1-1-2006

Saving Time and Diminishing Liberty: The Proposal to Abolish the Preliminary Exam Requirement in Michigan

Jason Sweet
Michigan State University College of Law

SAVING TIME AND DIMINISHING LIBERTY: THE PROPOSAL TO ABOLISH THE PRELIMINARY EXAM REQUIREMENT IN MICHIGAN

by
Jason Sweet

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Julian Cook
Spring, 2006

Introduction

A proposal currently in the Michigan Legislature would eliminate the requirement for preliminary exams in Michigan. According to its supporters, this proposal will eliminate the significant amount of time currently wasted by prosecutors and police in preparing for preliminary exams.[1] Some procedural safeguards have been built into the legislation, but the underlying effect would be the loss of the right to preliminary examinations for defendants in the state courts. Further, only those defendants charged with ten-year felonies would have the right to petition, based on a showing of cause, for a preliminary exam. This paper will examine the efficacy of that proposal. It will focus on the current state of the law, how the proposed legislation will change that law, and my proposal for how the legislature could better meet its goal while not evincing such a burden on Michigan defendants.

My proposal for preliminary examinations in Michigan seeks to have this procedural phase of criminal law found to be a constitutional requirement. Absent a constitutional requirement, I propose that a different line be drawn for who is entitled to a probable cause hearing. Furthermore, a similar objective could be accomplished by introducing an incentive for defendants to waive their preliminary exams. Allowing the defendant to do this would still give him the right to his exam if he so desires, but would also give him the option to waive that exam in return for a noting of his cooperation at a subsequent sentencing hearing.

Definitions & Explanations

Before examining the history of the preliminary exam in the federal and state courts, it is important to understand some of the nuances of this requirement. To aid in the understanding of this topic, I begin with some simple legal definitions of some of the terms that will be used throughout this paper. For those with a background in or strong familiarity with Criminal Law,

[1] *See* Mike Cox, *Cops on Street Plan Makes Sense*, LANSING ST. J., June 22, 2005, at 7A.

these definitions will be unnecessary. However, for the legal novice or the reader who completed his/her Criminal courses in law school and never visited the subject-area again, these definitions will provide a helpful guide to aid in our discussion.

The crux of this paper will cover the preliminary exam or preliminary hearing. *Black's Law Dictionary* defines preliminary hearing as

> "A criminal hearing (usu. conducted by a magistrate) to determine whether there is sufficient evidence to prosecute an accused person. If sufficient evidence exists, the case will be set for trial or bound over for grand-jury review, or an information will be filed in the trial court."[2]

Preliminary hearings may also be called preliminary examinations, probable cause hearings, bindover hearings, and examining trials.[3] These terms may be used interchangeably in legal writings, but preliminary examination and preliminary hearing are those most frequently used, and thus will be the primary language used throughout this text.

The initial step in a criminal prosecution is the arraignment. Arraignments and preliminary exams are often confused, but they play different roles in the criminal process. While a preliminary hearing requires a showing of sufficient evidence to hold a defendant, the arraignment is an opportunity for the defendant to hear the charges against him and enter a plea.[4] Charges may be brought against an accused through the filing of an information or by securing an indictment. While an indictment requires action by the grand jury, an information does not.[5]

As we've now seen, a typical criminal prosecution begins with charges being brought through either an information or an indictment. The defendant is then arraigned, and a preliminary hearing is held. While the remaining steps in the criminal prosecution are certainly

---

[2] BLACK'S LAW DICTIONARY 1199 (7th ed. 1999).
[3] Id.
[4] *See* Id. at 104.
[5] *Compare* Indictment, BLACK'S LAW DICTIONARY 776 (7th ed. 1999), *with* Information, BLACK'S LAW DICTIONARY 783 (7th ed. 1999).

important, they are of little concern to this paper. Instead, we return our focus to the preliminary hearing.

Preliminary Hearing – In General

Now that we have defined the preliminary exam and some of its related criminal procedure components, we need to understand why the preliminary exam exists and how it benefits the government and the accused.

We saw in the preliminary hearing definition that a determination is made as to whether or not there is "sufficient evidence" to prosecute the accused. What is sufficient evidence? For the preliminary hearing, sufficient evidence is said to be obtained when probable cause has been shown that a crime was committed and the defendant committed it.[6] At the preliminary examination, the probable cause burden on the state is an easy one to meet. To meet its burden, the state must simply show that its evidence, "[when] viewed most favorably to [the] state, would warrant a person of reasonable caution to believe that the defendant had committed the crime with which he or she was charged."[7]

While a primary purpose of the preliminary exam is not to secure testimony, it is often used as such by prosecutors. A typical example would be in the situation of a domestic assault. A prosecutor may wish to put the accuser on the stand in a preliminary exam to secure her testimony for later use at trial in case she attempts to recant at the time of trial. It is not at all uncommon for accusers to reconcile with their abusers between the time of accusation and trial. Having secured the accuser's testimony in the record at the preliminary exam allows the

[6] *See* 21 Am. Jur. 2d Criminal Law § 565 ("The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it.).
[7] State v. Newsome, 238 Conn. 588, 598 (1996).

prosecutor to use this testimony as direct or impeachment evidence should the need arise at the criminal trial.

From a defendant's perspective, a probable cause hearing is important to the protection of a liberty right. The probable cause standard requires the prosecutor to show probable cause that a crime was committed and that the defendant committed the crime in order to hold the charged defendant.[8] This right then allows the defendant to challenge the prosecution's case, forcing the prosecutor to show probable cause before the defendant may be denied his liberty through incarceration.

Along with and closely related to protecting defendants from being held without probable cause, is the protection that the preliminary hearing affords a defendant from persecution by overzealous police officers and prosecutors. "The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention."[9] Further, the preliminary exam protects the accused from "hasty, improvident, or malicious prosecution"[10] and prevents the state from "further denying the accused his right to liberty"[11] without a showing of probable cause.

While the preliminary hearing serves the government by allowing it to secure testimony and solidify its case against an accused, the providence of the protections of this right are granted to the defendant. Without the preliminary exam, the defendant may be held without a showing of cause by the government. Without the preliminary exam, the accused awaits his trial from jail, his liberty denied, with no recourse against an improvident or unethical government actor.

[8] *See* State v. Ross, 39 N.D. 630 (1918).
[9] Commonwealth v. McBride, 528 Pa. 153, 157 (1991).
[10] State v. Williams, 198 Wis.2d 516, 527 (1996).
[11] Id.

While not a perfect tool, the preliminary exam helps to protect the defendant's right to be free from a denial of liberty without due process.

Federal Requirements

Having briefly discussed some of the reasons why the preliminary exam is important to both the government and the accused, we now turn to the federal requirements.

In the Federal Courts, defendants charged with a felony are entitled to a preliminary hearing, with certain exceptions. Rule 5.1 of the Federal Rules of Criminal Procedure reads as follows:

> "(a) In General. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:
> (1) the defendant waives the hearing;
> (2) the defendant is indicted;
> (3) the government files an information under Rule 7(b) charging the defendant with a felony;
> (4) the government files an information charging the defendant with a misdemeanor; or
> (5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge."[12]

While most federal defendants are indicted, Rule 5.1 provides that any defendant charged with a felony is entitled to a preliminary hearing. The exception noted in 5.1(a)(3) that references a 7(b) charge relates to situations where a defendant has been charged with a felony and waives his indictment in favor of an information.[13] Statutorily then, a defendant charged with a felony federal offense has a right to a preliminary hearing. So far, the courts have limited this right to federal defendants.

Defendants have attempted to apply the federal standard to the states through the Due Process Clause of the 14th Amendment. The Supreme Court has held that there is no due process

[12] FED. R. CRIM. P. 5.1(a).
[13] *See* FED. R. CRIM. P. 7(b).

violation when state courts do not provide for a preliminary hearing.[14] The Supreme Court has also held that the 5th Amendment guarantee of prosecution by grand jury indictment is not a fundamental right applicable to the states through the 14th Amendment.[15] As a result, the states are not required to indict a criminal defendant or afford him a preliminary exam prior to holding him for trial.

Federal defendants charged with felonies are protected through the requirement that they be given a preliminary exam. The Supreme Court has limited this requirement to the federal government and has not required it of the states. However, all states require some type of probable cause review before a defendant charged with a felony made be held for trial.[16] Until the proposed change, Michigan required that as well.

Current Michigan Requirements

Preliminary examination requirements in Michigan and the reasons for them are similar to the systems of its sister states and the federal government. Michigan is the only state (thus far) to propose the radical change of eliminating the preliminary exam requirement. Before going into the details of the proposal, we must first understand the current requirements in Michigan so that we may understand the impact of the proposed changes.

According to the Michigan Supreme Court in a ruling handed down in 2003, "the purpose of a preliminary examination is to determine whether there is probable cause to believe that a

[14] *See* Lem Woon v. State of Oregon, 229 U.S. 586, 590 (1913) ("But since, as this court has so often held, the 'due process of law' clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states.").
[15] *See* Hurtado v. California, 110 U.S. 516 (1884).
[16] State Bar of Michigan, Criminal Jurisprudence and Practice Committee, *Public Policy Report on Preliminary Exam Legislation* (October 7, 2005) *available at* http://www.michbar.org/publicpolicy/positionpdfs/positionPDF280.pdf ("Nearly all states require either a grand jury indictment or a preliminary examination before an accused may be made to stand trial for the commission of any felony. The few states which allow a felony trial to proceed without one of these conventional screening methods provide, at the very least, for what is known as direct filing, a probable cause review conducted by the trial judge prior to trial.").

crime was committed and whether there is probable cause to believe that the defendant committed it."[17] This language is similar to the federal purposes provided infra and, while not directly mentioning a liberty right, it seems inherent in the language. For if one of the purposes is to determine "whether there is probable cause to believe that the defendant committed [the crime]," the most plausible reading of that purpose is a protection for the defendant against a denial of liberty through incarceration or wrongful prosecution. There is no clear way to read that purpose as benefiting the government. It seems only to evince the protection of the accused. As late as 2003, the Michigan Supreme Court has given the protection of the defendant's liberty interest as a purpose for the preliminary hearing.[18]

While the Court does seem to find a right for the defendant to a preliminary hearing, in 1990 it clarified that the right is statutory rather than constitutional.[19] The Michigan Court of Appeals reaffirmed the statutory nature of the right in 2003.[20] The State Supreme Court again noted that the right is not constitutionally protected in a 2003 ruling.[21] While there may be no explicit protection of the right to the preliminary exam in the Michigan State Constitution, it may be argued (and I will propose) that the right should be federally protected and applied to the states through the Due Process Clause of the 14th Amendment.

Michigan has also established procedural requirements for the timing of preliminary hearings. Michigan law entitles the state and the accused to a "prompt examination"[22] and it specifically requires the courts and judicial officers to bring the examinations to "a final determination without delay."[23] While the previously quoted sections are vague on any actual

[17] People v. Perkins, 468 Mich. 448, 452 (2003) *quoting* MCR 6.110.
[18] *See* Id.
[19] *See* People v. Hall, 435 Mich. 599 (1990).
[20] *See* People v. McGee, 258 Mich. App. 683 (2003) *quoting* MCR 6.110(A) *and* MCLA §766.1.
[21] *See* People v. Yost, 468 Mich. 122 (2003) *quoting* MCLA §766.13.
[22] MICH. COMP. LAWS ANN. § 766.1
[23] Id.

time requirements, MCLA 766.4 provides in part, "the magistrate before whom any person is arraigned on a charge of having committed a felony shall set a day for a preliminary examination not exceeding 14 days after the arraignment."[24] In general, Michigan provides that the defendant is entitled to a prompt examination, specifically within 14 days of arraignment, and that the hearing must proceed without delay.

Notably absent in our discussion thus far is in what types of cases Michigan requires a preliminary exam. While the statutes outlining the preliminary hearing requirements are silent on the issue, the section of the code dealing with the responsibilities of district courts provides insight. Specifically, Chapter 83 of the Revised Judicature Act of 1961 covers the jurisdiction and powers of the district courts. It enunciates that the district court has jurisdiction over, "Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court, but there shall not be a preliminary examination for any misdemeanor to be tried in a district court."[25] As a result of this section, it is clear then that Michigan requires preliminary examinations for all felonies and for certain misdemeanors over which the circuit court has jurisdiction. These would include misdemeanors for which the maximum penalty equals or exceeds one year of imprisonment.

To summarize the current Michigan requirements, any defendant charged with a felony (or misdemeanor punishable by incarceration of one year or more) is entitled to a preliminary hearing. The hearing must be held within 14 days of arraignment. This right to a preliminary exam in Michigan is statutory rather than constitutional. That statutory creation is what has given rise to the proposed changes by the Michigan legislature.

[24] MICH. COMP. LAWS ANN. § 766.4.
[25] MICH. COMP. LAWS ANN. § 600.8311(d).

The Michigan Proposal in Detail

Thus far we have examined the purpose of the preliminary exam and the requirements in both the federal and the Michigan state courts. At this point, we have only scratched the surface. What follows will be a more in-depth analysis of the law as it currently exists in Michigan with the proposed changes to each section of the law.

In a June 22, 2005 article in the Lansing State Journal, Michigan Attorney General Mike Cox announced the "More Cops on the Street" proposal.[26] In the article, AG Cox professes his support for the plan and notes, "Reforming our state's outdated criminal justice system to reflect modern day realities and priorities is a solution whose time has come."[27] According to Cox, the preliminary hearing is one of the "outdated" aspects of our criminal justice system.

The proposal to change the preliminary exam requirements in Michigan is spread across three legislative proposals. House bills 4796, 4799, and 4800 each propose specific changes to current state law across multiple statutes. The bills are tie-barred, meaning that all three bills must be enacted for any of them to become law. We will examine each bill individually to better understand how the proposal will change existing state requirements.

House Bill 4796

House bill 4796 (hereinafter HB 4796) was introduced to the Michigan House of Representatives on May 17, 2005 by primary sponsor Rep. Bill McConico. HB 4796 amends 1927 PA 175 by amending sections 1 and 4 of Chapter VI (MCL 766.1 and 766.4). Both sections relate to the timing requirements for preliminary exams.[28]

[26] *See* Mike Cox, *Cops on Street Plan Makes Sense*, LANSING ST. J., June 22, 2005, at 7A.
[27] Id.
[28] *See* MICH. COMP. LAWS ANN. § 766.1 *and* MICH. COMP. LAWS ANN. § 766.4.

The current wording of section one provides for the requirement that the defendant is entitled to a prompt examination.[29] The proposed amendment adds a significant amount of language and weight to the section. This section previously consisted of only one subsection and gave no specific requirements other than mandating a prompt examination. Five subsections have been added, each providing specific instructions on ushering criminal defendants through the former preliminary exam.

In subsection 2, HB 4796 amends section 1 by providing that the accused is not entitled to an examination under subsection 1 for a felony charged on or after August 1, 2006.[30] This amendment completely eliminates the requirement of a preliminary exam. Defendants are not simply bound over after arraignment at this point. Instead, subsection 3 does provide for some procedural safeguards.

The addition of subsection 3 now provides that for an individual charged with a felony on or after August 1, 2006, the court will set a conference to be held within 14 days of arraignment.[31] The conference provides an opportunity for the prosecuting attorney and the defendant and his attorney to review the charges, discuss bail, and review the procedural aspects of the case. The conference is not meant to be adversarial, there is no requirement to show probable cause, the Rules of Evidence do not apply, and witnesses are not to be called. The prosecuting attorney, defense attorney, and the defendant are required to attend the conference unless the defendant waives his right to the conference.

From the perspective of the courts, subsection 3 allows the court to preside over the conference but does not require it to do so. However, if the court does not preside over the

[29] MICH. COMP. LAWS ANN. § 766.1
[30] H.B. 4796, 93rd Leg., Reg. Sess. (Mich. 2005).
[31] Id.

conference, the judge must be available during the conference to dispose of any plea agreements or determine bail.

Subsection 3 also provides instructions for the delivery of evidence from the prosecutor to the defense attorney. The subsection directs that

> "The prosecuting attorney shall provide the defendant and his or her attorney with all of the following information relating to the case before or during a conference held under this subsection and, if additional information is obtained after the conference, promptly after that information is obtained:
>
> A. A copy of each investigative report prepared by or on behalf of law enforcement.
> B. A copy of each witness statement.
> C. A copy of each recorded confession and, if the confession was transcribed, a copy of that transcription."[32]

This information as provided to the defendant provides the opportunity for the defendant and his attorney to review aspects of the prosecution's case and help to determine whether or not a plea agreement may be appropriate under the circumstances. It also gives the defense team more information by which it may successfully seek bail or release of the defendant pending trial.

Subsection 4 provides that the rules of discovery under the Michigan Rules of Court apply to the defense and prosecution during the conference.

While subsection 3 specifically excluded witnesses from being called during the conference, subsection 5 details the availability of the defense or prosecution to petition the court to hear witnesses. Specifically, subsection 5 allows the defense or prosecution to petition the court to allow him to question a witness for the purpose of preserving the witness's testimony. The subsection directs the court to grant the petition for good cause shown, and it establishes a rebuttable presumption that a petition from the prosecution is for good cause. If the petition is granted, the court shall preside over the examination. In this instance, the Rules of Evidence would apply and cross-examination would be permitted.

[32] H.B. 4796.

Subsection 6 allows for a preliminary hearing under certain circumstances. This subsection provides that the prosecution or defense may move that the court, for good cause, order a preliminary exam. This section permits this preliminary exam motion only when the accused is charged with a felony that carries a maximum penalty of imprisonment for ten years or more. The motion must be made within 14 days of arraignment. As with the conferences, the court sets the date for any preliminary hearing ordered under this section.

Section 4 of Chapter VI previously provided the time requirements for when a preliminary exam would take place, that being 14 days after arraignment. This section and its accompanying requirements are still in place, however the section now applies only to those preliminary exams that are required under subsection 6 of the amended act.

House Bill 4799

House Bill 4799 (hereinafter HB 4799) was introduced to the Michigan House of Representatives on May 17, 2005 by primary sponsor Rep. William VanRegenmorter. The bill amends sections 40 and 42 of Chapter VII, which corresponds to MCL 767.40 and 767.42. Both sections primarily deal with information filing.[33]

As currently written, section 40 requires informations to be filed in the court having jurisdiction over the subject of the information.[34] Further, it requires the examining magistrate to file that information.[35] This language, requiring the examining magistrate to file the information, has been stricken under the proposal.[36] This relates to the changes made to information filings in section 42 outlined below.

[33] *See* MICH. COMP. LAWS ANN. § 767.40 *and* MICH. COMP. LAWS ANN. § 767.42.
[34] *See* MICH. COMP. LAWS ANN. § 767.40.
[35] Id.
[36] H.B. 4799, 93rd Leg., Reg. Sess. (Mich. 2005).

The current language of section 42(1) states that an information may not be filed against an accused charged with a felony until the accused has had a preliminary exam or waived his right thereto.[37] As amended, subsection 1 keeps this requirement for felonies prior to August 1, 2006, that being the expected date that the proposed changes to preliminary hearing requirements will take effect.[38]

HB 4799 adds a new subsection 2 that requires that an accused charged with a felony on or after August 1, 2006, has had a conference (or waived his right thereto) under MCLA 766.1(3) (as amended under HB 4796) before the accused may have an information filed against him.[39] An information may also be filed if the accused has had a preliminary hearing subject to MCLA 766.1(6) (as amended under HB 4796). The former subsection 2 dealing with information filing against a fugitive from justice remains unchanged except that it becomes subsection 3 (767.42(3)) under the proposal.

House Bill 4800

House Bill 4800 (hereinafter HB 4800) was introduced to the Michigan House of Representatives on May 17, 2005 by primary sponsor Rep. William VanRegenmorter. This bill amends 1961 PA 236 by amending section 8311 (MCL 600.8311). This part of the Michigan code defines the jurisdiction of the district courts.[40]

As written, Section 8311 currently grants jurisdiction to the district courts for misdemeanors punishable by fine or imprisonment not exceeding one year, ordinance and charter violations, arraignments, bail, and bond acceptance, and preliminary exams for all felony cases

[37] *See* MICH. COMP. LAWS ANN. § 767.42.
[38] *See* H.B. 4799.
[39] Id.
[40] *See* MICH. COMP. LAWS ANN. § 600.8311.

or misdemeanor cases over which the district court does not have jurisdiction.[41] The wording of Section 8311 remains substantially unchanged under HB 4800, with the exception of changes made to subsection D dealing with preliminary exams and the addition of three new subsections (E, F, and G).[42]

The proposed amendment to subsection D gives the district court jurisdiction over all preliminary exams for felony cases charged before August 1, 2006.[43] It continues to indicate that preliminary exams will not be held for misdemeanors.

Subsections E, F, and G have been added to deal with the conference and preliminary hearing requirements added through these bills. Subsection E gives the district court jurisdiction over preliminary hearings ordered pursuant to MCL 766.1(6) (as amended by HB 4796).[44] Subsection F gives the district court jurisdiction over conferences as required by MCL 766.1(3) (as amended by HB 4796).[45] Subsection G confers upon the district court the jurisdiction to hear pleas in felony cases made before an information has been filed in the circuit court.[46] It does stipulate that sentencing for those felonies shall be in the circuit court.

Together, House bills 4796, 4799, and 4800 amend the Michigan code and eliminate the requirement for preliminary hearings in Michigan. In lieu of the examination, this proposal adopts a conference standard whereby the prosecution and defense will meet to discuss the procedural aspects of the case. These bills, and as such this proposal, passed the Michigan House of Representatives on December 14, 2005. Each bill passed on a 64-43 roll call vote. As

[41] Id.
[42] H.B. 4800, 93rd Leg., Reg. Sess. (Mich. 2005).
[43] Id.
[44] Id.
[45] Id.
[46] H.B. 4800.

of January 11, 2006, each bill has been referred to the Michigan Senate Judiciary Committee for hearings. As of this writing, no hearings had been scheduled on the bills.

The Michigan Proposal – Why It Fails and How to Fix It

The proposal to eliminate preliminary hearings in Michigan has national ramifications. No other state has completely eliminated the preliminary exam from its books as Michigan proposes to do. Should this bill pass in Michigan, other states could certainly follow suit. That is why it is so important that we closely scrutinize these proposed changes and analyze them from not only policy aspects but constitutional concerns as well.

To understand where the Michigan proposal has gone wrong and how we can fix it, we must ask several questions. Is this proposal constitutional at the state level? National level? Should it be? Why eliminate the preliminary hearing completely? Rather than eliminating the requirement, why not instead provide an incentive for defendants to waive the preliminary exam? Why require a ten-year felony before defendants can show cause for a preliminary hearing? Why not allow all defendants to show cause that a hearing is justified? I will examine all of these questions in the analysis that follows.

Individual Liberty: Is the Proposal Constitutional? Should It Be?

The first and most direct avenue of challenge to this proposal would be a judicial challenge should the bills pass the State Senate and be signed into law by the governor. The constitutional challenge could be on multiple grounds, but the most obvious seems to be a liberty interest approach.

The new law eliminates the right to a preliminary hearing for all defendants in Michigan. If we were to ask the layperson how he felt about that, most would probably not see any major impact. In fact, most people not versed in the law are almost certainly unaware of their current

right to a preliminary exam or what it means. Thus, removing that right would have little effect on Joe Citizen. Because of this lack of understanding by the layperson, our careful scrutiny becomes that much more important. How does eliminating this right truly affect the average Michigan citizen?

To simply and clearly demonstrate the impact felt by losing the preliminary hearing requirement, imagine the following hypothetical. A warrantless arrest is made on Sally Smith. She is suspected of committing a felony, the maximum penalty for which is 5 years imprisonment. Sally contends her innocence, but the prosecution moves forward. Sally is arraigned, a conference is held, and she is charged. Sally is unable to post bail, so she is held in the county jail for the time leading up to and during her trial. At trial, she is acquitted of all charges.

Based on that hypothetical, imagine that Sally spent several weeks in jail because she was unable to afford her bail. A defendant being unable to afford bail is certainly not an uncommon occurrence in state or federal courts. Imagine also that had Sally been entitled to a preliminary hearing, the prosecution would have been unable to meet its burden of probable cause based on their lack of evidence. This crime was well publicized and something that the local prosecutor needed to act swiftly on to appease the public outcry. In his haste to prosecute, he failed to gather adequate evidence and was mislead as to the real perpetrator. As a result, Sally was charged and held. Had Sally been allowed a preliminary hearing, the prosecution likely would have failed its probable cause burden and the case would have been dismissed. Considering that examinations must be held within 14 days of arraignment, Sally would have spent only a few weeks in jail. Instead, she was held for several weeks against her will.

Admittedly, the proposed hypothetical may be uncommon. Nonetheless, is it not worth considering? Is it right for the government to be able to hold an accused without any probable cause showing or grand jury indictment? Can we really trust our prosecutors enough to give them that much discretion?

The constitutional concern inherent in the hypothetical is Sally's lost liberty. She was incarcerated for weeks without any hearing on the merits of her case. Being held without a hearing on the merits is a deprivation of one's liberty interest. According to the Due Process Clause of the 14th Amendment to the United States Constitution, no state shall "deprive any person of life, liberty, or property, without due process of law."[47] It would seem clear then that incarceration, even for a limited amount of time, without some type of hearing would be a violation of the Due Process Clause. The State Bar of Michigan Criminal Jurisprudence and Practice Committee agrees with the importance of the preliminary exam calling it, "a critical stage in determining whether a subsequent trial is appropriate or necessary, in accordance with due process and equal protection under the Fourteenth Amendment."[48] Surprisingly, the Supreme Court has held otherwise.

In 1913, in the case of *Lem Woon v. State of Oregon*, the Supreme Court ruled that they were unable to see how, "an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory on the states."[49] Based on that ruling, the Court enunciated that a lack of a preliminary hearing is not a violation of the Due Process Clause of the 14th Amendment. *Lem Woon* is still good law.

---

[47] U.S. CONST. amend. XIV, § 1.
[48] State Bar of Michigan, Criminal Jurisprudence and Practice Committee, *Public Policy Report on Preliminary Exam Legislation* (October 7, 2005) *available at* http://www.michbar.org/publicpolicy/positionpdfs/positionPDF280.pdf.
[49] Lem Woon v. Oregon, 229 U.S. 586, 590 (1913).

The fact that imprisonment without a formal hearing is not fundamental enough to garner the protections of the United States Constitution is both puzzling and troubling. The Supreme Court has found a personal liberty interest in the right to contraception,[50] the right to live with one's family,[51] the right to marry,[52] and the right to engage in consensual homosexual sodomy.[53] Based on these findings, I contend that either the Court believes that the right to contraception and the right to engage in homosexual sodomy are more important than the right to a hearing on probable cause to show that a citizen should be incarcerated, or that the Court simply has not heard a valid argument to apply the federal preliminary exam requirement to states. Based on the Court's expansion of the scope of Due Process Clause protection since 1913 when *Lem Woon* was decided, a liberty interest claim seems much more plausible today.

Another approach to a Constitutional attack would be to challenge the law on Fourth Amendment grounds. In fact, the Fourth Amendment does seem to provide a protection from the type of deprivation that Michigan seeks to enact through this legislation. In 1971, a Florida law allowed for a person arrested without a warrant and charged by information to be jailed without any opportunity for a probable cause determination. Florida prisoners challenged this law as unconstitutional. In examining the challenged law, the Court noted the requirement that probable cause for an arrest warrant must be determined by someone independent of police and prosecution.[54] The Court applied that rule to the case at hand by holding, "the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial."[55]

[50] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[51] *See* Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
[52] *See* Zablocki v. Redhail, 434 U.S. 374 (1978).
[53] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[54] Gerstein v. Pugh, 420 U.S. 103, 118 (1975) *quoting* Shadwick v. City of Tampa, 407 U.S. 345 (1971).
[55] Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975).

The *Gerstein* ruling tells us that the prosecutor alone may not determine probable cause. Instead, that determination must be made by someone independent of the police and prosecution.

Based on the language thus far quoted from *Gerstein* it is likely that a Michigan defendant may have a Constitutional claim under the Fourth Amendment. Even more weighty is the following language from *Gerstein* that is directly on point with the Michigan proposal:

> "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[56]

The Michigan proposal provides no provisions for a probable cause determination. After an arrest, the accused is arraigned, a conference is held, then the case proceeds to trial. Assuming a warrantless arrest, at no point prior to trial is the prosecution required to show probable cause. While most arrests may be effectuated by a warrant, a warrantless arrest seems ripe for judicial challenge. Based on the fact that *Gerstein* has not been overruled and it does have precedential value, it would seem that the Court would have to overturn *Gerstein* (or at least the language pertinent to the Michigan proposal) in order to find the new Michigan law to be constitutional. This line of challenge seems to carry the greatest likelihood of success for overturning the Michigan proposal.

In addition to the liberty concerns discussed above, we must also consider the ramifications of an excessive bail situation. To date, the Supreme Court, "…has not decided whether the states are under federal constitutional constraints with reference to bail."[57] Considering the Michigan proposal, the State could conceivably charge and hold a defendant without bail or any type of probable cause hearing and not be violating any constitutional provisions based on currently settled law. Perhaps this very scenario would present a case that

[56] Id. at 124-25.
[57] WILLIAM COHEN ET AL., CONSTITUTIONAL LAW 512 (12th ed. 2005).

would entice the court to consider whether or not the 8th Amendment's protections against excessive bail should be applicable to the states through the 14th Amendment.[58]

Affirmative Waiver vs. Affirmative Request

While it seems as though completely eliminating the preliminary hearing in Michigan may put this law in Constitutional jeopardy, there are certainly better proposals that should be considered that would still promote the goals of the state while also protecting the liberties of the citizens of Michigan.

One such proposal would be to change the preliminary hearing requirement from being an automatic procedural step that must be waived to one that is considered waived unless specifically requested by the accused. Several states currently follow this rule including Maryland[59] and South Carolina.[60] Both Maryland and South Carolina require that the accused give notice within ten days of arraignment of his desire to have a preliminary exam.[61] If no notice is given, the right is considered to be waived.

The practice in Maryland and South Carolina seems to give the best of both worlds. Notice is given to the accused that he has a right to a preliminary hearing and he is told how long he has to request that right.[62] From the defendant's standpoint, he still has the right to a preliminary hearing should he choose to exercise it. While this may not seem much different than other states that require an actual waiver of the preliminary exam, it works out much differently for the prosecution. In a state requiring an actual waiver, the prosecution must proceed with the assumption that the preliminary hearing will occur. He must schedule and prepare witnesses, gather and prepare evidence, and be sure that he has enough evidence ready to

[58] *See* U.S. CONST. amend. VII.
[59] MD Rules, Rule 4-213(3).
[60] Rule 2, SCRCrimP (a).
[61] *See infra* notes 38 and 39.
[62] *See infra* notes 38 and 39.

show probable cause all within 14 days of arraignment. The prosecutor may have done all of the leg work to prepare for the probable cause hearing only to have that hearing waived at the eleventh hour. In a state that instead requires the accused to request the hearing, the prosecutor may proceed with the assumption that a hearing will not be held. He is not required to gather all of the evidence required in the affirmative waiver states. Instead, he may proceed in his preparation for the trial. If the defendant gives notice of his desire for a preliminary hearing, the prosecutor would then be required to prepare for the hearing as in the affirmative waiver states. The main difference being that, when a defendant specifically requests a preliminary hearing, it seems much more likely that he will not later waive that right. In other words, the hearing will actually occur and the scheduling of witnesses and the preparation by the prosecutor will not be in vain.

One concern that may give some pause with an affirmative request system is that some defense attorneys may make it their practice to automatically request a hearing in every case. That same attorney may then take some time evaluating the case only to later waive the hearing hours or minutes before its scheduled time. This would leave Michigan in the same situation where it is now. To correct this problem, attorneys could be held to a requirement that, if requesting a preliminary hearing, the attorney must follow-through with and participate in that hearing in good faith. Should the attorney desire to waive the hearing after having made an affirmative request for one, he could be required to show cause to the judge for the reason for his decision. Absent a compelling reason, the judge could require the hearing to continue and/or impose sanctions on the offending attorney for his misconduct.

The procedure used in some states whereby the accused is given notice of his right to a preliminary examination and the responsibility lying on him to request it is a better solution for

Michigan than the proposed amendments. This solution protects the defendant's liberty interest and his right to a probable cause hearing while also helping to prevent the government from wasting precious prosecution and law enforcement resources at hearings waived at the last minute.

Waiver as a Mitigating Factor at Sentencing

Another possibility would be to provide an enticement for the accused to waive the preliminary hearing by making that waiver a mitigating factor at sentencing. This could be accomplished by maintaining the requirement for a preliminary hearing. The requirement could be either an affirmative waiver or a specific request for the exam. However, in either case, the defendant's waiver of his right to the preliminary exam would be considered in a light favorably to the defendant. The defense would be allowed to present this to the judge or jury at a subsequent sentencing hearing on the charge, and the judge and jury would be required to consider the waiver as a showing of cooperation with the prosecution, a mitigating factor.

One inherent problem with this type of system could arise in a situation where a judge uses the lack of waiver as a punishment against the accused. For example, imagine that a judge tells the defendant that waiving her right to a preliminary hearing will be used as a mitigating factor at sentencing, but if she doesn't waive her right, the judge will impose the heaviest sentence possible if convicted. While this is certainly unethical, is it unconstitutional? The Supreme Court has not confronted this exact question, but it has held that vindictiveness in sentencing is unconstitutional based on the fact that a defendant may not be punished for exercising a right.[63] Though it is unclear whether or not the court would find this behavior to be unconstitutional, the ruling in *Pearce* does at least warrant a claim on vindictiveness grounds and would provide some hope of success.

[63] *See* North Carolina v. Pearce, 395 U.S. 711 (1969).

Requiring that a waiver be considered a mitigating factor serves both the government and the accused. Retaining the requirement for a preliminary exam affords the defendant the option to have that exam at his discretion. His waiver of that hearing may serve him in the end because of the treatment this waiver would receive at sentencing. From the state's perspective, it is likely that this incentive would encourage many defendants to waive their preliminary hearing rights. It serves the defense by still allowing for a hearing when he deems it necessary, and it serves the state by significantly limiting the number of the preliminary exams that are likely to occur.

Right to Show Cause Available for All Defendants Charged with a Felony

While I certainly have concerns with many aspects of the Michigan proposal, no aspect troubles me as much as what I call the "ten-year requirement." The ten-year requirement establishes that an accused charged with a felony may petition the court for a preliminary hearing only if the accused is faced with a maximum penalty of imprisonment for ten years or more.[64] Michigan is establishing a bright-line rule whereby only ten-year felonies entitle the defendant to a preliminary hearing, and only then if he is able to show cause that a hearing is necessary.

As of this writing, I have heard no justification offered by the State or the bill's sponsors for this ten-year requirement. Quite frankly, I cannot think of a justification that would make sense for drawing the line at ten years. Is nine years not enough of a deprivation of one's liberty to require that he be shown probable cause of his crime? How about eight years? While being admittedly trite with my questions as to the time requirement, I simply cannot fathom a compelling state justification for drawing such a bright line.

Rather than requiring a ten-year felony, why not afford all defendants charged with a felony the opportunity to show cause that a preliminary exam should be held? This would not automatically require a preliminary hearing. The burden would fall on the defense to show cause

[64] H.B. 4796, 93rd Leg., Reg. Sess. (Mich. 2005).

that such a hearing was necessary. The "show cause" requirement would prevent frivolous claims by the defense and allow a judge to rule on the validity of the defendant's request. Again, this proposal seems more in line with protecting a citizen's liberty interest while also not immediately granting everyone a preliminary exam. Since I concede that many defendants would not be able to nor would wish to show cause of the necessity of a hearing, this proposal would effectively eliminate most preliminary exams in Michigan.

Allow Officers to Testify via Video-Conference

One of the justifications offered by the Michigan Attorney General for this legislation is that it will put police officers back on the streets by not requiring them to sit and wait at a preliminary hearing.[65] This is certainly a valid reason. Most people would likely concede the fact that they would prefer to have police officers on the streets fighting crime and protecting our neighborhoods rather than sitting in a court room waiting to testify at a preliminary exam. While the justification is certainly a good one, the ends used to meet that goal are overly-inclusive.

Rather than eliminating the preliminary exam to put our officers back on the streets, the same can be accomplished by allowing police officers to testify at preliminary hearings via video-conferencing. Officers would not have to attend the hearing in person. Instead, the officer could testify from the police station. The technology is already available for this type of activity. The courts use this technology regularly for arraignments and other proceedings involving incarcerated defendants. By allowing police officers to utilize this technology we significantly lessen the impact on their jobs and the time wasted waiting for a hearing. Instead of driving to the courthouse and waiting for his turn, the officer may simply return to his precinct, give his

[65] Mike Cox, *Cops on Street Plan Makes Sense*, LANSING ST. J., June 22, 2005, at 7A ("For example, the St. Clair Shores Police Department's drug enforcement officers spent nearly 2,500 hours in courts waiting to testify at preliminary exams. Only four hours were actually spent testifying.").

testimony, and get back to his work. No time is wasted driving to and from the courthouse, which in some jurisdictions, is several miles away.

In an open letter in opposition of this legislation, Regina Mullen, Director, Prison Services Project agreed with this suggestion. Her letter reads in part,

> "…rather than eliminate the requirement that police attend probable cause hearings, police statements can be provided through web conferencing at any precinct. Surely, it would be less expensive to have officers, who are already on duty, testify by video, rather than have no testimony at all. Further, since everyone is well-aware of the court schedule hearing, police officers know when they are scheduled to appear: the police department already schedules around them."[66]

Allowing police officers to testify via video-conference would still take time and would take the officers away from their normal duties. However, the impact to the officers and the government would be much less than the system currently in place.

Section Conclusion

The State Bar of Michigan Criminal Jurisprudence and Practice Committee summed up the Michigan proposal best when it stated, "Eliminating preliminary examinations would put Michigan in the embarrassing position of providing less critical screening than any other state in the country before requiring a person to stand trial for a felony."[67]

To date, there has been no public outcry over the proposed legislation. This may be attributed to a lack of knowledge on the part of the individual citizen or a lack of understanding as to what this legislation seeks to accomplish. However, a significant number of learned professionals have spoken out in opposition to the measure. According to legislative analysis completed by the House Fiscal Agency on September 27, 2005, the following groups oppose the

[66] Regina Mullen, *Response to Michigan AG "More Cops on the Street" Proposal* (May 11, 2005) *at* http://www.prisonactivist.org/pipermail/prisonact-list/2005-May/009885.html.
[67] State Bar of Michigan, Criminal Jurisprudence and Practice Committee, *Public Policy Report on Preliminary Exam Legislation* (October 7, 2005) *available at* http://www.michbar.org/publicpolicy/positionpdfs/positionPDF280.pdf.

legislation: Criminal Defense Attorneys of Michigan, American Civil Liberties Union, Justice Caucus of the ACLU, Michigan Judges Association, Michigan District Judges Association.[68] The fact that these unrelated groups with varying interests have come together to express their opposition to this legislation should give pause to every Michigan citizen. If nothing more, it should cause us all to step back and ask ourselves if this legislation is warranted. Is diminishing a liberty interest important enough to save the State and its police officers time and money?

Conclusion

A proposal in the Michigan Senate would eliminate the current requirement that all defendants charged with a felony in Michigan have a right to a preliminary hearing. This proposal easily passed the State House and seems likely to pass the Senate as well. If the bills are signed and the proposal becomes law, a constitutional challenge may be brought. It is impossible to predict how the Supreme Court might rule on such a challenge considering their reluctance to classify the preliminary exam as a constitutional right. However, the Fourth Amendment claim based on the *Gerstein* case in Florida does lend some credence to a constitutional challenge.

Regardless of the constitutionality of this proposal, there are better ways to accomplish what Michigan has set out to do. Rather than eliminating the preliminary exam altogether, Michigan should employ a system that requires the accused to request a hearing. If the accused does not request the hearing within 14 days of arraignment, he is deemed to have waived his right to the exam. To entice the defendant's waiver of his right to a hearing, the state should also provide that this waiver will be introduced as a mitigating factor at any subsequent sentencing hearing on the charge. While still allowing an accused the right to a preliminary hearing, this

[68] State of Michigan, House Fiscal Agency, *Legislative Analysis: Eliminate Preliminary Examination for Some Felony Crimes* at 6 (September 27, 2005) *available at* http://www.legislature.mi.gov/documents/2005-2006/billanalysis/House/pdf/2005-HLA-4796-3.pdf.

alternative proposal still provides an inducement to waive that right, likely resulting in fewer preliminary exams. Though they may not have said it directly, that is the ultimate goal of the proposed legislation in Michigan. This alternative satisfies that goal while also protecting the accused's right to a probable cause hearing before he may be detained.

Since the events of September 11, 2001, the American people have been more aware of the needs of our government to take action to prevent terrorism. As such, we have given up some of our freedoms in the name of protecting our nation. The passage of the Patriot Act (and its recent renewal) provide a clear example. While I concede the importance of diminishing some of our personal liberties in the name of national security, where do we draw the line? What Michigan proposes to do is to eliminate a hearing at which probable cause is determined, essentially allowing the government to hold an accused up to and through trial with no pre-screening procedural safeguards. I am not prepared to allow our state government to go that far. Are you?