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STREAMLINING CRIMINAL PROCEDURE IN MAGISTRATE COURT*

ROBERT BATEY** AND DIANA L. FULLER***

I. INTRODUCTION

Two recent developments have turned the attention of West Virginia's criminal law community to magistrate courts. In March 1976, the state legislature reconstituted these courts,1 expanding their criminal jurisdiction to include the trial of all misdemeanors.2 Just three months later, the United States Supreme Court considered the constitutionality of the expedited procedures characteristic of lower-level courts. In Ludwig v. Massachusetts,3 the Court held that Massachusetts' ban on jury trials in district court—that state's analogue to West Virginia's magistrate court4—was constitutionally permissible so long as defendants convicted in district court were entitled to trial de novo in a higher court where the right to trial by jury applied.5 The decision in Ludwig came two days after the Court decided a similar question in North v. Russell.6

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4 A district court in Massachusetts has jurisdiction over municipal ordinance violations, all misdemeanors (except criminal libel), all felonies punishable by not more than five years' imprisonment, and certain felonies with potential sentences of more than five years. Id. at 620. For the criminal jurisdiction of magistrate courts see W. Va. Code Ann. § 50-2-3 (Cum. Supp. 1976).
5 427 U.S. at 625-26.
6 427 U.S. 328 (1976). In North, the Court approved a conviction before a police
Both Ludwig and North alluded to the efficiency of these lower-level courts, and North quoted approvingly from an earlier Supreme Court pronouncement that "these courts are designed . . . to provide speedier and less costly adjudications than may be possible in . . . courts . . . where the full range of constitutional guarantees is available." Thus, in these cases the Court approved the notion that constitutional rights may be curtailed in lower-level courts in order to achieve more efficient proceedings if the defendant can regain his rights on trial de novo.

Ludwig and North give states like West Virginia the opportunity to streamline lower-level court proceedings. The statute reorganizing West Virginia's magistrate courts provides an excellent means for taking advantage of this opportunity: the power to promulgate supervisory rules which the statute vests in the West Virginia Supreme Court of Appeals. This article suggests a number of ways in which the court's rulemaking power can be exercised to make magistrate courts more efficient. It first examines Ludwig in detail, concentrating particularly upon the requirement that the defendant have easy access to a court where all constitutional rights are observed. The second section of the article recommends changes in magistrate court procedure which would assure that this requirement is met. The final section suggests how to take advantage of having met this requirement; a series of procedural reforms is proposed, each of which seeks to make criminal trials in magistrate court more efficient.

II. LUDWIG V. MASSACHUSETTS

Richard Ludwig was charged in the District Court of Northern Norfolk, Massachusetts, a lower-level criminal court, with the crime of negligently operating a motor vehicle so as to endanger the lives and safety of the public. Since his alleged offense was punishable by as much as two years' imprisonment, Ludwig de-
manded a jury trial, basing his claim on *Duncan v. Louisiana.* In *Duncan*, the Court held that "a crime punishable by two years in prison is . . . a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial. . . ."14 The district court denied Ludwig's motion and thus squarely raised the question of the applicability of constitutional rights in lower-level criminal courts. This was the question which the Supreme Court addressed in *Ludwig v. Massachusetts.*15

In writing the majority opinion of the Court, Justice Blackmun first described Massachusetts' "two-tier system of trial courts for criminal cases,"16 comparing it with the systems used in other states having upper- and lower-level criminal courts. The common feature which defines these systems is the availability of a trial de novo in the second tier of the court system after conviction in the first tier.17 The systems differ, however, in their provisions regarding the availability of trial by jury.

Some States provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to bypass the first; and still others, like Massachusetts, do not allow an ac-

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14 Id. at 162.
15 In this context, *North v. Russell*, discussed at note 6 supra, is less edifying than *Ludwig* for two main reasons. (1) Unlike *Ludwig*, *North* did not consider the applicability to lower-level criminal courts of settled constitutional doctrine. While Ludwig could rely on *Duncan* in asserting his claim to a jury trial, North had no Supreme Court precedent which directly supported his claim to a law-trained judge. (2) When compared with Justice Blackmun's majority opinion in *Ludwig*, Chief Justice Burger's opinion in *North* is curiously oblique. In the section which considered North's due process claim, 427 U.S. at 333-38, the Chief Justice discussed that claim without precisely indicating the holding of the Court. In addition to this relative defect in the majority opinion, *North* is marred by Justice Stevens' inability to participate and by Justice Brennan's unexplained concurrence in the result. All nine justices subscribed to at least one of the three opinions in *Ludwig.*
16 427 U.S. at 620.
17 In Colten v. Kentucky, 407 U.S. 104 (1972), the Court described these systems in the following manner:
The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, . . . the slate [is] wiped clean. Prosecution and defense begin anew. By the same token neither the judge nor jury . . . is in any way bound in the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. (citation omitted)
Id. at 113.
cused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second.18

Although Massachusetts does not formally allow a bypass of its lower-level courts,19 Justice Blackmun was quick to note the existence of "an established, informal procedure known as 'admitting sufficient findings of fact.'"20 By this procedure, the defendant can avoid protracted fact-finding in the lower-level court. After such an admission, the judge of the lower-level court hears evidence until he is convinced of the existence of probable cause and then finds the defendant guilty. The defendant may appeal this verdict and obtain a trial de novo.21

Justice Blackmun's extended description of this informal bypass method implies that its existence was significant to the Court, an implication borne out in a subsequent section of the majority opinion. After briefly describing the series of events which brought Ludwig to the United States Supreme Court,22 Justice Blackmun turned his attention to Ludwig's trial-by-jury claim, separating the argument into two distinct contentions: (1) jury trials are constitutionally required in lower-level criminal courts; and (2) even if jury trials are not required in these courts, the Constitution at least prohibits burdens on defendants' access to courts where trials by jury are available—burdens such as cost, in both time and money, of juryless lower-level criminal court trials.

The majority opinion rejected Ludwig's first contention with ease:

It is indisputable that the Massachusetts two-tier system does afford an accused . . . the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution. [T]he jury serves its function of protecting against prosecutorial and judicial misconduct . . . at the second tier of the Massachusetts system. . . .

Because trial by jury was available to Ludwig in Massachusetts' upper-level courts, the Constitution did not require that it also be

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18 427 U.S. at 620.
19 A guilty plea, the customary bypass vehicle in other states, bars trial de novo in Massachusetts. Id. at 620-21.
20 Id. at 621.
21 Id.
22 Id. at 622-24.
23 Id. at 625-26.
available in that state’s lower-level courts. But allowing deferral of the defendant’s right to a jury trial also allows a chilling of the exercise of that right during the period of deferral. This was the thrust of Ludwig’s second contention, to which the Court gave a more elaborate response.

The majority opinion noted three ways in which delaying the defendant’s right to trial by jury might chill his ultimate exercise of that right. First, the defendant might not be able to afford two trials. After the juryless trial in the lower-level court, such a defendant might be financially incapable of exercising his right to a jury trial. Second, the defendant might not be able to withstand the “psychological and physical hardships” of two trials and might therefore waive his right to another trial even if it constitutes his first opportunity to present his case to a jury. Third, the defendant might fear a harsher sentence as a result of the later trial and forego his right to trial de novo before a jury for that reason.

In considering the first two possibilities, Justice Blackmun admitted that the burdens imposed by a trial in the lower-level court are “not unreal and . . . may, in an individual case, impose a hardship.” However, these possible burdens on the right to trial by jury were not enough to invalidate the Massachusetts system of upper- and lower-level courts. By taking advantage of the informal procedure for bypassing the lower-level court, a defendant can largely avoid these burdens. Consequently, his right to trial by jury

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21 The Court distinguished the seemingly contrary holding in Callan v. Wilson, 127 U.S. 540 (1888), on the ground that Callan assessed the constitutionality of a two-tier system operating in the District of Columbia and was thus the product of the guarantees of right to trial by jury in both article III of and the sixth amendment to the United States Constitution. Since only the latter provision applies to the states, Callan did not control the decision in Ludwig. 427 U.S. at 629-30. For a further basis for distinction see note 34 infra. In a concurrence, Justice Powell adhered to his view that the sixth amendment does not apply to the states. Accordingly, he would have distinguished Callan because it interpreted the sixth amendment, while Ludwig called for interpretation of the due process clause of the fourteenth amendment. Id. at 632 (Powell, J., concurring opinion).
22 427 U.S. at 626.
23 Id.
24 By its own terms, this portion of the opinion considered only the first possibility, that the juryless trial could burden financially the defendant who wishes to exercise his right to trial by jury. Id. However, Justice Blackmun’s analysis of this potential burden applies equally as well to the possibility that the psychological and physical burdens of the first trial will chill the defendant’s right to a jury trial.
25 Id.
is not infringed.29 In other words, as long as there exists a means of escaping the financial, physical, and mental costs of the first trial, deferring trial by jury until the second trial is not unconstitutional.30

With regard to the first two possibilities, the existence of the procedure for admitting sufficient findings of facts was crucial. That procedure was, however, irrelevant to the Court's consideration of the third possibility—that fear of a greater sentence on retrial will deter a defendant from exercising his right to a jury trial. The majority opinion concluded that Colten v. Kentucky31 precluded consideration of this possibility. In Colten, the defendant argued that fear of a greater sentence on trial de novo chilled exercise of his right to appeal, but the Supreme Court disagreed. "[T]he hazard of being penalized for seeking a new trial . . . [does not inhere] in the trial de novo arrangement."32 Relying on this and similar language in Colten, the Ludwig Court determined that there was no hazard of being penalized for seeking a new trial before a jury.33

In these ways, the Court denied all three of the burdens that the Massachusetts two-tier system of trial courts arguably placed on the right to trial by jury. It is clear, however, that if the informal procedure for bypassing the lower-level courts had not existed, the majority might well have considered the financial, physical, and mental costs of the first trial impermissible infringements on the right to a jury trial.34 Fortunately for Massachusetts, the informal bypass procedure was available, and that state's conviction of Ludwig was accordingly affirmed by the Supreme Court.35

29 Id.
30 In this context, Justice Blackmun also observed that, were Massachusetts to abandon its two-tier system of courts, defendants would probably have to wait just as long as they now do to obtain jury trials. Id. at 629. Consequently, whatever burden this delay imposes would not be relieved by striking down Massachusetts' system of upper- and lower-level courts.
32 Id. at 116.
33 427 U.S. at 627.
34 Justice Blackmun underscored the importance of the procedure for admitting sufficient findings of fact by mentioning its existence as another basis for distinguishing Callan v. Wilson, 127 U.S. 540 (1888). See note 24 supra. Because there was no similar procedure in the District of Columbia at the time Callan was decided, the Callan Court's rejection of juryless trials in lower-level criminal courts did not require a similar rejection in Ludwig. 427 U.S. at 630.
35 Affirmance followed the concluding section of the opinion, which considered
Justice Blackmun's opinion was supported by only four other members of the Court. The four dissenters expressed their views in an opinion written by Justice Stevens. His dissent, like the majority opinion, focused on the procedure for bypassing trial in the lower-level court. Unlike Justice Blackmun, however, Justice Stevens could not find that this procedure relieved the burdens which the first trial imposed on the right to a jury. He would have preferred a procedure by which the defendant could bypass all proceedings in the lower-level court: "All of the legitimate benefits of the two-tier system could be obtained by giving the defendant the right to waive the first-tier trial completely."

The dissent argued that the first trial may, in a number of ways, deter exercise of the right to a second trial and, consequently, chill the defendant's right to a trial by jury. Besides the financial, physical, and emotional strain of two trials, there is the fact that "[a] second trial of the same case is never the same as the first." There is also the additional problem that "the right to trial de novo by taking an immediate appeal [does not] make the judge's guilty finding and sentence entirely meaningless." At the second trial, the judge and even some of the jurors may know of the previous adjudication of guilt, which knowledge will inevitably color many of their determinations. While the procedure for admitting sufficient findings of fact may ease some of these burdens on the right to a jury trial, Justice Stevens was unwilling to hold that the availability of this procedure relieved the defendant of all such burdens. Consequently, he would have reversed the conviction.

Ludwig's claim that Massachusetts' two-tier system places a defendant twice in jeopardy. 427 U.S. at 630-32. The Court found that the argument was "without substance." Id. at 631.

Chief Justice Burger and Justices White, Powell, and Rehnquist joined the opinion of the Court. Justice Powell also wrote a brief concurring opinion. See note 24 supra.

Justices Brennan, Stewart, and Marshall concurred in the dissent. 427 U.S. at 632 (Stevens, J., dissenting opinion).

Id. at 634. The only purpose which Justice Stevens could attribute to the requirement that a trial be held in the lower-level court is an illegitimate one, that being "to discourage jury trials by placing a burden on the exercise of the constitutional right." Id. at 635.

Id. at 634-35.

Id.

Id. at 637.

The dissent quoted extensively from Callan v. Wilson, 127 U.S. 540 (1888), arguing that the existence of a precedent "so nearly in point," 427 U.S. at 634, was
While the Court divided sharply over the adequacy of Massachusetts' informal bypass procedure, all nine justices appeared to agree that, within two-tier systems, all constitutional rights need not be observed in the lower-level courts, as long as these rights are accorded defendants in the upper-level courts and as long as defendants can reach these upper-level courts with ease. The controversy in Ludwig concerned whether Massachusetts provides the easy access which the Constitution requires.

If states like West Virginia wish to make proceedings in their lower-level criminal courts more efficient, Ludwig indicates that they may suspend some of the defendant's procedural rights in order to achieve this goal. Ludwig also indicates the prerequisite for this suspension of procedural rights: the defendant's path to a court where his constitutional rights will be observed must not be a difficult one.

III. RIGHT OF REMOVAL AS THE PREFERRED BYPASS MECHANISM

Ludwig v. Massachusetts strongly implies that a convenient means of avoiding trial in the lower-level criminal courts is a prerequisite for expediting procedures in these courts. If some of the defendant's procedural rights are not to apply at the first tier, he must be guaranteed relatively unfettered access to the second tier of courts. It is clear that West Virginia does not provide such access to defendants in magistrate court. Consequently, the first step toward streamlining proceedings in magistrate court is granting criminal defendants a right of removal to the circuit court.

Under current West Virginia law, there is no way for a defendant in a misdemeanor prosecution to bypass trial in magistrate court. Unlike parties in a civil suit, the criminal defendant has no right of removal. He may not avoid a trial in magistrate court by pleading guilty and then exercise his right to a trial de novo. The West Virginia Supreme Court of Appeals has repeatedly stated that there is no right to appeal from a verdict rendered upon a plea of guilty, even when the plea is entered in magistrate court and the subsequent appeal is to the circuit court for a trial de novo. Likewise, a West Virginia misdemeanor defendant may not

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further reason for rejecting the arguments offered by Massachusetts. For the Court's treatment of Callan see notes 24 and 34 supra.


44 Browsky v. Perdue, 105 W. Va. 527, 143 S.E. 304 (1928); State v. Stone, 101
take advantage of an informal bypass procedure like the one approved in *Ludwig*. Such "an established, informal procedure"46 simply does not exist in West Virginia. Consequently, the defendant in magistrate court must suffer a full trial in that court before he is granted access to the circuit court.

It should be plain from even a cursory reading of *Ludwig* that West Virginia thus fails to provide the easy avenue to its upper-level courts which is the prerequisite for relaxing constitutional requirements in its lower-level courts. The first trial's financial, physical, and psychological burdens, which Justice Blackmun characterized as "not unreal,"46 are just as likely to arise in West Virginia as in Massachusetts; furthermore, in West Virginia there is no informal bypass proceeding to mitigate these burdens. Thus, it is highly unlikely that the United States Supreme Court would approve any suspension of the procedural rights of a defendant in West Virginia's magistrate court unless some change is made in the rules governing that defendant's access to circuit court.

This change can take any one of three different forms, each of which satisfies the requirements of *Ludwig*: (1) West Virginia may adopt an informal bypass procedure like the one used in Massachusetts; (2) the state may alter its position with regard to guilty pleas by allowing a defendant to obtain trial de novo in the circuit court after pleading guilty before a magistrate; or (3) the state may give a defendant in magistrate court the right to remove his prosecution to the circuit court before magistrate court proceedings have commenced. Although any one of these changes is acceptable, the last—granting defendants a right of removal—should be preferred.

The rules governing proceedings in magistrate court could be revised to include a bypass procedure similar to Massachusetts' "admitting sufficient findings of fact."47 This would, of course, satisfy the requirements of *Ludwig*. However, the adequacy of this procedure was sharply disputed in the Supreme Court, and the switch of a single justice would have resulted in rejection of the

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W. Va. 53, 131 S.E. 872 (1926); Nicely v. Butcher, 81 W. Va. 247, 94 S.E. 147 (1917).

46 427 U.S. at 621.

47 Id. at 626. See note 27 supra.

48 See text accompanying note 19-21 supra.
procedure. Discretion would thus seem to recommend the adoption of a bypass mechanism less burdensome to the defendant.

Decreasing the burdens on the defendant, by allowing him to dispense with the first trial completely, rather than partially, would also decrease the burdens on the state, because it would have only one trial to conduct. Since the state apparently loses nothing by allowing complete avoidance of the first trial, permitting a speedier bypass would serve the interests of both the defense and the prosecution.

One way of permitting this speedier bypass is to honor the defendant’s right to trial de novo even after he has pleaded guilty in magistrate court. Under such a rule, defendants could gain access to the circuit court far more quickly than they could under a procedure like Massachusetts’ “admitting sufficient findings of fact.” In Ludwig, Justice Blackmun attempted to justify the Massachusetts bypass procedure on the ground that it “achieves essentially the same result” as a procedure allowing trial de novo after a guilty plea. By using that justification, the majority in Ludwig broadly implied that such a rule is more than acceptable as a prerequisite to the suspension of procedural rights in lower-level criminal courts. Thus, if West Virginia changed its rule regarding the effect of a guilty plea on the right to trial de novo, the requirements of Ludwig would be met.

There are, however, difficulties with adopting such a bypass mechanism. First, there appears to be a deep division on the United States Supreme Court regarding the constitutional adequacy of such a rule. Not all of Justice Steven’s arguments against the Massachusetts procedure are blunted by adoption of a rule allowing trial de novo after a guilty plea. The plea still leads to an adjudication of guilt and to a sentence, either of which facts may be known by, and have an influence upon, the judge or jury at the

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44 During the oral arguments in Ludwig, counsel for Massachusetts was asked, “What good is the first hearing to the State, where you know the man is going to appeal . . . ?” 427 U.S. at 634 n.1 (Stevens, J., dissenting opinion). Counsel offered no justification for requiring the first hearing—“Well, in the situation that you gave, . . . I would say the State really has no benefit . . . ,” Id.—and extended reflection has failed to suggest any legitimate reason for the requirement. See note 38 supra.

42 427 U.S. at 621.

45 See text accompanying note 44 supra.
second trial. Accordingly, the four dissenters in *Ludwig* would probably prefer a bypass mechanism which did not require a plea, a finding of guilt, and sentencing. Adopting a rule which conditions easy access to the circuit court upon a plea of guilty in magistrate court runs the risk that these four will attract a fifth vote.

The second major difficulty with adopting such a rule is that it requires that a substantial amount of court time be devoted to proceedings which trial de novo will render pointless. The magistrate must follow the appropriate procedures for accepting a plea of guilty and for sentencing. The former requires a determination that the plea is voluntary and intelligent. The West Virginia Supreme Court of Appeals has recently urged the implementation of an elaborate process for plea acceptance in the hope that this process would thwart subsequent collateral attacks. Even minimal adoption of this process in magistrate court would consume many hours of court time, all of it wasted when the defendant intends to appeal and obtain a trial de novo.

In addition to the time lost in accepting the plea, there is the time consumed by sentencing. In many instances, the sentencing discretion vested in the magistrate is considerable, making the sentencing decision a difficult one. The time consumed in making this decision will also be wasted if the defendant plans to appeal and force a new trial.

Although allowing trial de novo after a guilty plea would be an acceptable prerequisite for suspending some of the procedural rights of magistrate court defendants, a bypass procedure even less

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51 See text accompanying note 41 supra.
52 Dissenting for Justice Marshall and himself in *North v. Russell*, Justice Stewart wrote:
In short, I cannot accept the suggestion that, as a prerequisite to a constitutionally fair trial, a defendant must stand up in open court and inform a judge that he is guilty when in fact he believes that he is not.
427 U.S. at 346 (Stewart, J., dissenting opinion).
burdensome to these defendants should be preferred. By giving misdemeanor defendants a right of removal to the circuit court, exercisable at any time before trial, West Virginia would provide access to its circuit courts in such a way as to satisfy any constitutional critic. Moreover, this bypass procedure would place few, if any, administrative burdens on the state. No evidentiary showing by the prosecution would be necessary; nor would any expenditure of court time be needed beyond that required to notify the circuit clerk that the prosecution had been removed.

The only significant argument which can be mounted against giving misdemeanor defendants a right of removal is that such a right would make access to the circuit court so easy that every defendant would take advantage of it. This would, of course, overload the dockets of the circuit courts. The argument is not persuasive, however, because of the considerable advantages to the defendant of remaining in magistrate court.

As the misdemeanor defendant decides whether or not to exercise his right or removal, one factor he will consider is the relative expense—in terms of both time and money—of defending himself in circuit court. A major goal of the lower-level courts is to adjudicate criminal charges more quickly and economically than upper-level courts can. Lower-level courts are "courts of convenience, [designed] to provide speedy and inexpensive means of disposition of charges of minor offenses." For those defendants primarily interested in resolving the charges against them with a minimum of inconvenience, the option to remove their cases to the


57 In his Ludwig dissent, Justice Stevens spoke highly of “giving the defendant the right to waive the first-tier trial completely.” 427 U.S. at 634 (Stevens, J., dissenting opinion).


59 In North v. Russell, Chief Justice Burger offered further examples of the advantages of being tried in a lower-level court: "[I]t is a convenience to those charged to be tried in or near their own community, rather than travel to a distant [upper-level] court . . . . and to have the option . . . . of a trial after regular business hours." 427 U.S. at 338.
circuit court will be unimportant, and, in these cases, the right of removal will not be exercised.

Another major factor likely to be considered in the removal decision is the increase in the possibility of acquittal which results from remaining in magistrate court. A defendant who refuses to exercise his right of removal even though he fully intends to seek a trial de novo if convicted in the lower court thereby guarantees himself "two opportunities to avoid conviction and secure an acquittal." Since the prosecution must establish guilt twice under this procedure, the probability of an acquittal is greater than it would be if the case were removed to the circuit court before trial in the magistrate court. Consequently, defendants interested in maximizing their chances for acquittal will spurn the opportunity to remove their cases to the circuit court.

Even if there is no realistic possibility of acquittal in the lower-level court, a defendant may improve his chances for acquittal in the upper-level court by using the first trial as a discovery device. "Proceedings in the inferior court . . . offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own." Remaining in magistrate court can thus be a wise defense strategy even when acquittal in that court is highly unlikely.

What the existence of these factors indicates is that, while some misdemeanor defendants will remove their cases to circuit court, many will not. Consequently, there will be no overburdening of the circuit court dockets and, therefore, no good reason not to give misdemeanor defendants a right of removal to the circuit court.

Providing a right of removal to an upper-level court allows the suspension of some of the defendant's constitutional rights in the lower-level court. Because removal is one of the defendant's means of access to a court where all his constitutional rights are honored, the defendant must be fully informed of his right to remove. This

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63 In North v. Russell, the Supreme Court spoke of the lower-level court's "obligation to inform all convicted defendants . . . of their unconditional right to a trial de novo." 427 U.S. at 335. Chief Justice Burger inferred this obligation from the importance of trial de novo to the defendant who seeks access to a court where
admonition should be a part of the general procedure for informing a defendant of his rights, which should occur when the defendant first appears before the magistrate.

Because it is unrealistic to assume that an uncounseled defendant will understand all the implications of his right of removal, the defendant’s right to the advice of an attorney at this stage of the proceedings must be safeguarded. Without a lawyer’s assistance, the defendant’s right of removal would be virtually meaningless. Fortunately, in West Virginia the right to counsel in magistrate court is statutorily guaranteed, making further protection unnecessary.

As a prerequisite for streamlining magistrate court proceedings by suspending some of the defendant’s constitutional rights, West Virginia should grant defendants in that court a right to remove their cases to the circuit court. The West Virginia Supreme Court of Appeals should create this right of removal by rule. Such a rule should define the right to remove, declare when it is exercisable, and describe the procedure by which the defendant is informed of this right. On this foundation, the supreme court of appeals could erect a truly efficient magistrate court system.

IV. PROCEDURAL REFORMS TO PROMOTE EFFICIENCY

Once the prerequisite for streamlining magistrate court procedure has been met, simplification can occur at every stage of the criminal proceeding, from the defendant’s initial appearance to the imposition of the sentence. By suspending some of the defendant’s procedural rights, as well as some of the prosecution’s, the entire proceeding will be made far more efficient. The defendant who remains in magistrate court because he desires an expeditious resolution of the charges against him will see his wish fulfilled.

all constitutional rights are observed. Id. at 334-35. By the same reasoning, defendants must be informed of the right of removal, since it, too, is a means of access to a fully constitutional court.


64 The decisions in Ludwig and North indicated quite clearly that the right to counsel is not one of the rights which may be suspended in the lower-level courts. 427 U.S. at 627; 427 U.S. at 335.


66 Id. § 50-1-16.
Initial Appearance. When the defendant first appears before the magistrate, the following three separate procedures are required under current law: (1) the magistrate must inform the defendant of his rights;\textsuperscript{67} (2) the magistrate must set bail for the defendant;\textsuperscript{68} and (3) the magistrate must determine if the defendant is validly in custody.\textsuperscript{69} While the process of informing the defendant of his rights is too important to be expedited,\textsuperscript{70} the other two procedures can and should be avoided. Standardizing the setting of bail can achieve this avoidance.

A strong argument can be made for the proposition that a criminal defendant has a constitutional right to an individualized determination of bail.\textsuperscript{71} Thus, standardization through the use of a schedule specifying particular amounts of bail for particular crimes is constitutionally suspect. As a consequence, magistrates must consider a number of circumstances before setting bail.\textsuperscript{72} The supreme court of appeals can end this waste of court time by establishing a bail schedule applicable to all alleged misdemeanants who are to be tried in magistrate court.\textsuperscript{73} Under such a schedule, setting bail for a defendant who chooses to remain in magistrate court would be little more than a clerical function. Defendants preferring an individualized determination of bail could obtain it simply by exercising their rights of removal to the circuit court. The presence of the option to remove would satisfy any constitutional right to an individualized determination of bail that defendants might have.

The existence of such a schedule would simplify the setting of bail. Furthermore, the contents of the schedule could be used to streamline the process by which the magistrate judges the validity of the defendant's being in custody. This judgment, which requires

\begin{itemize}
  \item \textsuperscript{67} W. VA. CODE ANN. § 62-1-6 (1977 Replacement Volume).
  \item \textsuperscript{68} Id. § 62-1c-1.
  \item \textsuperscript{69} Gerstein v. Pugh, 420 U.S. 103 (1975). Gerstein v. Pugh does not require such a determination when the defendant has been brought before the magistrate pursuant either to an arrest warrant or to an indictment. Id. at 116-17 nn.18 & 19.
  \item \textsuperscript{70} See text accompanying notes 62-63 supra.
  \item \textsuperscript{72} W. VA. CODE ANN. § 62-1C-3 (1977 Replacement Volume), requiring consideration of "the seriousness of the offense charged, the previous criminal record of the defendant, his financial ability, and the probability of his appearance" at trial.
  \item \textsuperscript{73} The schedule should not control the setting of bail for alleged felons or for those alleged misdemeanants whose trials will be in circuit court.
\end{itemize}
a determination of whether there was probable cause to arrest the defendant, is necessary only when the defendant will remain in custody after the initial appearance. Thus, the more often the bail schedule requires that a defendant be released without the posting of any bail, the more often the magistrate can avoid determining the validity of custody. This is only one of the advantages of releasing defendants without requiring bail. After considering all the advantages, the American Bar Association recommended release without bail as the preferred means of dealing with almost all criminal defendants. Whether alleged felons should be released in this fashion should probably be judged on a case-by-case basis, but there seems to be little danger in granting alleged misdemeanants the right to release without the posting of bail.

The West Virginia Supreme Court of Appeals should promulgate rules allowing the release without bail of all magistrate court defendants. This would obviate the need for a procedure to set bail and for a procedure to determine the validity of custody; it would greatly expedite the initial appearance. If the court is unwilling to take this step, it should at least establish a bail schedule for defendants in magistrate court. This would relieve magistrates of the need to determine the amount of bail necessary in each case. A procedure for judging whether there is probable cause to continue the defendant's custody would still be necessary, but the bail-determining portion of the initial appearance could be omitted, thereby simplifying the hearing.

Procedure Before Trial. After his initial appearance before the magistrate, the defendant may enter one or more of the following motions: (1) he may object to the form of his prosecution by claiming misjoinder of charges or misjoinder of defendants or both; (2) he may object to the timing of his prosecution; or (3) he may assert his discovery rights against the prosecution. These motions are

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75 Id.
76 ABA Standards, Pretrial Release § 1.2(a) (Approved Draft 1968).
78 In some cases greater control over the defendant may be desirable. If the prosecution is unwilling to press its case in circuit court—which would end the relevance of the magistrate court bail schedule—then the appropriate means of restraining the defendant is through the issuance of a peace bond. W. Va. Code Ann. § 62-10-1 to -4 (1977 Replacement Volume).
highly technical, presenting questions to the magistrate which are both difficult and time-consuming. By acting to simplify the pretrial process in magistrate court, the supreme court of appeals can avoid this waste of court time, thereby expediting proceedings considerably.

Under current law, whenever two or more offenses or two or more defendants are prosecuted in a single trial, the defense may have grounds for an objection. When multiple charges are joined, the defendant has a right to sever the trial of those charges if they were not part of the same "continuous transaction."79 When multiple defendants are joined, any one of them has an absolute right to sever his trial.80

The most efficient way to use magistrate court time is to resolve as many criminal charges as possible in a single trial. Since the current law on joinder of offenses and parties frustrates this use, the supreme court of appeals should exercise its rulemaking power to change that law. Joining multiple charges against a single magistrate court defendant should not be objectionable, as long as all the joined charges allege only the commission of misdemeanors. Similarly, joining multiple defendants should be permissible in magistrate court if the cases against the defendants share common elements of proof.81 Under these rules, the only objectionable joinder would be the trial of two or more defendants on wholly unrelated charges. Any defendant dissatisfied with such liberal joinder standards could escape them simply by exercising his right of removal.

Along with complaining about the form of his prosecution, a defendant may challenge the timing of his prosecution. He may claim that trying him would violate the statute of limitations, which requires that a misdemeanor prosecution begin within one year of the commission of the alleged offense,82 or he may claim a violation of the three-term rule, which forbids trial if three or more

81 See ABA STANDARDS, JOINDER AND SEVERANCE § 1.2(c) (ii) (Approved Draft 1968), recommending a similar test for use in all criminal prosecutions.
82 W. Va. Code Ann. § 61-11-9 (1977 Replacement Volume). The only exception to this rule allows petit larceny prosecutions to begin at any time up to three years after the offense allegedly occurred. Id.
circuit court terms have elapsed since the prosecution began.\textsuperscript{53} These superficially simple rules are complicated by the addition of a number of factors which suspend their applications. The statute of limitations does not apply to any period during which the defendant obstructs prosecution by leaving the state or otherwise concealing himself.\textsuperscript{54} The three-term rule does not apply to any term during which the defendant is insane, asks for a continuance, escapes from jail, or fails to appear for trial; nor does it apply to any term during which any witness is ill or kidnapped or to any term in which the defendant's trial ends in a hung jury.\textsuperscript{55}

A great deal of court time can be consumed in deciding whether there has been a suspension of either one of these time limits and in determining the length of any such suspension. In order to avoid this waste, the supreme court of appeals should adopt rules which apply the statute of limitations and the three-term rule to magistrate court prosecutions without any possibility of suspension. This would greatly simplify the magistrate's inquiry, as a defendant's motion under either of these time limits would require only a glance at a calendar for resolution. Extended argument concerning the defendant's obstruction of the prosecution or his acquiescence in its delay or any other suspending circumstance would be irrelevant.\textsuperscript{56}

In addition to his objections regarding the form and timing of his prosecution, the defendant may assert his discovery rights before trial. Current law entitles the magistrate court defendant to a bill of particulars setting forth in detail the essential elements of the case against him,\textsuperscript{57} to any of his statements or any of his prop-

\textsuperscript{54} See W. Va. CODE ANN. § 55-2-17 (1966), explicitly recognizing these suspensions of the civil statute of limitations. There seems to be no good reason not to read similar suspensions into the criminal statute.
\textsuperscript{55} W. Va. CODE ANN. § 62-3-21 (1977 Replacement Volume).
\textsuperscript{56} Unlike most of the other changes in current law recommended in this article, this proposal disadvantages the prosecution. A misdemeanant who left the state after his crime and then returned a year later could not be prosecuted under the rules proposed, even though a conviction would be proper under current law. It is important, therefore, to note that the prosecution also has a "right of removal." Whenever the state is dissatisfied with the rules applicable in magistrate court, it may elect to proceed against the defendant in circuit court. W. Va. CODE ANN. § 51-2-2 (1966).
\textsuperscript{57} W. Va. CODE ANN. § 62-1B-1 (1977 Replacement Volume), giving the magistrate the power to require that the prosecution furnish a bill of particulars. When
erty which is in the hands of the prosecution, and to all exculpatory evidence known to the prosecution. Providing all this information is often a difficult task for the prosecution, so proceedings can be delayed first to allow the prosecution to prepare the information and then to allow the defendant to examine it. Such delay should be impermissible in a "court of convenience." The supreme court of appeals should act to make these discovery rights inapplicable to magistrate court proceedings, thereby organizing discovery in that court along more traditional lines. Under such a scheme, those defendants who seek discovery can obtain it by removing their cases to the circuit court. Thus, this reform in magistrate court procedure, like the recommended changes in the rules governing joinder and the timing of prosecution, can aid in the streamlining of that procedure while substantially protecting the procedural rights of defendants.

Jury Trials. The single factor which most complicates procedure in magistrate court is the defendant's right to trial by jury. Exercise of this right requires the expenditure of court time for the selection of a jury and for the instructing of that jury. Besides these delays before and after the presentation of evidence, the use of a jury lengthens the time required to put on evidence. Because evidentiary rules must be applied more strictly in jury trials (because the danger of prejudice is greater than in bench trials), more time is wasted on hearing and disposing of objections to the introduction of evidence.

there is no other document giving the defendant notice of the charges against him, the defendant's constitutional right to such notice would appear to make a bill of particulars mandatory. W. Va. Const. art. 3, § 14.

88 While the authority to order access to defendant's statements and property is discretionary, W. Va. Code Ann. § 62-1B-2 (1977 Replacement Volume), the supreme court of appeals has viewed denials of such access as constitutionally suspect. State v. McArdle, 194 S.E.2d 174 (W. Va. 1973).


90 Perhaps the symbolic value of preserving the defendant's right to exculpatory evidence in the hands of the prosecutor is reason enough for continuing this form of discovery in magistrate court. However, the value is purely symbolic, since the ethical obligations of the prosecutor require the production of any such evidence. ABA Code of Professional Responsibility Disciplinary Rule 7-103(B). In any event, the defendant's rights to a bill of particulars and to his statements and property in the prosecution's possession should be abrogated.

91 For a description and defense of the traditional view of criminal discovery see State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

West Virginia could avoid these delays by following the example of Massachusetts, which denies defendants in its lower-level courts the right to trial by jury. However, this simple step flies in the face of a firm commitment in the West Virginia Constitution to the right to trial by jury in all criminal cases. Since the legislature chose to honor this commitment in reconstituting the magistrate court, it probably would be impolitic for the supreme court of appeals to attempt to achieve a different result through the exercise of its rulemaking power.

Short of outright abrogation of the right to a jury trial, there are several steps which the supreme court of appeals could take to simplify trials in magistrate court. The court could standardize the procedures for selecting a jury and for giving the jury instructions. Further, it could save some of the court time wasted in dealing with evidentiary objections by regulating the relationship between magistrate and jury during the trial.

The supreme court of appeals should accept the legislature's invitation to promulgate rules for the selection of magistrate court jurors. Without such rules, the magistrate must summon prospective jurors, remove those who are disqualified, and strike those who are properly challenged for cause. The time consumed in this process could be saved in part by applying the procedures for summoning qualified circuit court jurors to the calling of magistrate court jurors. This would centralize largely administrative functions in administrative, rather than judicial, hands and thereby lessen the burdens on the magistrate.

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81 W. Va. Const. art. 3, § 14, art. 8, § 10.
89 W. Va. Code Ann. § 52-1-3 to -7 (1966, Cum. Supp. 1976). These sections authorize the preparation by jury commissioners of a list of those qualified to be jurors, the placing of each of these names in a jury box, and the selection of prospective jurors from that box. Id.
While rules of this sort would relieve magistrates of the tasks of summoning potential jurors and of striking those who are not qualified, such rules cannot discharge the magistrate's responsibility to remove prospective jurors who are prejudiced. In order to assure an impartial jury, under current law the magistrate must permit both the prosecution and the defense to question all the summoned jurors, must allow either side to put on evidence that one or more of the jurors is prejudiced, and must hear argument from both sides before deciding whether or not the potential juror is actually prejudiced. The supreme court of appeals should act to avoid this cumbersome inquiry by denying both the prosecution and the defense the right to question potential jurors. Instead, the magistrate should question the jury, using pattern questions promulgated by the supreme court of appeals. At the conclusion of such questioning, the prosecution and the defense could offer their challenges for cause, which the magistrate should consider without hearing any further evidence. After the magistrate rules on these challenges, peremptory challenges should be exercised and the trial begun.

The use of pattern questions for exposing juror prejudice is only one of the ways in which this technique can be used to streamline magistrate court procedure. Just as pattern questions can speed the trial process immediately before the presentation of evidence, pattern jury instructions can expedite the trial after all the evidence has been presented. Without such instructions, the magistrate can charge the jury only by soliciting potential instructions from both the prosecution and the defense and by then sifting through these submissions, choosing the ones that most accurately state the law or substituting instructions of his own drafting that

102 Federal judges have a similar power to conduct all questioning of prospective jurors. FED. R. CRIM. P. 24(a).
103 A more extreme but more efficient alternative would be to dispose of both sides' rights to challenge jurors for cause, relying instead on peremptory challenges to remove the prejudiced. Under this alternative, questioning by the magistrate would still be necessary (in order to allow informed use of the peremptory challenges), but argument over any individual juror could be avoided. However, the same concern which forestalls ending jury trials in magistrate court warns against abrogating the parties' rights to challenge jurors for cause. See text accompanying notes 93-96 supra.
propound the appropriate legal principles better than any of the ones submitted.104

In order to prevent this vast expenditure of time and effort, the supreme court of appeals should publish pattern jury instructions for every offense which can be prosecuted in magistrate court.105 When relevant, the use of these instructions should be mandatory, and no objection to their use other than upon grounds of relevance should be permitted. This would avoid excessive wrangling over the charge to the jury and speed the trial considerably.

In addition to expediting the progress of jury trials before and after the presentation of evidence, the supreme court of appeals can also act to speed the presentation of that evidence to the jury.106 Because putting on evidence generally leads to an objection, which usually requires an instruction to the jury to ignore either the evidence or the objection,107 the supreme court of appeals should authorize pattern instructions for this purpose as well. This would expedite the presentation of evidence to some extent.

Under current law, such instructions will sometimes fail to cure the prejudice done to the defendant by disclosing inadmissible evidence to the jury. When a curative instruction would be ineffective, West Virginia law requires the declaration of a mistrial.108 In order to avoid the delay occasioned by a mistrial, the supreme court of appeals should by rule deny any magistrate the authority to grant a mistrial at any time during the presentation of evidence.109 This would force the magistrate to rely on the pattern instructions, thus minimizing delay, as well as the chance that an improper declaration of a mistrial would bar further prosecution on double jeopardy grounds.110 Any defendant fearful of this

105 The American Bar Association has recommended the formulation of pattern instructions for use in all criminal trials. ABA Standards, Trial by Jury § 4.6(a) (Approved Draft 1968).
106 For ways of speeding the presentation of evidence in all magistrate court trials see text accompanying notes 111-25 infra.
107 This is the accepted means of handling such situations in West Virginia. State v. Arnold, 219 S.E.2d 922 (W. Va. 1976).
109 The court should, however, preserve the magistrate's power to declare a mistrial when there is a hung jury. W. Va. Code Ann. § 62-3-7 (1966).
ban on mistrials could dissipate its effect by exercising his right of removal or his right to trial de novo.

Assuming the unavailability of the most efficient solution to the problems raised in jury trials—doing away with the right to trial by jury in magistrate court—there are nonetheless some steps which the supreme court of appeals can take to simplify such trials. Jury selection, jury instruction, and the relationship of the magistrate and the jury during trial all can be regulated to achieve more expeditious proceedings.

Rules of Evidence. One factor which lengthens the presentation of evidence in jury trials and bench trials alike is the complexity of the applicable rules of evidence. This complexity makes objections to the introduction of evidence easy to raise and hard to resolve. In two crucial areas, hearsay and the application of the fourth amendment's exclusionary rule, the supreme court of appeals should simplify the controlling rules. The results would be less time wasted on evidentiary disputes and much speedier trials.

The intricacies of the ban on hearsay evidence are notorious.\(^\text{111}\) The difficulty in defining hearsay and the many exceptions to the ban on its use provide a number of opportunities for dilatory objections. Disposing of such objections can be a difficult task for a magistrate, with the task's becoming even more difficult when there is a jury present. The magistrate's effort is further complicated by the fact that some, but not all, of the hearsay rules are constitutionally required.\(^\text{112}\)

In reconstituting the magistrate courts, the legislature specifically granted the supreme court of appeals the authority to adopt special rules of evidence for magistrate court trials.\(^\text{113}\) The court's first exercise of this power should involve a simplification of the hearsay rules. Two possible simplifications have been suggested: (1) the set of exceptions to the ban on hearsay evidence could be replaced with a single general exception that admits hearsay when its probative value outweighs its potential prejudice, or (2) the hearsay ban could be lifted entirely.\(^\text{114}\)

\(^{111}\) For example, the Federal Rules of Evidence define hearsay in one section, ban it in another, and then list two categories of exceptions to the ban, with 24 exceptions in one category and five in the other. Fed. R. Evid. 801-04.


\(^{114}\) Fed. R. Evid. 801-06, Notes by Advisory Committee.
While the first approach obviously taxes the magistrate’s time and intellect more than the second, this more difficult approach does protect the factfinding process against the effects of grossly prejudicial hearsay. When a jury is the trier of fact, the first approach would appear to be better. On the other hand, when the trier of fact is a magistrate (who is, by training and experience, less likely to be swayed by prejudicial evidence than a juror would be), the second approach should be preferred. The supreme court of appeals should enact rules applying these reforms in the law of hearsay to jury and nonjury trials, respectively.

The evidentiary rules which enforce the constitutional ban on unreasonable searches and seizures are only slightly less complex than the rules enforcing the hearsay ban. Whenever a defendant claims that some of the evidence against him is the product of an unreasonable search or seizure, under current law the magistrate must first determine if a search or seizure occurred. Then he must decide whether that search or seizure was reasonable, either because there was a valid warrant or because one of the exceptions to the warrant requirement applied or because there was valid consent. Finally, the magistrate must consider whether the challenged evidence is subject to exclusion as the fruit of the unreasonable search or seizure. Resolving all these issues can consume a great deal of court time.

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115 If the supreme court of appeals chooses to end the right to jury trials in magistrate court, the second approach to hearsay should be taken in all magistrate court prosecutions. But see text accompanying notes 93-96 supra.


121 The expansion of the criminal jurisdiction of magistrate courts to include all misdemeanors, W. VA. CODE ANN. § 50-2-3 (Cum. Supp. 1976), should greatly increase the amount of court time devoted to search-and-seizure claims, since possession of a controlled substance now falls within the magistrate’s jurisdiction. See W. VA. CODE ANN. § 60A-4-401 (1977 Replacement Volume), making possession a misdemeanor.
The purpose served by this expenditure of court time is the deterrence of unconstitutional police conduct. Excluding the fruit of an unreasonable search or seizure "compel[s] respect for the constitutional guaranty . . . by removing the incentive to disregard it."\textsuperscript{122} In recent years, the Supreme Court has noted that this purpose may be accomplished without requiring exclusion at every stage of the criminal process.\textsuperscript{123} As long as the "incentive to disregard" the fourth amendment has been adequately counteracted by requiring exclusion at some stage, exclusion at all stages is not mandatory.

If magistrate courts discontinued excluding the products of unreasonable searches and seizures,\textsuperscript{124} there would still be an adequate mechanism for deterring such searches and seizures. Since the defendant could always remove his case to the circuit court, where exclusion would still be required, no investigating policeman—even one who knew he was investigating a misdemeanor, knew that the misdemeanor prosecution would begin in magistrate court, and knew that the exclusionary rule did not apply there—would have an incentive to disregard the fourth amendment.

The deterrence of unreasonable searches and seizures, thus, does not require exclusion of the fruits of such searches and seizures in magistrate court. Since exclusion wastes court time, the supreme court of appeals should promulgate rules which deprive magistrate court defendants of the right to suppress evidence solely because it is the product of an unconstitutional search or seizure.\textsuperscript{125} When combined with the recommended changes in the


\textsuperscript{124} Exclusion is currently required in magistrate court by statute. W. Va. CODE ANN. § 62-1A-6 (1977 Replacement Volume).

\textsuperscript{125} No change is recommended with regard to the exclusion of confessions, see Miranda v. Arizona, 384 U.S. 436 (1966), or of pretrial identifications, see United States v. Wade, 388 U.S. 218 (1967), since the exclusionary rules established in these areas tend to simplify, rather than complicate, the necessary inquiries. That is, it is generally easier to find that Miranda warnings were not given and to exclude a confession on that basis, than it is to find that the probative value of a confession given without warnings is outweighed by its potential prejudice to the defendant and to exclude the confession for that reason. This balancing of probative value against potential prejudice is necessitated by the presence of a jury. If the supreme
hearsay rules, this repeal of the fourth amendment's exclusionary rule should greatly simplify the law of evidence in magistrate court, expediting proceedings in that court dramatically.

Sentencing. As noted elsewhere, even the sentencing procedure in magistrate court can be time-consuming.\textsuperscript{128} Since magistrates now possess\textsuperscript{127} a discretionary power to sentence almost as broad as that of the circuit judges,\textsuperscript{128} and since magistrates must listen to convicted defendants (and their lawyers) before sentencing them,\textsuperscript{129} the process of punishing the convicted can be quite lengthy.

The supreme court of appeals should speed this process by adopting a schedule of mandatory sentences for all misdemeanors tried in magistrate court.\textsuperscript{130} Such a schedule would eliminate the magistrate's sentencing discretion, because the imposition of the specified sentence would be automatic. Since the magistrate would have no discretion to exercise, there would be no need to allow the defendant or his attorney to address the court before sentence was imposed.

This schedule of sentences should reflect a marked preference

court of appeals should abrogate the magistrate court defendant's right to a jury trial, see text accompanying notes 93-96 supra, some reform in the application of Miranda and Wade should then be considered. See text accompanying notes 114-15 supra.

\textsuperscript{128} See text accompanying note 55 supra.

\textsuperscript{127} The statutory provision which formerly gave the magistrate court jury the power to impose sentence is no longer in force. Act of March 13, 1976, ch. 33, [1976] W. Va. Acts 189, repealing W. Va. CODE ANN. \textsection 50-18-7 (1976 Replacement Volume). Thus, only the magistrate may now pass sentence on a defendant convicted in his court.

\textsuperscript{128} Unlike circuit court judges, magistrates may not place convicted defendants on probation. W. Va. CODE ANN. \textsection 62-12-1 (1977 Replacement Volume), granting such authority to the circuit courts. However, the magistrate may use his authority to place an individual under a peace bond, W. Va. CODE ANN. \textsection 62-10-1 to -4 (1977 Replacement Volume), as a form of probation.

\textsuperscript{129} Hill v. United States, 368 U.S. 424 (1962), suggests that a defendant may not be "affirmatively denied an opportunity to speak during the hearing at which his sentence [is] imposed." Id. at 429. Mempa v. Rhay, 389 U.S. 128 (1967), guarantees the defendant's right to counsel during sentencing.

\textsuperscript{130} The sentencing schedule should not apply to misdemeanor prosecutions in circuit court, where the judge should retain the power to select any one of range of penalties. This will give both prosecution and defense a forum in which to seek a sentence different from the one specified in the sentencing schedule.
for punishment by fine as opposed to incarceration.\textsuperscript{131} One way of achieving this goal is by making all of the mandatory sentences financial punishments as opposed to limitations on liberty. Another way would be to reserve incarceration for only the most serious misdemeanors. Under either approach, the magistrate should also be granted the authority to place those convicted defendants who are unable to pay their fines\textsuperscript{132} on probation,\textsuperscript{133} since they cannot be jailed for their inability to pay.\textsuperscript{134}

Sentencing, like many other stages of the criminal process in magistrate court, can be streamlined, making that court a more efficient forum for determining guilt or innocence. For the defendant who prizes speed over the painstakingly careful procedure of the circuit courts, the magistrate court can be a useful alternative.

V. Conclusion

Lower-level criminal courts can aim at one of two distinct goals. They can attempt to provide the full set of constitutionally required procedures which are available in the upper-level courts, or they can seek to supply efficient means for the speedy resolution of criminal charges. While commitment to the former goal comports more with contemporary notions of due process, commitment to the latter goal better conforms to reality. That is, streamlining magistrate courts is a far more realistic goal than constitution-\textsuperscript{}izing them.\textsuperscript{135}

\begin{itemize}
\item[\textsuperscript{131}] Such a preference is advocated in ABA Standards, Sentencing Alternatives and Procedures § 2.3(c) (Approved Draft 1971).
\item[\textsuperscript{132}] The defendant’s status as an indigent for sentencing purposes should be determined by the same process used in deciding whether counsel should be appointed for him. See W. Va. Code Ann. § 50-4-3 (Cum. Supp. 1976); id. § 59-2-1 (1966).
\item[\textsuperscript{133}] The sole condition of probation should be obedience of the law. If the defendant violates this condition within the standard probationary period (perhaps one year), the violation should cause the sentencing judge to impose a harsher penalty for the second offense. This assumes that the second prosecution will occur in the circuit court, where variation in sentencing is possible. The assumption is a reasonable one, since the violation of probation is just as likely to cause the prosecutor to seek a harsher penalty as it is to cause the judge to impose one.
\item[\textsuperscript{134}] Tate v. Short, 401 U.S. 395 (1971).
\item[\textsuperscript{135}] No attempt has been made in this article to gauge the disparity between the procedures currently required of magistrates and those procedures actually observed in magistrate courts. However, the widespread impression that the disparity is monumental suggests that overcoming whatever gap there is would be difficult indeed.
\end{itemize}
Perhaps this practical judgment about the limits of reform motivated the decisions in *Ludwig* and *North*. Whatever its motivations, the Supreme Court clearly chose efficiency and expedition as the aims appropriate for a system of lower-level criminal courts. West Virginia undoubtedly will accept this choice. It is hoped, therefore, that this acceptance will take the form outlined in this article.

136 It is possible, and perhaps even desirable, for West Virginia to commit itself to the goal of constitutionalizing its lower-level courts. However, without any impetus from the federal courts, this possibility is highly remote.