Florida Law Review

Volume 26 | Issue 4 Article 5

June 1974

The Preliminary Hearing Versus the Grand Jury Indictment: "Wasteful Nonsense of Criminal Jurisprudence" Revisited

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COMMENTARIES

THE PRELIMINARY HEARING VERSUS THE GRAND JURY INDICTMENT: "WASTEFUL NONSENSE OF CRIMINAL JURISPRUDENCE" REVISITED[1]*

The preliminary hearing[2] — the "Cinderella" provision of criminal procedure — has again been brought into the limelight by the Fifth Circuit Court of Appeals' decision in *Pugh v. Rainwater*.[3] It would be difficult to name a procedural device whose utilization more completely runs the gamut from mandatory application[4] to almost total atrophy,[5] and whose characteristics vary so widely among and within various jurisdictions.[6] This is true despite the fact that the preliminary hearing hovers close to being a matter of constitutional right.[7] Although the Supreme Court of the United States has not yet

*EDITOR'S NOTE: This commentary received the *University of Florida Law Review Alumni Association Commentary Award* as the outstanding commentary submitted during the winter 1974 quarter.

1. Coates, *The Grand Jury, The Prosecutor's Puppet: Wasteful Nonsense of Criminal Jurisprudence*, 33 PA. B. ASS'N Q. 311 (1962).

2. *See generally* Alexander & Portman, *Grand Jury Indictment Versus Prosecution by Information — An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997 (1974); Anderson, *The Preliminary Hearing — Better Alternatives or More of the Same?*, 35 MO. L. REV. 281 (1970); Scigliano, *The Grand Jury, The Information, and the Judicial Inquiry*, 38 ORE. L. REV. 303 (1959); Note, *The Preliminary Hearing — An Interest Analysis*, 51 IOWA L. REV. 164 (1965); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974); Comment, *Preliminary Hearings — The Case for Revival*, 39 U. COLO. L. REV. 580 (1967).

3. 483 F.2d 778 (5th Cir. 1973).

4. In England a preliminary hearing is required for virtually every accused, and neither the accused nor the prosecution can waive it. This is partly because the hearing is the only basis for drafting a formal accusation since England abolished the grand jury system in 1933. D. KARLAN, ANGLO-AMERICAN CRIMINAL JUSTICE 143-45 (1967).

5. In Louisiana a preliminary hearing is available upon request by the accused at the discretion of the judge. State v. Bickman, 283 So. 2d 236 (La. 1973). *See* Miller & Dawson, *Non-use of the Preliminary Examination: A Study of Current Practices*, 1964 WIS. L. REV. 252; Note, *Preliminary Hearing in the District of Columbia — An Emerging Discovery Device*, 56 GEO. L.J. 191, 206 (1967) (reporting that in some federal district courts the use of the preliminary hearing has virtually been abandoned).

6. L. KATZ, JUSTICE IS THE CRIME 43-46 (1972). *See also* Feeney & Woods, *A Comparative Description of the New York and California Criminal Justice Systems: Arrest Through Arraignment*, 26 VAND. L. REV. 973 (1973); Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A.L. REV. 636-757, 916-61 (1971); Miller & Dawson, *supra* note 5.

7. *See* United States *ex rel.* Hughes v. Gault, 271 U.S. 142 (1926). In this case a person indicted for violation of a federal statute in another state challenged a commissioner's refusal to hear evidence of his innocence before ordering his removal to another state. In his opinion, Justice Holmes said: "The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge." *Id.* at 149. Justice Brandeis, however, was of the opinion that "by refusing to hear and consider evidence . . . which bore upon the existence of probable cause, the commissioner did not merely commit error, but deprived the petitioner of his liberty without due process of law," *Id.* at 152.

declared that a citizen has the right to a preliminary hearing upon arrest for a criminal offense,[8] there are persuasive arguments that the fourteenth amendment guarantee of no deprivation of liberty without due process of law,[9] and the fourth amendment guarantee of freedom from unreasonable search and seizure[10] demand such a hearing.

Two difficult and unresolved problems are immediately brought to light by an inquiry into the preliminary hearing. First is whether the preliminary hearing has become so essential to the proper working of American criminal procedure that its denial violates due process of law. Second, if the preliminary hearing is considered a matter of right, there is the problem of its proper relationship to the other bastion of probable cause, the grand jury.

This commentary will profile the nature of the preliminary hearing, its reason for being, the increased status it has attained through *Pugh v. Rainwater*,[11] and finally, whether the preliminary hearing or the grand jury indictment affords a more appropriate determination of probable cause to detain an arrested citizen.[12]

BACKGROUND

It is difficult to define a preliminary hearing without discussing its proper function and without becoming confused by its great variety of forms.[13] Because the preliminary hearing is not constitutionally protected, its current status is wholly dependent on statutes and on judicial interpretation of those statutes. Although most states provide for a preliminary hearing, there is wide variation regarding its mandatory or permissive use,[14] the circumstances of its

8. KATZ, *supra* note 6, at 46.

9. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, §1.

10. "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation . . . ." U.S. CONST. amend. IV.

11. 483 F.2d 778 (5th Cir. 1973). It should be noted from the outset that *Pugh* focuses on the validity of pretrial incarceration without an impartial determination of probable cause, not, strictly speaking, the absolute right to have a preliminary hearing.

12. See text accompanying notes 81-110 *infra*.

13. The most frequently quoted articulation of the traditional view of the preliminary hearing is in Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922): "The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."

14. It is difficult to know which states *require* a preliminary hearing and which do not, primarily because judicial interpretation of state statutes is a significant conditioning factor. As the Fifth Circuit Court pointed out in *Pugh v. Rainwater*, the relevant Florida statute seemed to require that citizens arrested without a warrant be given a hearing, but the Florida courts refused to interpret the provision as mandatory. 483 F.2d at 780. *See* DiBona v.

use,[15] and the timing of its implementation.[16] Essentially, the preliminary hearing is a procedure by which a magistrate reviews the criminal charge against the arrestee promptly after arrest to ascertain whether he should be subject to further prosecution. The standard utilized is "probable cause" and the magistrate is the sole arbiter of whether it exists.[17] The hearing is conducted in an adversary manner,[18] though usually with less formality than a trial,[19] and witnesses may be subpoenaed.[20] Additionally, the defendant has the right to counsel,[21] the right to cross-examine witnesses,[22] and he can usually introduce evidence to rebut the charge against him.[23]

Beyond these basic characteristics, it is uncertain what other elements are essential to a proper preliminary hearing. This uncertainty has arisen out of the conflict between the need to guarantee an accused the essential elements of due process in the conduct of a preliminary hearing, and the attitude that the preliminary hearing itself is not an essential element of due process. The conflict repeatedly leads to situations in which courts have deemed the most flagrant irregularities in preliminary hearing procedure insufficient to reverse a conviction.[24] With very few exceptions, the most courts have been willing

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State, 121 So. 2d 192 (2d D.C.A. Fla. 1960) (which held that a person arrested without a warrant did not have a right to a preliminary hearing where an information was filed the following day). *See also* Comment, *Preliminary Hearings in Pennsylvania: A Closer Look,* 30 U. PITT. L. REV. 481 (1969), which discusses the preliminary hearing requirement in Pennsylvania. The author finds that although the statutes requiring a hearing do not appear to allow for exceptions, courts have held otherwise finding circumstances such as lack of prejudice, constructive waiver, and some situations involving fugitives. *Id.* at 482-88.

15. *See* Note, *Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?,* 25 MONT. L. REV. 135 (1963). Montana has an unusual approach. As in Florida, prosecution by information is permitted by Montana law. In Montana, however, a prior preliminary hearing is required unless the court grants leave to file without a hearing. While hearings are held before justices of the peace, whose knowledge of the law may be minimal, a hearing on the motion to file without a hearing must be heard by a district judge who is trained in the law. The note suggests that this system serves to establish probable cause more economically than the hearing, as well as to provide a more competent review of probable cause than the hearing itself. *See also* Comment, *supra* note 2, at 581-83, reporting that Colorado's system is similar to that of Montana but the motion for leave to file without a hearing is routinely granted with little judicial scrutiny.

16. *See* KATZ, *supra* note 6, at 247-365, for a description of the use of the preliminary hearing in each of the states.

17. *See* Comment, *Preliminary Examination—Evidence and Due Process,* 15 U. KAN. L. REV. 374, 375 (1967).

18. *See* Anderson, *supra* note 2, at 285.

19. Davis v. State, 65 So. 2d 307, 308 (1953).

20. *See* FLA. R. CRIM. P. 3.131(d).

21. *See* FLA. R. CRIM. P. 3.131(a)(2). *See also* Coleman v. Alabama, 399 U.S. 1 (1970).

22. *See* FLA. R. CRIM. P. 3.131(e).

23. *See* FLA. R. CRIM. P. 3.131(f).

24. *E.g.,* United States v. Rogers, 455 F.2d 407, 410-12 (5th Cir. 1972), where the defendant was detained for over four months before he was given a preliminary hearing. One week after his hearing, he was indicted. The court concluded that any procedural defect due to delay in the hearing became moot when he was indicted. *See also* Rhodes v. State, 282 So. 2d 100 (Ala. Crim. App. 1973).

to allow is a new preliminary hearing – if requested *before* trial.[25] Once the accused has been convicted, however, courts have not found improper hearing procedure adequate grounds to begin again.[26]

Additionally, the scope and meaning of the term "probable cause" is not clearly defined in the context of the preliminary hearing. Traditionally, probable cause is said to exist if the judge believes that a crime has been committed and feels there is "good reason" to believe that the accused is guilty.[27] The judge need not believe the defendant guilty,[28] nor is it necessary to present enough evidence to convict at trial.[29] At best, it seems that as yet there is a poorly defined idea that the standard of probable cause required to continue detention of an arrestee lies somewhere between the standard needed to arrest and the standard of "beyond a reasonable doubt" needed to convict.[30]

The aspect of the preliminary hearing that has drawn the most attention is

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25. *See* People v. DiPonio, 48 Mich. App. 128, 210 N.W.2d 105 (1973), discussed in notes 81, 107 *infra*.

26. *E.g.*, Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969); Scarbrough v. Dutton, 393 F.2d 6 (5th Cir. 1968). In most jurisdictions it is virtually axiomatic that post-conviction challenges of preliminary hearing procedure will fail. New Mexico is unique in its deviation from this norm. In Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969), appellant had appealed a conviction for manslaughter on the ground that he was not given the right to inspect a prior statement by a state witness at his preliminary hearing. The state supreme court found the defendant had a constitutional right to inspect the statement. The court then concluded that the effect of denying an accused a constiutional right at a preliminary hearing was as if there had been no preliminary hearing at all. Thus, since the New Mexico constitution requires that all persons held on an information be given a preliminary hearing, the court ordered the verdict vacated and a new preliminary examination of the defendant held. *See also* State v. Lopez, 84 N.M. 600, 506 P.2d 345 (1973) (dicta implying that where convictions for prior offenses were introduced to enhance sentence for a subsequent conviction, a finding that there had been defective preliminary hearings in the prosecution of the prior offenses would bar such use).

27. *Cf.* Jimenez v. Aristeguieta, 311 F.2d 547, 556 (5th Cir. 1962).

28. State *ex rel.* Stillman v. Merritt, 86 Fla. 164, 175, 99 So. 230, 234 (1924).

29. In the federal system, however, subsequent to the preliminary hearing the defendant must pass through a grand jury where the standard is supposed to be whether the grand jury would be willing to convict on the evidence then in the prosecutor's hands. Graham & Letwin, *supra* note 6, at 686-88.

30. For a discussion of the California standard, see *id.* at 688-92. *See also* People v. Hartsell, 34 Cal. App. 3d 8, 17-18, 109 Cal. Rptr. 627, 633-34 (1973) (evidence is sufficient to justify prosecution if it provides some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it). For the Pennsylvania burden of proof, see Comment, *supra* note 14, at 488-90. For Wisconsin, see Wilson v. State, 59 Wis. 2d 269, 208 N.W.2d 134 (1973). The Michigan standard is elaborated in People v. Walker, 385 Mich. 565, 189 N.W.2d 234 (1971) (at a preliminary examination the prosecution is required to show by *legally admissible* evidence that a crime has been committed and that there is probable cause to believe the defendant committed it). Also, a recent Massachusetts case, Myers v. Commonwealth, 298 N.E.2d 819 (Mass. 1973), provides a good discussion of the standard of probable cause appropriate in preliminary hearings. There, the court adopted the "directed verdict" rule whereby the magistrate views the hearing as if it were a trial and he were required to rule on whether enough credible evidence was presented to send the case to the jury. For a suggested approach to the question of probable cause, see Note, *The Preliminary Hearing*, *supra* note 2, at 778-85.

the element of discovery. Although determination of probable cause is usually said to be the primary purpose of the preliminary hearing, the degree of discovery inherent in the hearing itself has also been asserted to be an essential function.[31] When a statute gives an accused the right to a preliminary hearing and the hearing is either not held or is defective, a subsequent grand jury indictment or conviction at trial is usually held to nullify the question of probable cause and no new hearing is held.[32] If, however, the discovery available at the hearing is a right also deemed conferred by the statute, the denial of a preliminary hearing may be prejudicial. Therefore, where a hearing was defective or where none was held, courts have sometimes required a proper preliminary hearing even after an intervening indictment.[33] On the other hand, no court has yet ruled that denial of access to discovery at a hearing is sufficient to overturn a conviction.

Ironically, the preliminary hearing began essentially as a discovery device.[34] In early English law, a judge questioned the accused and the witnesses in an inquisitorial proceeding in order to ascertain facts for use by the prosecution at trial.[35] The first preliminary hearing statute, promulgated in 1554, required that the principals of each case be examined by *two* justices of the peace, a measure that appears to have been designed primarily for the purpose of preventing collusion between criminal and judge in the setting of bail.[36] As the hearing later evolved, justices examined all arrestees to discover and preserve evidence.[37] This investigative function, however, diminished so greatly with the development of the professional police force that eventually the justice's primary function became simply to ascertain that a crime had been committed.[38]

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31. Blue v. United States, 342 F.2d 894, 901 (D.C. Cir. 1964), *cert. denied,* 380 U.S. 944 (1965). *But see* Sciortino v. Zampano, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied,* 390 U.S. 906 (1968).

32. *E.g.,* People v. Spera, 10 Ill. App. 3d 365, 293 N.E.2d 656 (1973); Blakemore v. Commonwealth, 497 S.W.2d 231 (Ky. 1973). *But see* State v. Jackson, 282 So. 2d 526, 527 (La. 1973), expressing a change in the attitude of the Louisiana supreme court: "The majority of this Court [believes] . . . that the former jurisprudence watering down our Code of Criminal Procedure Articles concerning the right to a preliminary examination were incorrect. We [believe] that once a preliminary examination is ordered, filing of an indictment is insufficient to set aside that preliminary examination order. We further [believe] that even after indictment consideration must be accorded defendant's right to a preliminary examination. If the court follows its inclination in the present case, in the future all preliminary examinations which are ordered must be held even though a bill of information is filed in the interim." *Contra,* State v. Doyle, 290 So. 2d 903 (La. 1974); State v. Marshall, 284 So. 2d 778 (La. 1973).

33. *See* United States v. Pollard, 335 F. Supp. 868 (D.D.C. 1971), discussed in note 110 *infra.*

34. KATZ, *supra* note 6, at 22-23.

35. Plowscowe, *The Development of Present-Day Criminal Procedures in Europe and America,* 48 HARV. L. REV. 433, 458-59 (1935).

36. Weinberg & Weinberg, *The Congressional Invitation To Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968,* 67 MICH. L. REV. 1361, 1365 (1969).

37. KARLEN, *supra* note 4, at 145.

38. Weinberg & Weinberg, *supra* note 36, at 1367.

If so, the acused was usually held, even without evidence that he had committed the crime, apparently on the rationale that the opinion of one judge was not adequate basis for releasing an accused criminal.[39] Even the framers of the Constitution seemed to consider a "speedy trial" the primary antidote to unwarranted prosecution, with the grand jury an additional safeguard for serious crimes.

In these early cases, there is no indication that allowing judicial scrutiny of probable cause was seriously considered. In fact, it appears that it was the constitutional protection against self-incrimination that eventually changed the inquisitorial nature of the preliminary hearing in the United States to an examination of probable cause. With the defendant allowed to stand mute, the burden devolved upon the state to show probable cause to believe that the defendant did commit the crime charged.[40] There is consequently no common law right to a preliminary hearing.[41] If the preliminary hearing is a right to which an accused is entitled as an element of due process, it must be a right derived from evolving concepts of the individual's right to be free from any unnecessary intrusion by the State; from a heightened appreciation of the trauma of incarceration; and from a greater understanding of the new meaning that the weight, size, and complexity of the judicial machinery has given to the term "speedy trial."

DUE PROCESS AND *Pugh v. Rainwater*

The question whether the preliminary hearing has become so essential to the concept of "fundamental fairness" that its rejection is tantamount to a denial of due process of law was well treated in *Pugh v. Rainwater*.[42] In that case, a class action was filed on behalf of inmates of a county jail in Florida who had been arrested and held for trial pursuant to a criminal information.[43] The Florida Rules of Criminal Procedure do not provide for a preliminary hearing for those charged by information or indictment,[44] and the inmates

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39. *Id.*

40. *Id.* at 1368-69.

41. *See, e.g.,* United States *ex rel.* Lawson v. Skeen, 145 F. Supp. 776, 778 (N.D.W. Va. 1956); State v. Spindel, 24 N.J. 396, 407, 132 A.2d 291, 297 (1957).

42. 332 F. Supp. 1107 (S.D. Fla. 1971), *implementation plan adopted,* 336 F. Supp. 490 (S.D. Fla. 1972), *aff'd,* 483 F.2d 778 (5th Cir. 1973), *cert. granted sub nom.* Gerstein v. Pugh, 94 S. Ct. 567 (1973). Although the Court has already heard arguments in *Pugh,* reargument has been scheduled for October 1974, and the Court has invited the attorneys general of each state to file a brief as amicus curiae expressing their views. Letter from Bruce Rogow, counsel for Respondents, to the University of Florida Law Review, June 10, 1974. *See also* Comment, 25 VAND. L. REV. 434 (1972); Comment, Pugh v. Rainwater: *Spotlight on the Preliminary Hearing,* 60 VA. L. REV. 590 (1974).

43. 483 F.2d at 780.

44. "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charged against him." FLA. R. CRIM. P. 3.131(a). The holding of the Fifth Circuit Court of Appeals in *Pugh* called for the following adjustments in the conduct of preliminary hearings under the Florida Rules of Criminal Procedure: (1) A person charged by information *is* entitled to a preliminary hearing; (2) Limitation of the

argued that denial of such a hearing violated their rights under the fourth and fourteenth amendments.[45] The Fifth Circuit Court of Appeals determined that arrested persons have a right to prompt evaluation by a neutral party of probable cause to detain for prosecution.[46] Furthermore, the court ruled that the state attorney, who issues all informations, is too involved in the prosecutorial machinery to make a fair and impartial evaluation.[47] This holding is the first major judicial articulation that the right of an arrested person to a prompt impartial determination of probable cause is a right that derives from the Constitution and is not merely a right conferred by state law.

In arriving at its conclusion, the court distinguished several earlier United States Supreme Court decisions that had contributed to the uncertain status of the preliminary hearing.[48] In *Hurtado v. California*[49] the Court indicated that a criminal information is comparable to a grand jury indictment.[50] As a result it was assumed that both were equally adequate to determine probable cause. The court in *Pugh* pointed out, however, that the *Hurtado* court specifically stated that an information is a proper substitute for an indictment *after* examination by a magistrate, not in lieu of it.[51] Furthermore, the other negative holdings of the Supreme Court involving preliminary hearings, unlike *Pugh,* were cases challenging the absence of a preliminary hearing *before* detention. The issue in *Pugh* was the right to a preliminary hearing *subsequent* to arrest.[52]

Additionally, the court in *Pugh* faced both Florida and federal court decisions that refused to reverse or otherwise revise conviction and sentencing of persons who had been denied a preliminary hearing, even where such a hearing was mandated by statute.[53] The statement that "there is no constitutional right to a preliminary hearing" appears in almost all of these opinions. Nevertheless, the court in *Pugh* pointed out that in those cases denying relief, the petitioners had already been convicted and were challenging the validity of their convictions. In contrast, the petitioners in *Pugh* questioned the validity of *pre-trial* incarceration without a preliminary hearing.[54] It was further em-

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right to a preliminary hearing to those charged with a felony denies equal protection to those charged with a misdemeanor, and therefore any person charged with a misdemeanor carrying the threat of incarceration is entitled to a preliminary hearing; (3) Since Florida failed to show an adequate reason for allowing different time limits for preliminary hearings for those persons charged with a capital or life felony, the time limit for all incarcerated persons must be uniform. 483 F.2d at 788-90.

45. 483 F.2d at 778.
46. *Id.* at 779, 785-86.
47. *Id.* at 787.
48. *Id.* at 783-84.
49. 110 U.S. 516 (1884).
50. *Id.* at 538.
51. 483 F.2d at 784.
52. *Id.* at 783.
53. *E.g.,* McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968); Anderson v. State, 241 So. 2d 390 (Fla. 1970); State *ex rel.* Carty v. Purdy, 240 So. 2d 480 (Fla. 1970); Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970).
54. 483 F.2d at 786-87.

phasized that the arrestees in *Pugh* had petitioned *during* pre-trial detention, before a grand jury indictment or a subsequent trial mooted the issue.[55] They did not quarrel with past opinions in doubting that an improper or nonexistent preliminary hearing would be grounds for reversal of a conviction, since the conviction itself settled the question of probable cause. Where no such conviction had occurred, however, the court clearly thought that the subjection of an accused to the machinery of the criminal process without an immediate determination that there was sufficient evidence to warrant such action was plainly "odious to a sense of justice."[56]

The argument for the necessity of preliminary hearings is further reinforced by recent decisions, primarily in civil cases, granting individuals a hearing before acton can be taken against them or their property.[57] In these cases courts have ruled that due process demands a prior hearing. Thus, considering the trauma, stigma, time, and expense involved in defending a charge of criminal activity, the *Pugh* court was well justified in finding that due process requires a prompt determination of probable cause before subjecting an individual to criminal prosecution.[58]

Nevertheless, in addition to contending that a defendant is not constitutionally entitled to a preliminary hearing, the appellants in *Pugh* argued that, even if such a right to an impartial determination of probable cause did exist, the prosecutor was competent to make such a determination.[59] In refuting this contention the court utilized the language of the United States Supreme Court in *Coolidge v. New Hampshire,*[60] where a similar argument was propounded for the Attorney General's fitness to issue search warrants. There, the Court firmly aligned the Attorney General with the prosecution.[61] The Fifth Circuit Court of Appeals in *Pugh* found the state attorney's involvement with the prosecution to be at least as great as the involvement criticized in *Coolidge,*[62] and consequently ruled that persons charged by information must be given a preliminary hearing to ascertain probable cause.[63] The American grand jury,

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55. *Id.* at 787.

56. *Id.*

57. Fuentes v. Shevin, 407 U.S. 67 (1972) (hearing required before repossession of property); Bell v. Burson, 402 U.S. 535 (1971) (hearing required prior to suspension of driver's license and vehicle registration); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (hearing required before suspension of sale of liquor to an individual); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (hearing required before garnishment of wages). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972); Brown v. Fountleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969). *But see* Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974).

58. 483 F.2d at 787.

59. *Id.* at 784-85.

60. 403 U.S. 443 (1970).

61. *Id.* at 450.

62. 483 F.2d at 785, 787.

63. The response of the Florida courts to *Pugh* has not been enthusiastic. In February 1974 the Florida supreme court filed a modification of rule 3.131, changing the maximum prehearing detention period from 72 to 96 hours. The court stated that the purpose of the rule allowing an accused who was in custody a preliminary hearing within 72 hours was to

however, is also closely aligned with the prosecution; therefore the *Coolidge* rationale might be persuasive.[64]

In *Richardson v. Gerstein*,[65] a somewhat disturbing postscript to *Pugh v. Rainwater*, various inmates of the Florida Division of Corrections, seeking declaratory relief to shorten their sentences, alleged that failure to have a preliminary hearing was a violation of their constitutional rights.[66] The district judge who wrote the opinion in *Pugh v. Rainwater* also decided the *Richardson* case. In ruling that the inmates' standing to complain was erased when a valid conviction was entered, the judge stated: "[T]he remedy granted [in *Pugh*] was one uniquely available to persons seeking relief during their illegal pretrial incarceration."[67] The court relied on the familiar post-conviction cases for the proposition that "[t]he failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction."[68] Under this rationale, the state has no real incentive to comply with the preliminary hearing requirement, and a convicted party will have no ground to complain unless he can show that the lack of a preliminary hearing actually prejudiced his case at trial.[69]

Because it will be hard to argue prejudice at trial based on a lack of probable cause to bind over, once an accused has been found guilty at trial, it may be possible to argue prejudice based only on the ancillary functions of the

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speed the prosecutor's decision to file, or not to file, an information. The court's rationale for this action was that prosecutors who are rushed (72 hours) in their investigation tend to file informations where they lack firm belief in the integrity of the charge. Therefore, if the prosecutor is not rushed (96 hours) in his investigation, the number of these untenable charges will decrease and fewer innocent persons will be charged. The court voiced no concern for the fact that these "innocent" persons will be incarcerated for four days with no determination of whether there is probable cause for them to be in jail, and with no forum to protest. The court obviously rejected the *Pugh* notion of a preliminary hearing for every individual charged in information, referring to its "attendant costs and burdens upon the judicial system as well as the people of the state." *In re* Rule 3.131(b), Fla. Rules of Crim. Procedure, 289 So. 2d 3 (Fla. 1974). *See also* the recent holding of the Fourth District Court of Appeal, Cameron v. State, 291 So. 2d 222 (4th D.C.A. Fla. 1974), in which the court recognized that the *Pugh* decision would require that the defendant in that case receive a preliminary hearing. The court, however, said it was faced with the choice of following the "constitutional interpretations of the Fifth Circuit Court of Appeals" or the "long established constitutional views of the Supreme Court of Florida." The court opted for the latter, affirming the denial of a preliminary hearing, and certifying the question to the Supreme Court of Florida.

64. This relationship will be discussed in the text accompanying notes 81-110 *infra*.

65. 336 F. Supp. 67 (S.D. Fla. 1972).

66. The Fifth Circuit Court of Appeals has also contributed to the uncertainty of *Pugh's* effect by its recent holding in Harris v. Estelle, 487 F.2d 1293 (5th Cir. 1974). The facts of the case are unclear as reported, a factor that is critical to understanding the import of the case, because the court dismissed *Pugh's* application to *Harris* as being factually distinguishable. Nevertheless, the court flatly stated that if a defendant was not entitled by state law to a preliminary hearing, there was no constitutional question because *"there is no federal constitutional right to a preliminary hearing." Id.* at 1296 (emphasis added).

67. 336 F. Supp. at 68.

68. *Id.* at 69.

69. Zide v. State, 253 So. 2d 917 (3d D.C.A. Fla. 1971).

hearing, particularly discovery. This argument, however, has not been overwhelmingly embraced by the courts, and Florida is less vulnerable to it than many other jurisdictions, including the federal system, because Florida's pretrial discovery procedure provides almost total revelation of the state's case.[70] The argument that pretrial detention without proper determination of probable cause is per se a violation of due process, which would require reversal of a conviction, has largely been ignored. Nevertheless, the temptation to subvert preliminary hearing procedure may not be as great as might be expected, for the prosecution is already provided with a means to circumvent the preliminary hearing in the form of a grand jury indictment.[71]

Criticism of the Preliminary Hearing

Long ago, Justice Harlan expressed doubt about allowing judical scrutiny of a criminal charge, warning that a judicial officer may be too much an agent of the State.[72] Harlan did not see such a person as capable, to the same extent as a grand jury, of safeguarding the rights of the individual against infringement by the State.[73] Nonetheless, it may well be that the preliminary hearing offers the citizen greater protection of his individual rights than does the contemporary grand jury.[74]

Criticism of the preliminary hearing has labeled it essentially a *pro forma* determination of probable cause, asserting that it does not have value for the accused proportionate to its cost in time and legal fees.[75] Nevertheless, a preliminary hearing is, at the very least, an opportunity for the defense to see the bare essentials of the state's case against the accused and, at best, the preliminary hearing provides the innocent absolute relief from unfounded charges.

It has been argued that a preliminary hearing is actually an impediment to an individual's right to a speedy trial. Available statistics indicate, however, that delay with a preliminary hearing is not unreasonably greater than without one.[76] Furthermore, the advantages of a preliminary hearing are usually greater

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70. Fla. R. Crim. P. 3.220(a).

71. Mr. Justice White, in his concurring opinion in Coleman v. Alabama, 339 U.S. 1, 17-18 (1970), warned that the requirement of counsel at preliminary hearings could significantly reduce the number of hearings, for the prosecutor would tend to avoid them by going directly to the grand jury where counsel is not allowed.

72. "Under the local statutes in question, even the district attorney of the county is deprived of any discretion in the premises; for, if in the judgment of the magistrate before whom the accused is brought — and, generally, he is only a justice of the peace — a public offense has been committed, it becomes the duty of the district attorney to proceed against him. . . . Thus, in California nothing stands between the citizen and prosecution for his life, except the judgment of a justice of the peace." Hurtado v. California, 110 U.S. 516, 554 (1884) (Harlan, J. dissenting).

73. *Id.*

74. See text accompanying note 108 *infra.*

75. *President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 31-32 (1967), *cited in* Anderson, *supra* note 2, at 290 n.42.

76. Katz, *supra* note 6, at 46-51.

than the disadvantages of the quantum of delay and, in any case, a preliminary hearing is almost always waivable.[77]

A common complaint in jurisdictions where magistrates do not have to be attorneys is that the magistrate tends to rely too heavily on the prosecution in deciding what constitutes probable cause. Even though the United States Supreme Court has ruled that nonlawyers are competent to review probable cause in another context,[78] it is arguable that if the preliminary hearing were held to be a matter of constitutional right, it would require a determination of probable cause by someone trained in the law.[79] On the other hand, members of grand juries, whose ignorance of the law is probably greater than that of nonlawyer magistrates, have historically been considered competent to evaluate probable cause. The problem of the role of the judge as sole arbiter of probable cause is exacerbated by the fact that probable cause is such a vague gauge that it often allows careless and capricious screening by a magistrate. This problem is irremediable where it exists and must depend, as does almost all of the judicial process, on the integrity and conscientousness of the bench.

The preliminary hearing is criticized by prosecutors on at least two grounds: first, that it provides the defense with too much information about the state's case without corresponding discovery by the state, and second, that the hearing rushes the state's investigation and preparation of its case against the defendant. The first argument involves the question of the merit of broad pretrial discovery and is therefore outside the scope of this commentary. The fallacy of the second point is obvious. If the prosecutor does not have in hand adequate evidence to establish probable cause within a reasonable time after arrest then the accused should not be detained.[80] Nevertheless, the prosecutor does have at his disposal an alternative procedure that allows the defendant no discovery at all and requires less careful preparation than the adversary preliminary hearing. The prosecutor may simply obtain an indictment from the grand jury.

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77. *E.g.*, FLA. R. CRIM. P. 3.131(c). This rule does provide, however, that even if the defendant waives the hearing, the prosecution can demand that the magistrate examine the state's witnesses. If, after hearing the testimony, the magistrate decides there is no probable cause to believe the accused guilty of any offense, he will be discharged.

78. Shadwick v. City of Tampa, 407 U.S. 345 (1972) (clerks of a municipal court declared qualified to issue arrest warrants). The *Shadwick* Court focused on the fact that the clerks had no affiliation that would distort the independent judgment required by the fourth amendment.

79. *But see* Brinegar v. United States, 338 U.S. 160, 175 (1949).

80. It has been suggested that the hearing can be advantageous to the prosecutor in that it gives him the opportunity to test the quality of the State's witnesses under cross-examination by the defense. Also, it freezes testimony while fresh in the witnesses' minds, and gets the testimony on the record. *See* Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 490 (1959). *See also* Comment, *Preliminary Hearings — The Case for Revival*, 39 COLO. L. REV. 580, 585-86 (1967). By presenting a strong case, the prosecution may also effectively influence the defendant to plea bargain. It is reported that in Washington, where every person arrested for a felony must have a preliminary hearing within 10 days, approximately 70% of the felonies are reduced to misdemeanors after the hearing. G. COLE, CRIMINAL JUSTICE: LAW AND POLITICS 177 (1972).

THE PRELIMINARY HEARING VERSUS THE GRAND JURY INDICTMENT

The most intriguing problem associated with the preliminary hearing is its almost total vulnerability to preemption by grand jury indictment.[81] Historically, the grand jury has been the principal buffer between the individual and the power of the state to prosecute for crime.[82] In fact, the grand jury was developed as a means of avoiding the abuse of the criminal information by the Court of the Star Chamber in England.[83] Furthermore, it was the grand jury that was canonized in the United States Constitution, not the preliminary hearing. The idea of having all criminal charges instituted by the State subjected to the scrutiny of a panel of citizens is a valuable one.[84] Nevertheless, in practice, the grand jury has become an inconsistent protective device for the citizen,[85] more often demonstrating emphasis on its ancient role as "grand inquisitor" by probing into a citizen's activities, exposing wrongdoing,[86] and punishing by "chilling effect" if not by actual prosecution,[87] Today the grand jury is allied with the prosecution not only by the dependence created by its members' ignorance of the law, but also by the very nature of its activities.[88]

Evidence has long been available that the grand jury does not function independently of the prosecution.[89] Commentators report that prosecutors can obtain indictments from grand juries with very little trouble.[90] As a result, it can be said that the reliability of the grand jury is roughly equivalent to that

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81. *See* United States v. Coley, 441 F.2d 1299 (9th Cir. 1971), discussed in note 110 *infra*. For a similarly extreme example in a state court, see Moore v. Sheriff, Clark County, 511 P.2d 1045 (Nev. 1973) (at 2:00 p.m. the defendant appeared in court for his scheduled preliminary hearing. The State announced it was not prepared to proceed and requested a continuance. The magistrate denied the request and dismissed the complaint. Earlier the same day, however, another district attorney submitted identical charges to the county grand jury. An indictment was filed at 2:01 p.m. on the same day. The court thereupon denied that plaintiff had any right to a preliminary hearing). *But see* People v. DiPonio, 48 Mich. App. 128, 210 N.W.2d 105 (1973). The Michigan courts have explicitly held that, in Michigan, a defendant indicted by a grand jury is entitled to a preliminary examination, so long as the right is asserted before trial.

82. *See* Hale v. Henkel, 201 U.S. 43, 65 (1906); Hurtado v. California, 110 U.S. 516 (1884).

83. Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693, 695 (1971). For history of the grand jury, see Whyte, *supra* note 80, at 462-73.

84. *See* Costello v. United States, 360 U.S. 361, 362 (1956).

85. "[A]s a protection to the innocent accused, the importance of the grand jury is more theoretical than real." Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423, 433.

86. As there was no police force or professional prosecutor when the grand jury was developing, it had the whole burden of investigating crimes and initating prosecutions. Whyte, *supra* note 80, at 482-83.

87. Tigar & Levy, *supra* note 83, at 700.

88. "The grand jury as known today is chiefly an accusatory instrument." Whyte, *supra* note 80, at 462.

89. *See* Morse, *A Survey of the Grand Jury*, 10 ORE. L. REV. 101 (1931). *But see* Scigliano, *supra* note 2, at 310.

90. Tigar & Levy, *supra* note 83, at 694.

of the prosecutor.[91] Furthermore, the prosecutor often uses the grand jury as a scapegoat to which he can shift the blame of a doubtful or unpopular prosecution.[92] For example, Professor Moore quotes *United States v. Cleary*[93] for the proposition that "when technical and theoretical considerations are put aside, the true nature of the grand jury emerges — *i.e.*, it is basically . . . a law enforcement agency."[94]

Recently the United States Supreme Court has tended to emphasize the investigative nature of the grand jury. In *United States v. Calandra*[95] the Court labeled the grand jury: "[A] grand *inquest*, a body with powers of investigation and *inquisition*, the scope of whose inquiry is *not to be limited . . . by doubts whether any particular individual will be properly subject to an accusation of crime.*"[96] The Court added that "[b]ecause the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue [both] its investigative and accusatorial functions . . . ."[97] This dual function of accusor and impartial evaluator has been referred to as a kind of "institutional schizophrenia."[98]

In *United States v. Dionesio*[99] the Court admitted that the grand jury does not always serve its historic role as a "protective bulwark standing between the ordinary citizen and the overzealous prosecutor."[100] Additionally, in *United States v. Mara*[101] Justice Marshall, dissenting, harshly criticized the "prosecutorial exploitation of the grand jury at the expense of both individual liberty and the traditional neutrality of the grand jury."[102] Justice Douglas, also dissenting, pointed out that a witness summoned before a grand jury often finds that the "room [of the grand jury] is the room of the prosecutor."[103]

Despite the obvious prosecutorial orientation of the grand jury, courts dealing with the intrusion of an indictment into a preliminary hearing have consistently stated that an indictment itself establishes sufficient probable cause to hold an accused for trial,[104] so that a post-indictment preliminary hearing to review probable cause is not warranted.[105] In light of *Pugh v. Rainwater*,

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91. Note, *American Grand Jury: Investigatory and Indictment Powers*, 22 CLEV. ST. L. REV. 136, 144 (1973). *Cf.* Whyte, *supra* note 80, at 489, reporting that one study shows the prosecutor to be even more accurate than the grand jury in his ratio of accusations to convictions.

92. Tigar & Levy, *supra* note 83, at 694.

93. 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959).

94. 8 J. MOORE, FEDERAL PRACTICE ¶6.02(1)(b) (1972). *See also In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973).

95. 94 S. Ct. 613 (1974).

96. *Id.* at 617, *quoting* Blair v. United States, 250 U.S. 273, 282 (1919) (emphasis added).

97. *Id.* at 620.

98. Comment, 22 DEPAUL L. REV. 737, 749 (1973).

99. 410 U.S. 1 (1972).

100. *Id.* at 17.

101. 410 U.S. 19 (1972).

102. *Id.* at 47-49 (dissenting opinion).

103. *Id.* at 24 (dissenting opinion).

104. *See, e.g.*, Coleman v. Burnett, 477 F.2d 1187, 1207 (D.C. Cir. 1973); United States v. Rogers, 455 F.2d 407, 410-12 (1972).

105. It must borne in mind that the federal system is constitutionally bound to the

however, that assertion bears reexamination. The constitutional goal at issue is a prompt and impartial determination of probable cause. Emphasizing this ideal, *Pugh v. Rainwater* refused to allow a state attorney to determine probable cause because his affiliation with the prosecution created an irrebuttable presumption against his neutrality and impartiality. Likewise, the grand jury has a demonstrable affiliation with the prosecution. There should be, therefore, a similar presumption against neutrality and impartiality in determinations of probable cause made by the grand jury.[106] Indictments, as well as informations, should be preceded or followed by an impartial judicial determination of probable cause as called for in *Pugh v. Rainwater*.[107] There is little logic in denying the prosecutor the right to ascertain probable cause by information and then allowing him a reliable vehicle for doing the same thing indirectly by indictment. Due process does not require that an accused *appear* to have an impartial review of the charge and evidence against him; due process requires that he have such a review *in fact*.

Perhaps the most serious criticism of the grand jury is the paucity of rights that the individual is afforded – especially in comparison with those available at a preliminary hearing. In a grand jury proceeding the witness (and potential accused) has no right to notice of the scope and nature of the crimes being investigated; no right to confrontation or cross-examination of witnesses; no right to present exculpatory evidence unless specifically asked for it; and no

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grand jury. U.S. CONST. amend. V. The states are not, however, because of the Supreme Court's holding in *Hurtado*. See text accompanying 50-51 *supra*. Thus, the federal cases involving preliminary hearings must be read with the thought that indictment will still be required, so that a mandatory preliminary hearing will be an added burden for the prosecution. It is doubtful that anything short of recognition that a grand jury is not an appropriately competent arbiter of probable cause to detain for trial will aid the plight of the preliminary hearing in the federal system. It is also true that the state systems that retain the grand jury generally reflect the same attitude as the federal court. There are manifestations of sentiment in Congress to do away with the grand jury by constitutional amendment. In response, the Justice Department has admitted that the grand jury does not offer much protection to the citizen, but that it should be retained for its investigatory value. Orlando (Fla.) Sentinel, Sept. 23, 1974, §A at 7, col. 3.

106. For additional expressions of doubt about the fitness of the grand jury to review probable cause, see Weinberg & Weinberg, *supra* note 36, at 1380: "The grand jury is not a proper body to reach an independent judicial determination of probable cause." *See also* 8 J. MOORE, *supra* note 94, ¶6.1(1)(a), *quoting* Williams, *Crime, Punishment, Violence: The Crisis in Law Enforcement*, 54 JUDICATURE 418, 420 (1971): "[T]he mandatory use of grand jury proceedings in urban cases 'is an outmoded, archaic fetish of yesteryear,' pointing to the long delays involved in routine cases just to obtain 'the rubber stamp processing of a grand jury.'" *Id. See also* Comment, *Preliminary Hearings in Pennsylvania: A Closer Look*, 30 U. PITT. L. REV. 481, 487-88 (1969).

107. In People v. DiPonio, a Michigan appellate division case, discussed in note 81 *supra*, the court reinforced its insistence on a post-indictment preliminary hearing, noting its use as a means to remedy possible defects in the grand jury proceedings. Similarly, a Washington, D.C. court recently required discovery of grand jury minutes as a means to remedy an improperly conducted preliminary hearing. United States v. Strickland, 14 CRIM. L. REP. 2324 (D.C. Super. Ct. 1973). This approach seems to conform to the posture adopted by the District of Columbia Court of Appeals in *Coleman v. Burnett*, discussed in notes 122-136 *infra* and accompanying text.

right to counsel.[108] Furthermore, in some jurisdictions the offer of immunity is an incentive to induce the witness to waive protection from self-incrimination.[109]

The disparity between the rights available before the grand jury and those available at a preliminary hearing suggests that a determination of probable cause made by a grand jury, rather than by preliminary hearing, could afford the defendant a basis for a claim of denial of equal protection. The State has little rational basis for providing some defendants with all the benefits and protections of a preliminary hearing, and leaving others to struggle with the grand jury without benefit of those safeguards. Although it is obvious that the courts have felt uncomfortable with this disparity, no solution has been found. Instead, the courts have developed evasive maneuvers to avoid the result of total preemption of the preliminary hearing through the grand jury. Simultaneously, the prosecution has developed sophisticated techniques to use the indictment to avoid the preliminary hearing whenever possible, simply because it is less trouble, provides the defendant fewer benefits, and is usually easier to dominate than a hearing magistrate. The bench, sensing the injustice that is often caused by this slick but seemingly proper maneuver of preempting the preliminary hearing, has developed reasons for disallowing attempts at preemption.[110]

The most influential cases that address themselves to the scope and inviolability of the preliminary hearing have come from the District of Co-

108. Tigar & Levy, *supra* note 33, at 698.

109. *Id.*

110. A typical example of situations that frequently occur is United States v. Coley, 441 F.2d 1299 (5th Cir. 1971). The defendant was given a preliminary hearing but the primary witness refused to answer defense counsel's questions. The charge was dropped for lack of adequate probable cause. The prosecution then secured an indictment, which not only served as an adequate finding of probable cause but also effectively destroyed the defendant's right to the benefits of a preliminary hearing. In response to the defendant's motion to quash the indictment, the court held that the Constitution does not require preliminary hearings and that "the distinction beween an aborted preliminary hearing and no hearing is one without a difference." *Id.* at 1301. Also, in the recent case of United States v. Quinn, 357 F. Supp. 1348 (N.D. Ga. 1973), the defendant was arrested on Jan. 6, 1973, and a preliminary hearing was set for Jan. 12, 1973. The hearing began as scheduled but a prosecution witness, an FBI agent, mentioned some notes taken during the investigation of the accused. Counsel for the defendant demanded inspection of the notes and the hearing was continued until Jan. 26 so that the agent might have time to remove any unrelated material. The prosecution was distressed at the ruling for disclosure and went to the grand jury. An indictment was returned and the preliminary hearing was cancelled over the objection of the defense. The court said that while they might object to the way "the game is played," *id.* at 1350, they did not believe any substantive rights of the defendant had been violated. *Id.* at 1351. *But see* United States v. Pollard, 335 F. Supp. 868 (D.D.C. 1971), where a magistrate had ordered a line-up prior to the preliminary hearing, and the prosecution, not wanting to conduct such a procedure, "nolle-prossed" and went to the grand jury. There, the court refused to allow the nullification of the preliminary hearing by indictment, holding that where a preliminary hearing is scheduled it can only be barred by a grand jury indictment that intervenes "in the normal course of events." *Id.* at 870. In this case the court found the action was "unilateral . . . [on the part of the Government], solely for its own benefit, and accompanied by indicia of vexatiousness." *Id.*

lumbia.[111] In 1963 the District of Columbia Court of Appeals in *Blue v. United States*[112] made two significant statements: (1) the function of the preliminary hearing is to provide discovery as well as to determine probable cause;[113] and (2) when an accused is denied access to discovery, the denial may not be "swept under the rug of a grand jury indictment."[114] The court indicated that, under proper circumstances, the hearing would proceed in spite of the indictment.[115] Even in *Blue,* however, the court pointed out that the right to a proper preliminary hearing must be asserted before conviction.[116]

The attitude of the District of Columbia Court of Appeals was further clarified three years after *Blue,* in *Ross v. Sirica.*[117] In the interim, *Blue* had generally been regarded as a judicial statement supporting the discovery aspect of preliminary hearings.[118] *Ross,* however, made it clear that the court's main concern was the impropriety of detaining an accused when his preliminary hearing has been so defectively conducted that he has not really had a proper determination of probable cause,[119] or where the government has managed, through continuances of one kind or another, to delay the preliminary hearing until a grand jury indictment destroys the defendant's right to one.[120] It was this situation that rankled the court, and it was clear in the *Ross* opinion that the imposition of a proper preliminary hearing was meant as a sanction against such practices.[121]

Finally, in 1973, in the case of *Coleman v. Burnett,*[122] the District of Columbia Court of Appeals gave some significant indications about its perception of the future of the preliminary hearing, and provided an example of what courts will face as long as the preliminary hearing is wholly a creature of statute and vulnerable to indictment. *Burnett* was the first major exposition of the ideas expressed in *Blue* and *Ross* since passage of the 1968 Federal Magistrates Act.[123] This statute affected the court's discussion in two vital particulars. First, the statute's passage laid to rest the idea that the discovery function of the preliminary hearing is important enough to justify reopening

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111. For a discussion of these cases, see Note, *Preliminary Hearing in the District of Columbia — An Emerging Discovery Device,* 56 GEO. L.J. 191 (1967).

112. 342 F.2d 894 (D.C. Cir. 1964).

113. *Id.* at 901.

114. *Id.* at 899.

115. *Id.*

116. *Id.* at 900.

117. 380 F.2d 557 (D.C. Cir. 1967).

118. See Note, *supra* note 111, at 194-202.

119. 380 F.2d at 563.

120. *Id.* at 564-65.

121. "The compelling reason justifying that sanction [imposition of a supplemental preliminary hearing subsequent to indictment] is to avoid the threat to personal liberty — the risk of unlawful detention without probable cause — inherent in such practices, and not their denial of the limited degree of discovery which a preliminary hearing incidentally, though inescapably, provides." *Id.* at 564.

122. 477 F.2d 1187 (D.C. Cir. 1973).

123. 18 U.S.C. §3060 (1970).

a preliminary hearing.[124] Second, the statute provided that a preliminary hearing need not be held where an indictment has intervened.[125] These factors severely restricted the approach that had been taken by courts in the past to correct defective hearings. Fortunately, however, in the interim the United States Supreme Court had considered a case involving the preliminary hearing in *Coleman v. Alabama.*[126]

The court in *Burnett* applied the remedies delineated in *Coleman v. Alabama* for violation of the arrestee's right to counsel at the preliminary hearing to the violation of the arrestee's right to a proper determination of probable cause. The court pointed out that *Coleman v. Alabama* held that a citizen had the right to a new trial even *after* conviction, if it were ascertained that a violation of his right to counsel had prejudiced his case at trial.[127] The court implied that the accused in *Coleman v. Burnett* would easily have the right, if convicted,[128] to a determination of whether the defective preliminary hearing he was given was prejudicial to his defense at trial. In *Burnett,* however, only an indictment had intervened, not the trial itself. The court said it made no sense to wait to see if the accused were convicted before allowing him to assert the right to a remedy for the defective hearing.[129] The court further decided there was no point in returning to a new preliminary hearing because the indictment had determined probable cause.[130] The remedy the court adopted, therefore, was to have the trial judge review the defective preliminary hearing and to do whatever he believed necessary to rectify any prejudice suffered by the defendant.[131] The court implied that if the defendant had experienced an injury, which might somehow "infect" the ensuing trial,[132] then the court would have to take what it ominously referred to as "appropriate corrective action."[133]

Thus, the *Burnett* court took a step forward in indicating that an improper preliminary hearing may be grounds for dismissal of a criminal charge.[134] This is a uniquely progressive aproach to the preliminary hearing, although in practice it is doubtful that it will have much effect. Because the preliminary hearing has not been held a constitutionally protected element of due process,

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124. 477 F.2d at 1209.

125. *Id.*

126. 399 U.S. 1 (1970). The Supreme Court determined that a preliminary hearing was a "critical stage" of the criminal process in the sense that, when held, the presence or absence of an attorney was critical to the defendant's rights. This opinion is not interpreted to require that a preliminary hearing be held, only that if one is held, then there is a right to counsel. The Court indicated that if counsel were not provided then there should be a judicial determination of whether the lack of counsel was prejudicial to the accused at trial. If so, a new trial would be provided, even after conviction. There seems to be little assistance from this opinion regarding situations in which the hearing is not provided at all.

127. 477 F.2d at 1209.

128. *Id.* at 1209-11.

129. *Id.* at 1211.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See text accompanying notes 131-133 *supra.*

trial judges may find it hard to visualize that its perversion could seriously prejudice an otherwise valid trail.

Nevertheless, *Burnett* was regressive in its meek acceptance of the grand jury indictment as a review of probable cause.[135] If a trial judge chooses not to exercise vigorously the powers he has been granted to correct errors in preliminary hearings, the accused is no better off than he might have been prior to the line of cases following *Blue,* which indicated that a supplemental preliminary hearing after indictment might be required. The decision in *Burnett* does not slam shut the door to a supplemental preliminary hearing for an indicted defendant. Rather, it closes it gently, suggesting that the accused move on to trial where the judge will somehow erase any prejudice.[136] Such obfuscation and convoluted logic as the courts have been forced to adopt could be abandoned by the simple expedient of removing the preemptive power of the grand jury indictment. Accused citizens could thereby be guaranteed an impartial judicial determination of probable cause.

CONCLUSION

It is anticpated that the United States Supreme Court will uphold the decision of the Fifth Circuit Court of Appeals in *Pugh v. Rainwater* and require that any citizen charged by information with a crime be afforded a prompt judicial review of the charges against him. Such a holding will affect the criminal procedure of many states by reducing the procedural framework to the simple requirement that every accused be given either a prompt preliminary hearing or grand jury indictment. It is doubtful the Court will address the inequality of these procedures from the viewpoint of the accused. The Court may have to do so, however, if in implementing the new mandatory preliminary hearing, the states fail to rectify its circumvention by indictment.

The preliminary hearing must be examined to determine how it may best be implemented and utilized in Florida, and the power of preemption by indictment must be discontinued. To do this it is not necessary to disturb the grand jury in any significant way. The historic need for the grand jury to protect the citizen from abuse of prosecutorial authority is virtually eliminated by the presence of an independent judiciary. In its role of inquisitor-accusor the grand jury cannot be expected to be more impartial about its accusations

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135. 477 F.2d at 1207.

136. United States v. King, 484 F.2d 768, 776-77 (D.C. Cir. 1973), a subsequent opinion by the District of Columbia Circuit Court of Appeals, is indicative of how the *Coleman* approach to preliminary hearings will be applied. The court found that the defendant was denied the right to examine a witness whose testimony was potentially material to the issue of probable cause. Nevertheless, the court refused to order the preliminary hearing reopened, saying that the intervening indictment had "made conclusive" the existence of probable cause. Thus, any harm that the accused suffered at the defective hearing would have to be rectified according to the *Coleman* rationale that "the trial judge will be able to draw upon his imagination in the kind of remedy-fashioning which traditionally has been a prerogative of the federal judiciary to suitably avert injury from the wrong suffered here."

than any other prosecutorial element. Any indictments handed down, therefore, should also be scrutinized by an impartial judicial officer.

Every citizen accused of a crime in the State of Florida should have the right to a preliminary hearing. Systematic implementation of the hearing would eliminate all the effort wasted in attempts to avoid it; guarantee all accused persons a similar measure of probable cause, reviewed by the same kind of judicial officer, with comparable benefits and access to discovery; force the prosecution to be more alert in the preparation of its cases; provide the innocent and the unconvictable with an early release from prosecution; and apparently, reduce the total number of persons held in jail and bound over for trial.

It is not suggested that a mandatory preliminary hearing is a panacea for pretrial criminal procedure. In practice, the preliminary hearing may be much less beneficial to the accused than it appears in theory.[137] Nevertheless, a judicial magistrate is a better arbiter of probable cause than either the state attorney or the grand jury, and the failure to provide every accused with the right to a preliminary hearing makes up in unfairness for what it may lack in unconstitutionality.[138] Of all possible reforms to the criminal procedure of Florida, the guaranteed right to a preliminary hearing upon arrest will best protect the constitutional rights of the innocent citizen.

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137. One commentator has argued that requiring a preliminary hearing for every arrestee would turn the hearing into an "assembly line procedure," with no real scrutiny of the probable cause to detain. Anderson, *supra* note 2, at 324.

138. "As a protection for the innocent, the advantage of a preliminary hearing on an information [over a grand jury] is manifest." Whyte, *supra* note 77, at 490. Justice Ervin of the Supreme Court of Florida, dissenting in Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970), argued vigorously that the preliminary hearing may well be "elevated to a 'critical stage' proceeding by virtue of the constitutional requirements of due process and fair trial." *Id.* at 734. Justice Ervin also argued that a preliminary hearing should not be preempted by indictment, for the preliminary hearing "confers upon an accused person procedural rights which are unquestionably distinct and superior to whatever rights are available to an accused at the *ex parte* grand jury and information stage of the proceedings." *Id.*