instance, their orientation reflects aspects of the relationship with the local courts and the defense bar.

In Maricopa County, cooperative justices of the peace and a willing defense bar make the preliminary hearing setting the perfect opportunity to weed out many cases without the necessity of either a preliminary hearing or grand jury review. In effect, as Arenella suggested concerning trials, the preliminary hearing is offered in Maricopa County to most, if not all, in the expectation that only a few will accept.[1] The use of straight waivers and negotiated pleas at this stage keeps the Justice Court docket manageable.[2] The defense bar also receives something in return for waiving the preliminary hearing. Stated rationales include earlier discovery, concessions regarding conditions of release, and avoidance of stiff penalties.[3] In addition, defense lawyers have personal incentives for cooperating at this stage, including normative pressure from prosecutors and justices to keep the system moving and the necessity of handling a large volume of cases efficiently.

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[1] Arenella, Peter, "Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication," Michigan Law Review, 78:463, 1980.

[2] Prosecutors in Maricopa County report that if the preliminary hearing is actually held, they are unlikely to offer major concessions in subsequent plea negotiations.

[3] In addition, the Superior Court caseload is reduced by the number of cases weeded out at the time of the scheduled hearing.

Moreover, the fact that most defendants are bound over at the conclusion of the hearing may be used as a justification for waiving the preliminary hearing without necessarily sacrificing the interests of the client.

In Pima County, local norms and informal relationships among system participants have resulted in an entirely different approach to pretrial screening. While the County Attorney's Office has initiated a number of innovative programs--e.g., victim-witness, adult diversion--and weeds out a significant number of marginal cases early on, it has a fairly tough policy with respect to those cases which survive its initial screen. Facing an aggressive public defender's office, the prosecutor's office leaves little opportunity for extensive discovery or negotiation before the case is bound over to Superior Court. The grand jury in this site is viewed largely as an arm of the prosecutor. As such, it is an extremely efficient, highly predictable screening mechanism which effectively minimizes defense involvement in the case prior to arraignment in Superior Court. While the judges take exception to this view of the grand jury proceeding, they feel they have very little power to effect change.

Both the grand jury and the preliminary hearing serve a variety of collateral functions which may be important in determining when and how each mechanism is used. Many commentators have concentrated on the formal or stated goals of these institutions, while ignoring the functions actually fulfilled in practice. Our study complements the findings of previous researchers by pointing out the many secondary or collateral functions served by the two major pretrial screening devices. These functions, which must be taken into account in any discussion of the relative merits of these proceedings, are summarized below.

Discovery. Since Arizona's revised Rules of Criminal Procedure provide for broad and early disclosure by both the prosecution and defense, the importance of the grand jury and the preliminary hearing for discovery purposes is somewhat mitigated in this state. Indeed, the liberal discovery policy is cited as an important factor in the decision to cut back on the scope of the preliminary hearing proceeding. At the same time, these institutions do serve certain purposes with regard to pretrial discovery. Both the preliminary hearing and the grand jury transcript amplify the information supplied in the formal complaint. The preliminary hearing offers two additional advantages: it allows the opportunity to obtain more detailed discovery through the cross-examination process; and it offers the ability to preserve testimony for possible use at trial.

Preservation of testimony. Use of the preliminary hearing proceeding to preserve testimony is important in a number of ways: 1) it preserves the testimony of very young children who may forget the incident over time; 2) it preserves the testimony of older witnesses who may become infirm or die; and

3) it preserves the testimony of witnesses who may be intimidated into not testifying at trial or subject to bodily harm. As noted above, the latter factor is often cited by proponents of the grand jury: grand jury secrecy is seen as an important factor in protecting the identity of such witnesses. Given the fact that secrecy is often difficult to achieve in practice,[1] use of the preliminary hearing to preserve the testimony of witnesses for use at trial may be a useful alternative.

Testing constitutional issues. Neither the grand jury nor the preliminary hearing serves as a forum for testing constitutional issues in Arizona, another collateral function served in other jurisdictions.[2] The preliminary hearing does provide a limited opportunity for the defense to explore the police officer's actions in obtaining evidence and/or the chain of custody involved in handling the evidence. The extent to which this opportunity is utilized, however, is very much dependent on the aggressiveness of the defense attorney in pursuing this line of attack and the permissiveness of the magistrate in allowing it, since questioning for this purpose is specifically precluded under the revised Rules.

Of course, it should be pointed out that there are reasons for this restricted view of the preliminary hearing in Arizona. As noted earlier (Section 3.1.2), the revised Rules reduced the scope of the preliminary hearing. At the same time, disclosure provisions were broadened and the omnibus hearing for pretrial motions was introduced. Under these Rules, the legality of the evidence obtained is tested before a judge in the Superior Court rather than at the preliminary hearing. Given that magistrates need not be lawyers, the preliminary hearing in Arizona could be considered an inappropriate forum in which to entertain such questions. Therefore, it is important that neither the preliminary hearing nor the grand jury be regarded as fulfilling this function as they currently operate in Arizona.

Review of conditions of release. The issue of bail may be discussed in an adversarial setting at the preliminary hearing. Favorable conditions of release are also negotiated, on occasion, in exchange for a waiver of the preliminary hearing. In the case of the grand jury, however, the bail recommendation is made by the prosecutor following the return of an indictment, and the judge must make his or her decision without defense input.

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[1] General Accounting Office, Comptroller General, Report to the Congress: More Guidance and Supervision Needed Over Federal Grand Jury Proceedings, GGD-81-18 (Washington, D.C.: Government Printing Office, 1980).

[2] Graham, Kenneth, and Leon Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Implications." UCLA Law Review, 18:636 (1971) (see discussion in Chapter 3 of this report).

Use of the Transcript. Clearly, the grand jury and preliminary hearing are not used as substitutes for full trial in Arizona. That function is fairly unique to Los Angeles County.[1] On the other hand, the grand jury and the preliminary hearing transcript are used by both parties to prepare for trial.

Occasion for plea negotiation. As noted throughout this report, the time scheduled for the preliminary hearing in Maricopa County is frequently used as an occasion for plea negotiations. In fully one-third of the cases scheduled for a hearing, the case is disposed at this stage either through a plea to a misdemeanor in lower court or through a "plea arraignment" in Superior Court. In either case, the preliminary hearing presents the first real opportunity for both parties to meet each other face to face and to work out an immediate resolution to the case. This opportunity is rarely utilized in Pima County. Once the prosecutor has decided to move forward, plea negotiation is not likely to occur until the case is bound over to Superior Court following a grand jury indictment or filing of an information.

Investigation. The grand jury also serves an important collateral function: as an investigative tool in complex, white collar and organized crime cases. This was discussed in Chapter 5 above and will be examined again later in this chapter.

6.2.2 Efficacy and Efficiency of the Two Proceedings

Neither the grand jury nor the preliminary hearing screened out a significant percentage of cases in the jurisdictions under study. There are at least two possible explanations for the high incidence of cases in which probable cause was found.

On the one hand, such results suggest that both grand juries and magistrates are likely to "rubber stamp" the decision of the prosecutor. In partial support of this thesis, we found that grand jurors tended to ask very few questions of witnesses (approximately two per case); spent very little in time in deliberations (an average of 4.4 minutes in Maricopa County);[2] returned indictments on all counts, not a subset thereof; and in nearly every case

[1] Ibid.

[2] Comparable data were unavailable in Pima County.

rendered a unanimous decision.[1] Similarly, magistrates typically found probable cause for all counts.

On the other hand, these findings are also consistent with another causal explanation: prosecutorial screening is so effective that few cases are likely to be weeded out at the preliminary hearing or grand jury stage. Given the fact that prosecutors report using the likelihood of conviction standard to screen cases, whereas the two formal screening mechanisms employ a weaker probable cause standard, this thesis is also highly probable. Indeed, the low rate of acquittal (less than five percent) in cases presented either to the preliminary hearing or to the grand jury suggests that the prosecutor's screening decision is highly predictive of both the immediate and ultimate disposition of the case. However, it is important to note that prosecutorial screening occurs after the probable cause determination, as well as before. In both counties, post-grand jury and preliminary hearing dismissals occurred (some as a result of plea bargains in other cases involving the same defendant and some due to newly discovered weaknesses in the case). This was most apparent in Pima County, where approximately 25 percent of our sampled grand jury cases were dismissed following the indictment. Given the practice in this county of weeding out select categories of cases (most notably those involving minor drug offenses) prior to filing charges and presenting the majority of the remaining cases to the grand jury without in-depth screening, it is not surprising to see more dismissals at this later stage.

It is important to point out that the low standard of proof required by both pretrial screening mechanisms appears to influence strongly the attitudes and behaviors of prosecutors and the defense bar with respect to use of these proceedings. Prosecutors, for example, feel no need to put on multiple witnesses or to introduce physical evidence when the hearsay testimony of a single police officer is likely to meet the probable cause standard. Unless tactical considerations dictate presenting additional evidence, there are several strong disincentives for doing so: 1) to avoid additional demands on scarce resources; 2) to avoid unnecessary disclosure; and 3) to avoid possible contradictions in testimony between the preliminary hearing and trial. Similarly, defense counsel have every reason to expect that their clients will be bound over at this stage. Thus, they feel that failure to offer affirmative defenses and extensive use of preliminary hearing waivers are not harmful to their clients' defense. On the contrary, introducing defense witnesses or physical evidence at the pretrial screening stage may have serious negative consequences, including the possible impeachment of the witness at trial, prosecution for perjured testimony, and early disclosure of defense strategy.

[1] See Carp, Robert A., "The Harris County Grand Jury: A Case Study," Houston Law Review, 12:90 (1974), for similar findings in his intensive participant observation study of the Harris County grand jury.

If the probable cause standard is appropriate at this stage in case processing, then rules designed to turn the preliminary hearing or the grand jury into a rigorous pretrial screening device may not achieve the desired result. Alternatively, raising the standard of proof may place a severe strain on system resources, as the proceedings more closely resemble mini-trials. Either way, this brings us to a corollary conclusion, as discussed below.

Prosecutorial screening must be examined carefully, since it appears to play a critical role in the pretrial screening process. If we can generalize from the findings of this study and related research efforts, prosecutorial screening, where it occurs, is far more likely to influence who is bound over for trial than either the preliminary hearing or the grand jury. Thus, those seeking to "reform" the pretrial screening processes may also want to focus their attention on prosecutors' screening policies and procedures.

While it is beyond the scope of this study to generate a set of "reform" principles, an approach worthy of consideration would be the articulation of standards by prosecutors, including the standard of proof required for a given case to pass through the prosecutor's screening net. Such standards could be fairly explicit, while preserving prosecutorial discretion and flexibility. Consistent with the historical goal of community involvement in charging decisions as represented by the grand jury, the screening standards might be developed and/or reviewed by members of the local community. To help ensure that standards are applied even-handedly, a review system is desirable. Like the preliminary hearing and grand jury transcripts, a formal written record of the screening decision would allow internal office review.

While both the preliminary hearing and the grand jury are fairly perfunctory proceedings, the preliminary hearing does appear to be a slightly more rigorous mechanism for determining probable cause. Neither procedure was used to test the legality of evidence, and the preliminary hearing was used only rarely to present affirmative defenses in the jurisdictions under study. In essence, each proceeding offered a relatively weak test of factual guilt. Morover, there was little difference in the ultimate disposition of cases reviewed by either the preliminary hearing or the grand jury. While this may not completely reflect the capacity of either process to screen cases, it does suggest that neither forum may have the potential to have an effect on the flow of cases through the criminal justice system.

Nevertheless, the preliminary hearing finding of probable cause was typically based on the direct testimony of at least one civilian witness, and in a few instances (7%) involved the direct introduction of physical evidence. The grand jury, in contrast, relied almost exclusively on the hearsay testimony of police officers in making a routine determination of probable cause. Even in complex cases involving economic crimes and major felonies, civilian witnesses were rarely called to offer grand jury testimony. In addition, the

preliminary hearing allowed the defense an opportunity to test the credibility of certain witnesses through use of extensive cross-examination. Thus, the preliminary hearing may provide a somewhat better test of probable cause in terms of the amount of evidence presented and the opportunity to challenge that evidence.

Despite the relative merits of the two proceedings in screening routine cases, there may be instances in which state or local prosecutors need to use the grand jury proceeding to investigate and prepare for the prosecution of complex criminal cases. As noted in Chapter 5, among the ways in which the grand jury may assist in case development are these:

- to subpoena records and other forms of physical evidence;
- to compel testimony from uncooperative witnesses;
- to assess and "lock-in" the testimony of possible defense witnesses;
- for purposes of impeachment of trial testimony or prosecution for perjury;
- to grant immunity to individuals in return for testimony against others higher up in the criminal organization; and
- in conjunction with use of electronic surveillance, to elicit truthful testimony, and/or to encourage requests for immunity in return for cooperation.

Furthermore, unless the preliminary hearing is actually held, the relative efficacy of that proceeding as a screening device may be moot. While Aranella and others have expressed concern over the failure of both the grand jury and the preliminary hearing to provide adequate pretrial screening, frequent waiver of the preliminary hearing results in many cases being adjudicated without benefit of any independent test of either the factual or legal basis of the charge.

It is impossible to say which approach is more efficient; each jurisdiction has found a way to process large numbers of cases quickly. Pima County relies almost exclusively on the grand jury, screening out certain categories of cases beforehand and submitting the remainder to one of two grand juries, each operating two days a week.[1] In the view of local prosecutors, the

[1] As noted above, a second round of screening takes place after the grand jury finding, through use of dismissals.

grand jury process is very efficient for several reasons. First, the grand jury proceeding takes slightly less time than the preliminary hearing since it involves fewer civilian witnesses and precludes the opportunity for cross-examination by defense counsel. It also minimizes the time needed to prepare for the proceeding: it is easier to prepare police officers than civilian witnesses. Second, the timing of the proceeding is somewhat more predictable, since it is scheduled and largely controlled by the prosecutor. Thus, prosecutors and government witnesses need not waste large amounts of time waiting for their turn on the docket. Finally, the grand jury is a fairly inexpensive screening procedure: despite the fact that there are up to 16 persons on the grand jury each day, they serve at a very low rate of pay.

When used as an opportunity for plea negotiation, the preliminary hearing process can also be described as extremely efficient, since so many cases terminate at that stage. In Maricopa County, the system handles the large volume of cases scheduled for the preliminary hearing only because the various parties accept and follow local norms: the preliminary hearing is actually held only when no other arrangement is possible. Through use of plea negotiation in lower court and plea arraignments in trial court, many cases are resolved without committing further resources at the pretrial or trial stage. In essence, by scheduling, but not necessarily holding, the more lengthy pretrial screening procedure, the system saves prosecutors, defense counsel, and the trial court time and resources.

6.2.3 The Issue of Reform

Although those urging grand jury reform (or even abolition) often base their arguments on the comparison between the grand jury and the preliminary hearing, our findings reveal that the logic of such a position is weak in several ways. First, there is no uniform or standard preliminary hearing against which to measure the grand jury. Depending upon the jurisdiction involved, the preliminary hearing may be an ex parte proceeding, may deny the accused many of the due process safeguards which reformers advocate for the grand jury, or may be a perfunctory "rubber stamp." Second, in some jurisdictions the grand jury has been modified and offers the defendant a number of due process safeguards. Third, it is dangerous to make such comparisons in a vacuum; it is much more appropriate to examine the proceedings as they are actually used in practice. Fourth, the theoretical debate over the grand jury versus the preliminary hearing often fails to take into account the fact that each serves a broad array of collateral functions which in large measure are interrelated with local preferences and practice. Finally, there may be a traditional way of doing things in a jurisdiction that is reasonably comfortable to all parties. Any attempts to question the existing practice or suggest alternatives may face serious obstacles if they are not sensitive to local tradition. We cannot prescribe which approach is best for pretrial screening, nor can we say what each proceeding should look like. We can,

however, point out a number of factors which should be kept in mind by those considering or advocating change.

If the grand jury and the preliminary hearing co-exist as alternative screening devices, the question of equal protection may arise. In approximately one-half of the states (including Arizona), the preliminary hearing and the grand jury function simultaneously, with the prosecutor choosing between the two.[1] Depending on local practice, this structure may operate in several different ways. In some jurisdictions, such as Pima County, nearly all cases will be processed through the same screening mechanism, whereas in other instances each proceeding handles a portion of the caseload.

Although this system has been challenged on equal protection grounds on the theory that the level of due process protection provided to the defendant differs depending on the screening mechanism selected by the prosecutor, most courts, including the Arizona Supreme Court, have upheld this dual system of prosecution.[2] California stands alone in ruling that the use of alternative screening mechanisms violates equal protection guarantees.[3] One other state (Wisconsin) has addressed the issue legislatively, requiring that a preliminary hearing be held even though an inictment has been returned in a case, the same remedy imposed by the California Supreme Court in Hawkins.

It is clear, then, that the use of different mechanisms to determine probable cause does not constitute a violation of the equal protection doctrine under the laws of most states. Nevertheless, there is no doubt that in practice certain types of cases receive different treatment through the prosecutor's discretion.

In Arizona, the type of pretrial screening procedure utilized was dependent in large measure on two dominant factors: 1) the community in which the defendant was charged; and 2) a number of collateral objectives, including the prosecutor's desire to test witnesses' credibility, preserve testimony, avoid possible defense discovery, and/or demonstrate to the victim or community the fact that the case was being pursued vigorously.

At the same time, our findings revealed that the nature of the evidence offered and the rights afforded the defendant, including the right to cross-examine government witnesses, varied somewhat from one proceeding to the other.

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[1] As discussed in Chapter 1, the other options are 1) to have the two proceedings operate in sequence, as is the case in the federal system; and 2) to rely exclusively on the grand jury (or preliminary hearing).

[2] See, for example, State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975).

[3] Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916 (1978).

While these differences were not as striking in practice as some commentators have argued, one can still reasonably question whether the nature of the pretrial screening process should be entirely dependent on where the crime was committed and a host of secondary considerations.

For any jurisdiction examing its pretrial screening process, it is important to consider whether each proceeding serves a useful and distinct purpose. Otherwise, there may be little reason to keep both as competing mechanisms. Or, one may wish to retain both, but expressly distinguish between their functions--e.g., the grand jury would be used for complex, multiple-defendant cases and broad investigations into organized crime and public corruption, whereas the preliminary hearing would be retained for more routine case screening.

The Nature of the Proceedings

Regardless of which mechanism or combination of mechanisms exists in a given jurisdiction, questions concerning the nature of the proceeding remain. Whether probable cause is to be determined by the grand jury and/or the preliminary hearing, the following operational issues must be resolved: what procedures should be followed in the conduct of that hearing, what standards of evidence or proof should be required, what role does the accused and evidence favorable to his or her behalf play in the hearing, and what is the cost of the proceeding? In answering these questions, several considerations must be kept in mind.

First, there is no "perfect" or "ideal" preliminary hearing (or grand jury). Criticizing the performance of the grand jury because it is not like the theoretical performance of the preliminary hearing focuses too much attention on abstract models and is not likely to produce practical solutions. The debate on what protections the grand jury proceeding should offer should be more concerned with the nature of the grand jury per se, than with whether the grand jury matches a hypothetical and possibly flawed standard. Furthermore, defining the nature of the preliminary hearing or the grand jury involves assessing the appropriate balance between considerations of efficiency and the implementation of wide-ranging due process protections.

Second, attempts to "reform" a proceeding may produce unanticipated results. In Arizona, prior to the implementation of the new Rules in 1973, the preliminary hearing was essentially a mini-trial. Once grand juries began to be convened regularly rather than on an as-needed basis, prosecutors in Pima County readily turned to that alternative since they felt the preliminary hearing was essentially unworkable. If a proceeding is modified to

incorporate broad due process protections and is perceived to have forfeited efficiency as a result, the modified system may be a failure.

Decisions regarding which, if any, reforms to implement in either proceeding must be based on a thorough understanding of both their intended and likely impact. By all accounts, a record of the proceeding does prevent possible abuse of the grand jury process. Yet it may also have an unintended consequence: the prosecutor may be tempted to present the bare minimum of evidence to meet the legal standard of proof while avoiding the possibility of error or prejudice and minimizing potential defense discovery. Thus, the record may have a negative effect on the quality of evidence used in case screening.

This is not to say that this and other reforms may not be desirable or beneficial. It is simply important to recognize that reforms as conceived may not be the same in actual practice. In large measure, local customs and practice will dictate how the screening process operates, regardless of the legal framework.

Moreover, it is important to consider reforms in tandem. For example, the right to counsel before the grand jury is considered to be one of the most important of the American Bar Association's proposed principles and is certainly one of the most controversial. Yet, unless targets have the right to testify before the grand jury and receive notice of any inquiries concerning them, the right to counsel may be relatively meaningless in the majority of cases.

The impact of reform on grand jury practice is extremely difficult to define and measure. Often, researchers and policymakers rely on the perceptions of those who have adopted one or more proposed reforms to assess their effectiveness and to determine whether any of the anticipated problems actually arose. Such assessments usually fail to take into account the length of time the reform has been tried, the nature of the proceeding before modification, the manner in which the reform is actually implemented, and the overall legal framework in which the jurisdiction operates. For example, most of the respondents in Arizona expressed a favorable opinion concerning the defendant's right to have counsel in the grand jury room. Yet, this opinion was based largely on individual philosophy and conjecture and, at most, knowledge of a handful of cases in which the issue arose.

A fourth consideration in determining the nature of the pretrial screening mechanism is the extent of the resources available to support proposed changes. A proceeding which strains the resources of the prosecutor, the defense, and/or the court is not likely to be well received. In fact, it is quite probable that such a proceeding will be circumvented. Maricopa

County schedules preliminary hearings in most cases with the expectation that a sizable portion of the hearings will be waived. Maricopa County did experiment with routing more cases to the grand jury over the last year, but quickly desisted as large backlogs built up. (The grand jury proceeding in Maricopa County is slightly longer and more formalized than in Pima County.) In essence, reform should be tempered with practicality. If a reformed pretrial proceeding is so costly that it is routinely circumvented or unworkable, the pretrial screening process may wind up providing fewer safeguards than it did before.

A final conclusion is that efforts to improve the pretrial screening process and to protect the rights of defendants should not focus exclusively on the grand jury and the preliminary hearing. As noted above, prosecutorial screening plays an important role in weeding out weak and low priority cases, and should be subject to some form of formalization. So, too, rules governing pretrial discovery and the plea negotiation process can go a long way towards guaranteeing an open and fair case disposition process. Reform efforts are unlikely to achieve their intended objectives unless they take into consideration the system as a whole.

6.3 Suggestions for Future Research

Clearly, this study was limited in its objectives, and its findings raise a number of additional research questions. The following issues might be explored in future research efforts:

1. What role does the grand jury play in complex, investigative cases? Are there situations in which the power of subpoena, as well as the ability to compel testimony and to hear evidence in secret, make the grand jury uniquely suited to case development? Under what circumstances does the grand jury supplement/supplant the prosecutors' investigative powers?

2. What has been the experience of jurisdictions which have incorporated more of the ABA's principles on grand jury reform, particularly the right of all witnesses to be accompanied by counsel inside the grand jury room? What has been the effect on the usage and/or the nature of the proceeding? Have they produced unintended consequences? Do such reforms impede the grand jury in its investigative role, as opposed to its more routine screening functions?

3. Are there jurisdictions in which either the preliminary hearing or the grand jury serves as an "effective" screening mechanism? Does "real" screening through the preliminary hearing or the grand jury render the criminal justice system inefficient? Does it reflect a reluctance or inability on the part of prosecutors to perform their pre-trial screening function?

4. Assuming one could identify ideal models of each proceeding, how do they compare? Does a model grand jury closely parellel a model preliminary hearing? What residual benefits, if any, does one or the other proceeding have?

5. How do prosecutors screen cases? Are their policies well articulated and consistently applied at the local and/or state level?

6. What has been the experience of the California system following the Hawkins decision? Does mandating a post-indictment preliminary hearing result in a reduction in the use of the grand jury? Does it change the nature of the preliminary hearing and if so, how?

7. How frequently are preliminary hearings waived? Is use of waivers more common in jurisdictions which rely heavily on the preliminary hearing? What considerations affect use of waivers? Does the waiver represent an extra bargaining chip for the defense or the loss of an important step in the pretrial screening process?

Answers to these and other questions concerning the role of the grand jury (and the preliminary hearing) do not come easily. The issues addressed in this study and in any future research are sufficiently important to justify continuing examination by practitioners, policymakers and researchers.

APPENDIX A

METHODOLOGY

Site Selection

The site selection process was a very important component of this study's methodology given the broad range of research objectives. Arizona was well suited as the state in which to conduct our investigation for several reasons:

1. State laws allow the prosecutor to select either the grand jury or the preliminary hearing as the screening mechanism to be used in individual cases.

2. Both the grand jury proceeding and the preliminary hearing are held with some frequency.

3. At least some types of witnesses have the right to counsel in the grand jury room under state law.[1]

4. State laws require that the proceeding (whether grand jury or preliminary hearing) be recorded.[2]

At the same time, Arizona served as a perfect natural experiment, since its two largest counties (Maricopa County and Pima County) differed dramatically in their use of pretrial screening mechanisms. Thus, we were able to explore alternative approaches to the pretrial process under a uniform legal framework.[3]

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[1] The right to counsel was included as a criterion because it is one of the most controversial of the American Bar Association's "reform" principles. We felt it would be useful to obtain data on the extent to which it was utilized, as well as the perceptions of the various groups involved in its implementation.

[2] This requirement was deemed essential not only as a research issue, but also as a mechanism for facilitating data collection, since it assured that transcripts would exist for all cases.

[3] In contacting states whose legal framework met the criteria defined above, we discovered that in most large counties either the grand jury or the preliminary hearing was the predominant screening mechanism, handling 90% or more of the cases filed. In addition to Arizona, only Illinois emerged as a site candidate, since Cook County reported that it used the grand jury 46% of the time and Peoria County reported 83% usage. Practical considerations and the opportunity to study the grand jury at the state as well as the county level led to the decision to conduct the research in Arizona.

In addition to these theoretical reasons for selecting Arizona as the focus of our study, there were certain practical considerations. First, each county had management information systems which could facilitate the acquisition of statistics and data as well as the process of case sampling. Second, and of utmost importance, the receptivity to this research by key officials in both counties and at the state level, in conjunction with their generous offers of cooperation and assistance, were critical factors in selecting the study sites. Given the sensitivity of these data and the need for grand jury transcripts which are typically not available to the public, this cooperation proved indispensable.

Research Design

The research methodology used for this study combined quantitative analysis of case level data with qualitative information on the legal environment and jurisdictional policies and procedures for each of the three jurisdictions studied: Maricopa County (Phoenix), Pima County (Tucson), and the State Grand Jury. Specifically, data for the study were obtained from four different sources:

1. analysis of legislation, court rules, and recent case law, supplemented by review of office policies and written procedures;

2. analysis of secondary data on case flow in the jurisdictions under study;

3. interviews with judges, justices of the peace, prosecutors, public defenders, private defense attorneys, and police; and

4. analysis of a sample of case records, including grand jury and preliminary hearing transcripts.

Interviews were conducted with the following individuals: 21 prosecutors; five judges; three justices of the peace; seven defense attorneys, public and private; and 13 other respondents, including court administrators, police officials and research analysts.

The categories of information obtained through interviews and from secondary data and the sources for each category are depicted in Figure A.1. Topic agendas, which were used to guide the interviews with each type of respondent, included inquiries regarding existing policies, typical procedures and respondents' perceptions and opinions. The interviews were not intended to yield quantifiable responses, but rather individual answers to open-ended questions on a wide range of issues.

Figure A.1

MATRIX OF INFORMATION BY RESPONDENTS

Topic	Secondary Source(s)	Judges	Magistrates	General Prosecutors	"Special" Prosecutors	Public Defenders	Private Attorneys	Police
Context/community	Chamber of Commerce							
Crime rates/ victimization	X							X
Legislative history	Statutes, other sources	X		X	X	X	X	
Prosecutor's office	X			County Attorney or senior individual	X			
Court organization	X	Chief Judge X	X					
Public Defender's office	X					X		
Police organization	X							X
General rules	Statutes, rules	X		X	X	X	X	
Prosecutorial discretion		X	X	X		X	X	
Grand jury impanelment	X	X						
Grand jury operations/ charging/recording	X	X		X	X	X	X	
Role of judge in grand jury	X	X		X	X			
Preliminary hearing process	X		X	X		X	X	
Reform issues		X		X	X	X	X	X
Relative advantage of grand jury or preliminary hearing		X	X	X		X	X	X
Role of grand jury in complex cases	X	X			X	X	X	

The case level data collection methodology was designed to explore the operations of the screening grand jury and the preliminary hearing in both counties. In addition, the role of the grand jury in complex cases was studied through examination of cases handled by the State Attorney General and by special units in the county prosecutors' offices which specialize in prosecution of drug offenses, economic crime, official corruption and organized crime. The case sample is displayed in Table A.1.

Cases to be studied were randomly sampled from cases filed by the various offices between July 1, 1979 and June 30, 1980. The samples for the preliminary hearing and the routine screening grand jury were randomly selected from all cases filed during that interval.[1] Special samples were also drawn from the records of the Organized Crime and Racketeering Unit (OCRU)

TABLE A.1

CASE LEVEL SAMPLE

	Preliminary Hearing	Routine Grand Jury	Special Caseload Grand Jury
Maricopa County			
Screening cases	75	75	--
Drug offenses, economic crimes, official corruption, and other complex cases	--	--	25
Pima County			
Screening cases	84	74	--
Drug offenses, economic crimes, official corruption, and other complex cases	--	--	25
State Grand Jury	--	--	23
Totals	159	149	73

in Maricopa County and the Consumer Protection/Economic Crime Unit (CP/ECU) in Pima County. In conjunction with drawing these samples, 500 cases were identified randomly in each site to provide a description of the general

[1] All cases presented at the preliminary hearing in Pima County during the specified time frame were included in this study.

caseflow in each county. The last sample was drawn from the cases presented to the State Grand Jury by the Attorney General's Office.[1]

In each case, one defendant was randomly selected for study. Data were collected on case characteristics, key events during the proceeding, the types of evidence introduced, the involvement of the grand jurors or defense counsel in questioning witnesses, and characteristics of witnesses and their testimony through direct examination of transcripts of the proceedings. Our analysis consisted of developing simple descriptive statistics on the frequency of events, as well as means, medians and ranges for all relevant variables.

Our research approach precluded us from controlling for offense type. Although this would have permitted a clearer comparison of the grand jury and the preliminary hearing in screening like cases, it would have been infeasible. First, it was our intention to study the operation of prosecutorial discretion in selecting the screening mechanism. This discretion often results in variation by offense type, since prosecutors perceive that different proceedings have particular advantages for certain types of cases. Second, we wanted to examine the full range of operation of both proceedings, e.g., in cases involving simple theft, intra-familial assaults, and complex white collar crime cases. Third, given the infrequent use of one or the other proceeding in each county and the selectivity of that usage, we faced the possibility of empty cells if we tried to control for offense type. Although it would be interesting to conduct such a study, it was not feasible for our project. Our design did allow us to describe the interrelationships between offense type, prosecutorial discretion, and operational characteristics of the proceedings. Since the latter appear to be relatively consistent regardless of the specific offense type,[2] we have concluded that this was not a serious drawback. Indeed, it helped underscore the relatively perfunctory nature of the pretrial screening process across a wide range of case types.

[1] The cases from the State Grand Jury are the universe of all cases processed during our time frame excluding those in which the indictment was still sealed at the time of our data collection.

[2] This was particularly true of grand jury operations, which appear to be fairly similar regardless of the nature of the offense. On the other hand, it was impossible to separate differences in case type from variation in county level practice with respect to the preliminary hearing.

APPENDIX B

THE LEGAL FRAMEWORK

This material is intended to provide a brief overview of the laws and rules which affect the pretrial screening process in Arizona. This discussion is not meant to be an exhaustive treatment of the Arizona legal framework, but rather is intended to highlight those characteristics of the system which may help explicate prosecutorial decisions regarding use of the grand jury and preliminary hearing and the ways in which these mechanisms function.

Arizona Laws and Rules Affecting Pretrial Screening

The Arizona Rules of Criminal Procedure allow prosecutors to elect the pretrial screening mechanism--i.e., the preliminary hearing or the grand jury--to be employed. Although the primary focus of this study is on those two proceedings, they are part of and interrelated with a sequence of pre-trial events and should not be examined in isolation. To place these proceedings in context, this section briefly summarizes the laws and rules governing alternative ways in which felony charges may be filed in Arizona. Rules governing the related issues of discovery and sentencing are also highlighted, since these may have a substantial impact on pretrial screening procedures.

Case Initiation

Revised to streamline the processing of criminal cases and to reduce the hardship imposed by the system on the nonconvicted accused, Arizona's new Rules of Criminal Procedure became effective on September 1, 1973.[1] The procedures governing the processing of criminal cases under the new Rules differ depending on the nature of the case-initiating event. The case flows stemming from the three basic types of initiating events are depicted in simplified form in Figure B.1. Pattern A depicts the process which commences with an arrest; Pattern B illustrates the sequence of events which occur when a case is initiated by filing a complaint; and Pattern C reflects the steps followed in cases initiated directly by grand jury action.

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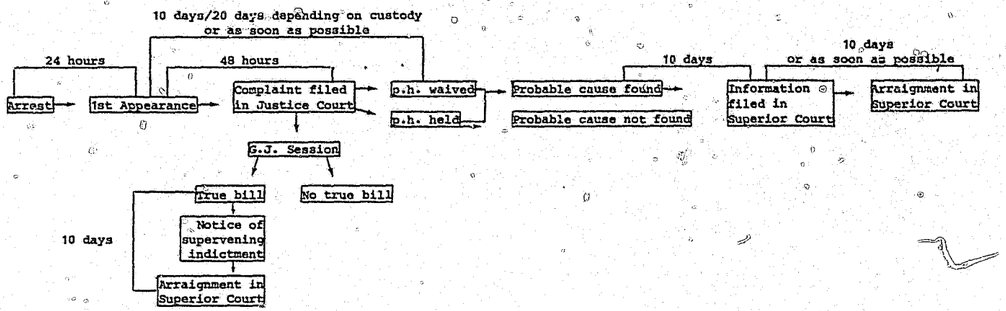
[1] See Berg, Timothy J. and John P. Lyons. "Arizona's New Rules of Criminal Procedure: A Proving Ground for the Speedy Administration of Justice." Arizona Law Review, 16:173, (1974).

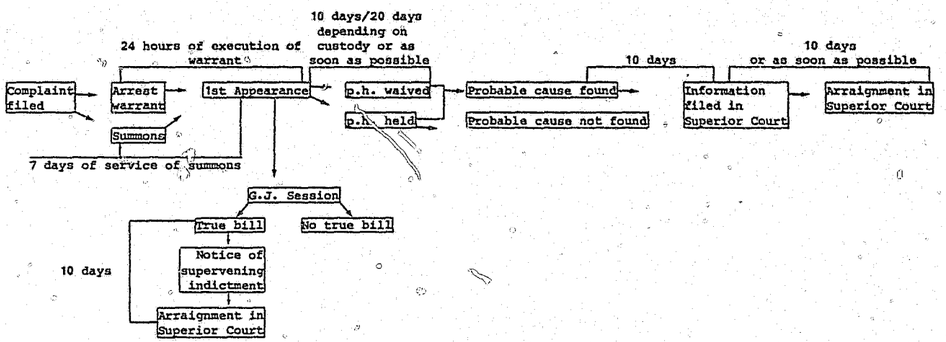
Figure B.1

FELONY CASE FLOW: INITIATION TO ARRAIGNMENT WITH MAXIMUM TIME LIMITS*

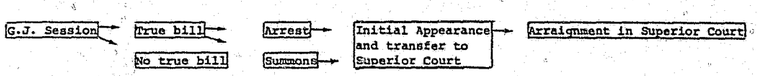
Pattern A



Pattern B



Pattern C



*Cases may be dismissed and refiled at any point.

Pattern A depicts those cases arising from a reactive warrantless arrest. Rule 4 of the Rules of Criminal Procedure requires that the arrested person be brought before a magistrate[1] "without unnecessary delay" for an initial appearance. If that appearance does not occur within 24 hours of arrest, the person must immediately be released from custody. At the initial appearance, the magistrate informs the defendant of the charges, determines the conditions of release, and informs the defendant of his or her rights, including the right to appointed counsel, the right to remain silent, and the right to a preliminary hearing. The magistrate must also describe the circumstances and procedures under which the right to a preliminary hearing may be waived. Unless a waiver occurs at this time, the magistrate must schedule the preliminary hearing.[2]

Within 48 hours of the initial appearance, the charges must be incorporated into a formal complaint. Failure to meet this deadline results in release of the defendant and vacating of the date set for the preliminary hearing. Following the issuance of a formal complaint, a preliminary hearing must be held within 10 days if the defendant is in custody[3] and within 20 days if the defendant is not in custody, unless: the preliminary hearing is waived; the preliminary hearing is postponed (upon a finding that extraordinary circumstances exist and that delay is in the interests of justice); or the complaint has been dismissed.[4]

The waiver of the preliminary hearing is governed by Rule 5.1(b). Under its provisions, a defendant cannot enact a waiver unless given the opportunity to consult with an attorney. Furthermore, any waiver must be in writing and signed by the defendant, his attorney, and the prosecutor.

Dismissal may occur in one of two ways. First, the prosecutor may dismiss the complaint because he feels the case should not be pursued any longer, or

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[1] Arizona law defines magistrate to include any justice of the Supreme Court, judge of the Superior Court, justice of the peace or police magistrate. Arizona Rev. Stat. Ann, 1-215(13) (Supp. 1972).

[2] The prosecutor need not attend the initial appearance, as long as a law enforcement officer appears and provides necessary information regarding the charges and the evidence supporting them.

[3] The 10 day provision is an outside limit. Under the Rules of Criminal Procedure, a defendant in custody has the right to demand that the preliminary hearing be held as soon as possible. In such a situation, the magistrate is obligated to hold the hearing as soon as the attendance of counsel, a court reporter and the witnesses can be arranged.

[4] Absent one of these exceptions, failure to commence the preliminary hearing within the specified time limit if the defendant is in custody will result in the defendant's release from custody unless he or she is being held for a non-bailable offense. If that occurs, the magistrate is required to notify the presiding judge of the delay and its causes.

because additional time is needed, perhaps for further investigation, before the charges are pressed. Alternatively, the complaint may be dismissed because it has been superseded by a grand jury indictment. The defendant does not have an absolute right to a preliminary hearing under Arizona law. As specified in the state Constitution, there is a right to a preliminary hearing in all felony cases except where there is a grand jury indictment.[1] Thus, it is wholly within the prosecutor's discretion to by pass the preliminary hearing through use of the grand jury or, alternatively, to forego the grand jury and allow the preliminary hearing to occur.[2] Ultimately, unless the case is dropped or a waiver is obtained, the question of probable cause will be resolved at a preliminary hearing or by a grand jury.[3] However, even if there is a finding of no probable cause at one of these hearings, the prosecutor may refile the charges.

Following a preliminary hearing (or a waiver), an information must be filed in the Superior Court within 10 days.[4] An indictment must be returned directly to the Superior Court by the foreman of the grand jury accompanied by the members of the grand jury and the prosecutor. In cases which follow the flow depicted as Pattern A, a notice of supervening indictment must be issued to inform the defendant's attorney of the indictment and the date on which the defendant must first appear in Superior Court. Regardless of whether a case is filed in Superior Court by an indictment or an information, the defendant is arraigned on the charges within 10 days.

Pattern B cases are initiated by filing a complaint in Justice Court rather than by an arrest. The magistrate receiving the complaint may issue subpoenas for any witnesses he or she deems necessary and any additional witnesses requested by the prosecutor. On the basis of the information contained in the complaint, any affidavits and any testimony that is taken, the magistrate must determine whether there is reasonable cause to believe an offense was committed and the defendant committed it. Unless that standard of proof is met, the complaint will be dismissed.

If the magistrate finds that the complaint is based on reasonable cause, he must issue either a warrant or a summons to notify the defendant of the complaint and bring him or her before the court. This initial appearance, which must occur within seven days of the service of the summons or within 24 hours of the arrest if a warrant is issued, follows the procedure described earlier in reference to Pattern A cases.

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[1] Arizona Constitution, Art. 2, §30 (1956).

[2] The factors involved in the exercise of this discretion are discussed in chapter 2 of this report.

[3] The nature of these proceedings is the focus of Chapters 3 and 4.

[4] Although the preliminary hearing may be held in either Justice Court or Superior Court, it is typically held in Justice Court.

In Pattern B cases, within 10 or 20 days of the initial appearance (depending on custody status) the probable cause determination must be made, either by the grand jury, a preliminary hearing, or a waiver of the latter. Unlike Pattern A cases, there is no need to file a complaint after the initial appearance in these cases. The procedures for dismissing the complaint in the event of a supervening indictment or for conducting or waiving a preliminary hearing are identical to those discussed earlier. From this point on, there are no differences between Pattern A and Pattern B cases.

The third type of case initiation is depicted as Pattern C on the flow diagram. This category of cases does not involve any proceedings at the Justice Court level. Instead, the case begins with a grand jury presentation by the prosecutor prior to an arrest or the filing of charges. The grand jury proceeding may or may not result in an indictment. In the latter situation, no further activity occurs unless the prosecutor pursues the case again at a later date. If the grand jury votes a true bill, an arrest warrant or a summons is issued at the discretion of the judge.

Rule 14.1(a) establishes the general rule that an arraignment should occur before the Superior Court within ten days after the filing of an indictment. If the defendant has not been arrested or summoned within that time frame or is in custody elsewhere, the arraignment is to be held as soon as possible. In cases in which an arrest warrant is issued, the defendant must be brought before a magistrate for an initial appearance within 24 hours of arrest. If the magistrate is not a Superior Court judge and therefore does not have jurisdiction to try felony charges, the magistrate must transfer the case to the Superior Court for arraignment. If the defendant is brought before a Superior Court judge following arrest and has waived or is represented by counsel, the initial appearance and arraignment coincide.

In addition to the Rules governing case initiation, two other aspects of Arizona law influence the pretrial screening process--the provisions governing discovery and the recently revised criminal code. These are briefly described below.

Discovery

Perhaps the most significant and controversial change embodied in the revised Rules was the creation of a comprehensive system of discovery. The revised discovery laws, in turn, had a profound effect on the usage and operation of the preliminary hearing in Arizona.

The proponents of the new Rules argued that the adoption of a broad discovery policy would improve the adjudication process through:

- early discovery of constitutional issues, which would in turn help reduce trial error due to such problems;
- fewer motions for continuance at trial due to surprise, and less confusion at trial due to better preparation;
- better informed and increased plea negotiation; and
- an increase in the speed of case processing by reducing pretrial delay associated with the defendant's need to gather information and by enabling presentation of almost all necessary motions in a single pretrial hearing.[1]

Opponents believed that the adoption of expanded discovery would have a number of potentially harmful consequences, including:

- witness intimidation and bribery;
- disclosure of the identity of undercover agents and informants;
- distortion of the balance of advantage in a criminal prosecution; and
- possible perjury and defense fabrication.

The first two concerns were addressed specifically in the revised Rules which guaranteed protection for certain classes of witnesses. The latter appear to be no longer at issue; most of the persons whom we interviewed appear to be fairly comfortable with the discovery rules as they are currently implemented. Indeed, there has been some movement towards even earlier disclosure of the prosecution's case than is required under the Rules.

Under the new Rules, the prosecutor must disclose the names and statements of all witnesses to be called as part of the case-in-chief. Prior Arizona law required disclosure only of the identity of these witnesses. The following items are included within the scope of the mandatory disclosure which must occur within 10 days of arraignment in Superior Court.[2]

- copies of any statements the defendant made to the police or other prosecutorial agents and statements of any other defendants to be tried with him;

[1] See Berg and Lyons, op. cit.

[2] The Rules also make provision for the court to grant additional disclosure under certain conditions upon request by the defendant.

- the names and reports of experts who have examined the defendant;
- a list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to him;
- a list of all prior acts of the defendant which will be introduced at trial to prove motive, intent or knowledge;
- a list of all prior felony convictions which will be used at trial;
- any information that may tend to mitigate or negate the defendant's guilt as to the offense charged or his punishment;
- any written or recorded material pertaining to the use of electronic surveillance, search warrants or informants in connection with the case.

The Rules also provide for disclosure by the prosecution. Under the Rules, the defense must comply with the prosecution's written request for physical evidence in connection with the charged crime at any time after the indictment or information is filed in Superior Court. Requests may include appearance in a lineup, fingerprints, photos, hair and blood samples, handwriting exemplars and the like. Counsel may be present at the taking of such evidence.

Within 20 days following arraignment, an additional provision in the Rules specifies that the defense must provide the prosecution with a written notice specifying all defenses to be used at trial. The notice must specify for each defense, the persons who will be called as witnesses at trial, including the defendant. Simultaneously, the defense must make available (1) the names and statements of all witnesses other than the defendant; (2) the names and reports of experts who will be called; and (3) a list of all papers, documents, photographs and other tangible objects which will be used at trial. Finally, additional disclosure from the defense may be ordered by the court upon petition by the government.

The Rules governing discovery also contain provisions for each side to take depositions. In addition to testimony given at the preliminary hearing, witnesses may be asked to respond to questions through the deposition process. Upon motion of any party or a witness, the court may order an oral deposition (1) to preserve testimony; (2) to obtain discovery from an uncooperative

witness; or (3) in exchange for prison release.[1] The Rules specifically exclude persons who have testified at the preliminary hearing. However, either party may seek a voluntary interview with such witnesses and, in exceptional cases, the court may order a deposition under the Rules governing additional discovery.[2]

Related to the expanded discovery provisions, the new Rules embodied another key change: the requirement of an omnibus hearing to expedite criminal case processing. The hearing, which is to be held after the discovery process is completed, is designed to deal with all pretrial motions. According to the Rules, the parties must present "all motions specified in the Omnibus Hearing form," and any other motion, defense, objection or request which is capable of resolution at that time.[3] If a matter is not raised in a timely manner, it will be overruled unless the basis of it was not known and could have been known through use of reasonable diligence. If such an instance arises, the party must raise the issue promptly upon learning of it.

The mandatory prehearing conference was established in tandem with the omnibus hearing. At the prehearing conference, counsel must disclose to the opponent those issues which will be raised at the hearing. Both the hearing and the conference are intended to make case processing both speedy and efficient.

Taken together, the revised Rules greatly expanded the discovery process, requiring both parties to disclose a great deal of information in a timely manner. At the same time, the Rules removed much of the motivation underlying the full-fledged preliminary hearing procedure which had been in operation prior to the Rules changes. No longer was the preliminary hearing to be regarded as the primary vehicle for ensuring early and comprehensive discovery. The impact of these provisions on use of the preliminary hearing for discovery purposes is discussed in Chapter 3.

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[1]The statement of a witness can secure his release from incarceration for failure to assure his appearance at trial or a hearing.

[2]Depositions may be used as prior recorded testimony in subsequent court proceedings. However, a "discovery" deposition may not be used at trial without the defendant's consent, if he was not present and did not waive being present. If the defendant waives his right to be present at the deposition, the testimony given may be used at trial since the courts reason that the defendant has been accorded the right to cross-examine the witness.

[3]Motions covered on the Omnibus Hearing form include dismissal, review of the probable cause determination, disqualification of a judge, change of venue, withdrawal of counsel, mental competency examination, severance or consolidation of defendants, suppression of evidence and modification of the conditions of release, among other things.

Arizona Criminal Code

In 1978 Arizona revised its criminal code, which was largely a codification of the common law, and replaced it with a new code intended to make the law more precise and to eliminate the "lofty common law language." Although the language of the law did change dramatically, the substance of the law did not; that is, with few exceptions, those acts which were crimes under the old law remained crimes under the new.

The new code made significant changes in the sentencing structure, however. As part of its revisions, the 1978 criminal code established six classes of felonies and three classes of misdemeanors.[1] For each class of felony, the new criminal code established a presumptive sentence. To allow a degree of judicial discretion in the presence of mitigating or aggravating circumstances, minimum and maximum sentences were also specified. The new sentencing structure did not prohibit the imposition of probation, however. One component of the new code did reduce the discretion available to the judiciary. If the prosecution alleged and proved a prior conviction or that the offense charged was "dangerous" in nature, probation was precluded and the sentence itself was enhanced. That is, the presumptive sentence as well as the minimum and maximum sentences were increased and the eligibility for parole was delayed. The sentences increased additionally as more prior convictions were proved.

The adoption of this sentencing structure was intended to reduce discretion in sentencing and to incarcerate a greater proportion of career and dangerous criminals. According to a number of respondents, however, the new code has simply removed discretion from judges and unintentionally given it to prosecutors. That is, under the new law, prosecutors can determine what the sentence will be by alleging or not alleging prior convictions or the dangerous quality of the offense. Thus, charging decisions assume even greater importance under the new code.

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[1]Some offenses could be charged as open-ended; that is, they could be treated as either felonies or misdemeanors.

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