



LOUISIANA PUBLIC DEFENDER BOARD

PRELIMINARY HEARING PROJECT

I. History

As a result of field visits which raised a concern about long term pretrial detention practices in some districts, resulting in guilty pleas under duress in order to get out of jail or at least learn a release date, this office sent a survey to all District Defenders in June 2009 seeking answers to the following questions:

- A. Do you file motions for preliminary examinations routinely, and are preliminary hearings held in your jurisdictions?
- B. Do you file formal discovery motions in your district and are they answered in writing?
- C. Is the practice in your district to give "open file discovery" in lieu of PEs and/or discovery motions?

The responses received from the various districts established that an alarmingly few number of districts actively file and pursue hearings on preliminary examinations. Several districts also responded that they do not file formal discovery motions because they receive open file discovery, and a few waive their client's right to preliminary exams in exchange for open file discovery.

II. Basics About Preliminary Hearing Practice

A. Purpose of preliminary examinations

In addition to the legal rationale for a preliminary hearing, that is, to determine probable cause to continue to hold the client in jail or under a bond obligation, there are additional compelling reasons to actively pursue preliminary exams. The most compelling reason for a more expanded use of preliminary hearings is the unnecessarily long delay between arrest and significant activity in a client's case. Prompt preliminary hearing practice compels judges and prosecutors to evaluate a case much earlier.

Second, these hearings tend to be invaluable sources of information. Of course, preparation for a preliminary examination includes investigation, but often times a complaining witness or an investigating officer will not agree to an interview by a member of the defense team. Thus, learning basic information about the case early on, through a preliminary examination, will aide counsel later in the proceedings.

Third, preliminary exams provide an opportunity to lock witnesses into testimony under oath. Although hearsay is admissible at a preliminary hearing, counsel should seek to establish the source of all hearsay offered at the hearing.

Finally, a preliminary exam provides a forum to expose any weaknesses in the state's case which may result in the client being charged with a less serious offense, his/her bond amount reduced,¹ and/or more reasonable plea offers being made by the prosecutor. During the preliminary hearing, counsel should pay particular attention to whether the state establishes all elements of the offense charged.

B. Preparing for the preliminary examination

Counsel should understand all elements of the charged offenses(s) as well as the elements of any lesser included offenses prior to the preliminary examination. Also, it is important for counsel to know all potential legal defenses which may be or become available inasmuch as the preliminary hearing provides an opportunity to test the viability of various defenses.

In addition to legal research, the defense attorney and/or team should investigate the facts prior to the preliminary examination. The police reports and any available public records should be obtained. The defense lawyer should visit the crime scene, preferably under the same conditions as existed at the time of the alleged offense. Counsel should also identify and interview potential witnesses prior to the hearing. Knowing what certain witnesses will say allows counsel to assess the strength of the state's case and possibly determine any discrepancies between various witnesses' stories.

C. Question form

The preliminary examination is one of the rare instances where defense counsel is more likely to ask open-ended cross questions. Since one of the goals of the preliminary hearing is to obtain information, counsel should ask non-leading questions to gather as much information as possible.

It is also important to remember that the transcript of the preliminary hearing may be used in subsequent hearings or at trial. Therefore, pronouns should never be used during witness questioning. Also, each question should be short, with only one fact per question.

III. Legal Landscape

A. Legal basis for preliminary hearing

Pursuant to La. Const. Art. I, § 14, every person charged with a felony who has not been indicted by a grand jury is entitled to a preliminary examination. The state or the defendant may request a preliminary examination and, upon request, the court is to "immediately" order the hearing unless the defendant has been indicted by a grand jury. La.C.Cr.P. art. 292. Even where an indictment has been returned, the court has discretion and authority to order a preliminary examination, either on its own motion or on motion of the state or defendant. *Id.* The court is to conduct the examination "promptly," allowing the defendant a reasonable time to procure counsel. La.C.Cr.P. art. 293.

¹ It is often good practice to combine a motion for bond reduction with the preliminary hearing motion, or to file simultaneously and ask that they be heard together. There is some additional leeway allowed defense counsel in questioning state witnesses and presenting defense evidence.

The Louisiana Supreme Court has recognized that the right to a preliminary hearing is a Constitutional right, “reflecting the importance of according an accused a prompt and *thorough determination* that there is sufficient cause to deprive him of his liberty.” State v. Jenkins, 338 So.2d 276, 279 (La. 1976) (emphasis added). Very soon after the right to a preliminary examination was enshrined in the 1974 Constitution, the Court confirmed that the preliminary hearing, as contemplated by Art. I, § 14, is “the type of formal, adversary proceeding provided for by our Code, including the right to subpoena and cross-examine witnesses.” Jenkins, 338 So.2d at 279.

B. Initial appearances are different

An initial probable cause determination is by law required to be made within 48 hours after arrest. This is required by both federal and state law. But it is clear that this initial determination, often made by a magistrate or commissioner in Louisiana, does not take the place of a preliminary hearing.

The U. S. Supreme Court in 1991 made it clear that a prompt determination of probable cause was a requirement of due process. County of Riverside v. McLaughlin, 500 U.S. 44 (1991). The Court’s suggested time frame of 48 hours was codified in Louisiana law in 1992, at C.Cr.P Article 230.2, which permits the determination of probable cause to be made on affidavits and without an adversary proceeding. It notes that the determination of probable cause “shall not act as a waiver of a person’s right to a preliminary examination pursuant to Article 292.”

C. Scope of preliminary examination

Article 296 provides that a defendant is to be released from custody or bail if it appears that there is not probable cause to charge him with the offense or with a lesser included offense. La.C.Cr.P. art. 296. If the preliminary examination is held after indictment, the preliminary examination is limited to the perpetuation of testimony and the fixing of bail. Id.

The proceedings are to be conducted fairly and evenhandedly and any attempt to give “the State greater latitude than the defense in questioning witnesses during the preliminary examination . . . would affect the basic validity of the preliminary examination”. Jenkins, 338 So.2d at 279. The Supreme Court has made it clear that “[t]he hearing is to be “full-blown and adversary, and one in which the defendant is entitled to confront witnesses against him and to have full cross-examination of them.” Id.; La.C.Cr.P. art. 294. Where a detective gives hearsay evidence of an eyewitness identification, he or she “is subject to full cross-examination as to the facts so relied upon” to show probable cause. State v. Antoine, 344 So.2d 666 (La. 1977).

Both the state and the defense are entitled to produce witnesses at the preliminary examination. La.C.Cr.P. art. 294. The defendant’s right to examine and cross-examine witnesses and to call witnesses is not to be curtailed simply because the court has heard enough to determine that probable cause has been established. State v. Spears, 634 So.2d 9 (La. App. 1 Cir. 1994). There are, however, some exceptions or additional procedures involved for issuing subpoenas to victim witnesses. See, *e.g.*, La.C.Cr.P. art. 294(B) and (E); R.S. 46:1844(C) (victim’s rights statute). The transcript of a defendant who testifies at the preliminary examination is admissible against the defendant at trial or other judicial proceeding. The transcript of the testimony of any other witness who testifies at the preliminary examination is

admissible on behalf of either party in any subsequent proceeding in the case where the witness is unavailable. La.C.Cr.P. art. 295.

The state may choose not to produce witnesses at a preliminary hearing; the state “cannot be forced to do so.” State v. Foster, 510 So.2d 717, 723 (La. App. 1 Cir 1987), *vacated in part on other grounds*, 519 So.2d 138 (La. 1988). Where the state does not produce witnesses, the defendant is entitled to immediate release from jail or bond obligation:

If the evidence adduced at the preliminary examination fails to disclose probable cause, art. 296 requires the court to order defendant's release from custody or bail. Such a release, however, does not have the effect of a judicial dismissal of the pending information, since it merely releases defendant from the inconvenience of custody or bail, and the district attorney must then decide whether the defendant will be brought to trial or the charge dismissed or whether a grand jury indictment will be sought. See Official Revision Comment (c) to art. 296. Moreover, discharge of a defendant after preliminary examination does not preclude the subsequent filing of an indictment, information, or affidavit against him for the same offense. La.Code Crim.P. art. 386. In other words, a preliminary examination does not determine the validity of the charge brought against a defendant, but rather determines whether or nor there is probable cause to deprive the defendant of his liberty. See State v. Jenkins, 338 So.2d 276 (La.1976).

State v. Sterling, 376 So.2d 103, 105 (La. 1979). See also State v. Mayberry, 457 So.2d 880, 882 (La. App. 3 Cir. 1984) (“The State need only present a *prima facie* case. If the evidence does not support probable cause, the court shall order defendant's release from custody or bail. This is not a judicial dismissal. The State may still proceed against the defendant.”).

D. Defining “probable cause”

The 1966 Commentary to article 296, in defining ‘probable cause,’ provides that “the real issue is whether a *prima facie* case, sufficient to hold the accused for trial is established.” The commentary further explains that “the test adopted here is a more meaningful statement of the basic idea that a substantial *prima facie* case of guilt must be established.” *Commentary (a)*, La.C.Cr.P. art. 296. The Commentary later equates probable cause in the circumstances with “a solid *prima facie* case.” *Commentary (c)*.

A finding of probable cause at a preliminary examination is equivalent to the finding required of a grand jury to return an indictment. Thus, the right to a preliminary examination is lost where a grand jury indictment has been returned, except for limited purposes. La.C.Cr.P. arts. 292, 296; State v. Howard, 325 So.2d 812 (La. 1976); State v. Qualls, 377 So.2d 293 (La. 1979).

Article 443 provides the formula for a grand jury indictment as: the evidence considered by it, if unexplained and uncontradicted, warrants a conviction. La.C.Cr.P. art. 443. The equivalency of the grand jury determination with a finding of probable cause is made explicit in the Commentary to the Code, which confirms that each finding is one where there is a *prima facie* case sufficient to hold a defendant for trial. *Commentary (a) & (b)*, art. 296.

The distinction between a finding beyond reasonable doubt and a finding of probable cause has been clearly explained as: a finding of probable cause does not require that the state exclude “every reasonable explanation” but only that it prove that it is more probable than not that the defendant is guilty. State v. McKnight, 99-K-0997 (La. App. 4 Cir. 5/10/99), 737 So.2d 218, 219-20, n.2; State v. Maxwell, 97-1927 (La. App. 4 Cir. 9/15/97), 699 So.2d 512.

E. Discovery and preliminary examinations

A defendant has no "right" to discovery by way of a preliminary examination. State v. Foster, 510 So.2d at 723. The primary function of the preliminary examination is to insure that probable cause exists to hold the accused in custody or under bond obligation. State v. Holmes, 388 So.2d 722 (La. 1980).

Although the primary purpose of the preliminary examination is the probable cause finding, the effect of a preliminary hearing may also be to provide some discovery to the defendant. As the Supreme Court has noted, “in some instances the preliminary hearing provides an opportunity for the defense to interrogate the State's witnesses and thereby avoid surprise.” State v. Phillips, 343 So.2d 1047, 1050 (La. 1977). The Third Circuit has similarly noted that, “[w]hile a preliminary examination can act as a discovery technique, the law does not treat it as such.” State v. Mayberry, 457 So.2d at 882.

During the preliminary examination, the defendant has a right to a “full blown” hearing and the “full cross-examination” of witnesses, including cross-examination of identification witnesses and the facts relied upon for evidence provided by hearsay. State v. Jenkins, 338 So.2d 276, 279 (La. 1976); State v. Antoine, 344 So.2d 666 (La. 1977). This does not mean that the defendant has a right to the names and addresses of state witnesses. The trial court may, in its discretion, order the disclosure of the names and addresses of witnesses interviewed by state agents where fundamental fairness requires it. State v. Walters, 408 So.2d 1337, 1338 (La. 1982). Where, due to the particular circumstances of a case, “normal investigative means” will not be sufficient to allow counsel to prepare an adequate defense, a judge may order that the state disclose witness names and addresses. *Id.* In Walters, the defendant discharged a firearm on Canal Street at the Bacchus Mardi Gras parade. In the circumstances, any number of thousands of witnesses could have seen the incident and many were quite likely visitors to the city and could have come from across the nation. In those circumstances, ordering the disclosure was not an abuse of discretion.

F. LPDB standards on preliminary hearings

In April 2009, the LPDB promulgated Trial Court Performance Standards. LAC 22:XV, Ch. 7. Section 715 of these standards provides counsel’s duties at the preliminary hearing:

- A. Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted in a timely fashion unless there are strategic reasons for not doing so.
- B. In preparing for the preliminary hearing, the attorney should become familiar with:
 - 1. the elements of each of the offenses alleged;
 - 2. the law of the jurisdiction for establishing probable cause;

3. factual information which is available concerning probable cause; and
4. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings.

IV. Summary

Every person charged with a felony in Louisiana has a constitutional right to a preliminary hearing prior to indictment. This hearing provides an opportunity for the defense to learn more about the state's case, test the strength of the state's case and any potential defenses, lock witnesses in to testimony under oath, convince the court that the state's evidence is weak or nonexistent, and possibly obtain the client's release from jail or bond obligation. Perhaps more importantly, the hearing forces the court and prosecutor to evaluate a case early in the proceedings. For all of these reasons, the preliminary hearing should be actively sought in all jurisdictions and should never be waived except for good cause. Obtaining police reports and other standard discovery should never be a basis to waive the preliminary hearing.