

# Preliminary Examinations

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## EXAMINATION OF THE NEED FOR PRELIMINARY EXAMINATIONS

By Lloyd E. Powell

### Introduction

Since the spring of 2005, there has been a movement afoot to do away with preliminary examinations in the majority of felony cases in the hope that it will more readily free law enforcement officers to return to their primary public safety duties—thereby purportedly resulting in a more cost-effective criminal justice system. During the very early hours of a December morning in 2005, the Michigan House of Representatives passed legislation toward that end with the apparent hope that the Senate and the Governor will subsequently approve what they have done.<sup>1</sup>

This article is an update to a written response to this movement that was prepared in May 2005 and subsequently published in *Michigan Lawyers Weekly*, the *Washtenaw County Legal News*, the *Jackson County Legal News*, and the *Res Ipsa Loquitur* publication of the Washtenaw County Bar Association. The purpose of this article is to attempt to examine objectively whether doing away with preliminary examinations will accomplish the ends desired by its proponents or whether this proposal may ironically have the very opposite effect of that intended, with consequences that might not be in the best interests of our criminal justice system and the overall community that it serves. This paper incorporates, condenses, and acknowledges input received from members of the judiciary and members of the law enforcement profession, as well as from the criminal defense bar by means of a statewide electronic forum. It also draws extensively on scholarly research concerning the issue of preliminary examinations by Kenneth M. Mogill, Esq.<sup>2</sup>

### Primary Nature and Purpose of Preliminary Examinations

A preliminary examination is the first substantive hearing in district court before a judge in felony cases, during which the state is required to produce sufficient evidence to establish that there is probable cause to believe that a felony has been committed and that the defendant committed it. If this is proven, the case is bound over to the circuit court for further proceedings.

In the pursuit of justice, other important purposes of preliminary examinations for the state and the defense are setting the amount of

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## THE CASE FOR PRELIMINARY EXAMINATION REFORM

By Jeffrey L. Sauter and Neil F. O'Brien

*"Lawyers are 100 percent in favor of progress, but totally resistant to change."*  
—Anonymous

### Introduction

Lloyd Powell's article leads a casual reader to conclude that recent proposals to reform the preliminary examination are unprecedented, violate constitutional mandates, and are practically unnecessary.

As we will see, the preliminary examination (PE) is not constitutionally mandated. It is a creature of statute, and it is appropriate that the legislature occasionally adjust the amount of procedural due process to reflect the current reality of felony punishment. Moreover, the proposal discussed in the Powell article is just one of several being considered. (Other discussions have focused on eliminating the hearing and substituting a district court conference, broad use of hearsay testimony, extending time deadlines, etc.) Such proposals are not unprecedented. The PE procedure has been modified several times with changing statutes and court rules. Finally, the need for reform is real. Crime victims, witnesses, and law enforcement agencies have too long had to bear the expense and burdens of rushing to attend a hearing that is waived 75 percent of the time. Our taxpayers cannot afford to waste estimated millions of dollars each year to protect an unexercised right.

### The Preliminary Examination Reform Proposal

The proposal attacked by Mr. Powell distinguishes among felonies. A PE would be retained for the most serious cases, including homicides, assault crimes with a maximum penalty of 10 years or more, major controlled substances offenses, life offenses, and "serious crimes."<sup>1</sup> Generally, the right to an examination would be eliminated for felonies in crime classes E to H of the sentencing guidelines, for which offenders receive scores under the guidelines likely to result in probation, not prison sentences. Thus, the preliminary examination would be retained in those cases in which there is a likely prison, not probation, sentence.

Mr. Powell blurs this important distinction for these crime classes by referring to habitual offender penalties. However, the habitual offender notice is not filed until the case is in circuit court.

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bond the defendant will receive if held for trial, the receipt of information about the credibility of witnesses and evidence (i.e., discovery), the weeding out of groundless or unsupported charges, the preservation of testimony in the event a witness disappears or dies before trial, and the relief of the accused from the degradation and expense of a criminal trial while also preventing any unnecessary deprivation of liberty.

While not specifically mandated by name constitutionally, where provided, as in Michigan, the process of preliminary examinations coincides with the due process and equal protection principles enshrined in the Fourteenth Amendment and the Bill of Rights—specifically the Fifth, Sixth, and Eighth Amendments. In that light, the process provides the opportunity for an immediate development of evidence and testimony essential to the ends of justice, and this in turn helps produce accurate and just results at circuit court trials.

The rationale that “lesser felonies” need not have preliminary examinations is misleading because the maximum statutory penalty is determined by an individual’s criminal history. The preliminary examination is a crucial stage in considering habitual offender enhancements since a defendant with three prior non-violent felony convictions, no matter how old or remote in time, may receive a possible life sentence if convicted of a new felony with a statutory maximum of five years. Moreover, these habitual offender sentencing guidelines must be considered by both the prosecution and defense as part of the plea and sentencing bargaining at the preliminary examination process level.

Whether one whose reputation has been sullied by a felony conviction goes to prison or not, civil liberties such as the right to vote and the prospects for meaningful employment in the future are significantly diminished or forever lost. Indeed, in that context, a felony is a felony, especially for the innocent citizen who has been unjustly convicted as a result of false testimony, sheer human error, false confessions obtained from those who are mentally or intellectually challenged, conscious or subconscious bias, and inaccurate or corrupt scientific evidence.

### **Cost Effectiveness of Preliminary Examinations**

The effort to eliminate the preliminary examination process for the overwhelming majority of felony cases appears to be the dream of a few prosecutors, who in turn have been joined by a few leaders in the Municipal League of Cities and the Michigan Association of Counties who see this illusory proposal as a budgetary panacea for cities and counties throughout the state. Unfortunately, however, the unanticipated consequence will be just the opposite because it will end up costing even more to everyone, and will prevent, rather than expedite, the return of police to the streets to provide public safety to our citizens.

In addition to being essential toward the ends of justice, preliminary examinations also serve as a valuable screening process that enables an early resolution of many cases. Expedited resolutions at

the preliminary examination stage protect the resources of the community in many ways. Preliminary examinations preserve judicial resources by avoiding additional expensive bond reduction and arraignment hearings. They avoid hearings and jury trials in circuit courts, free jurors and witnesses from having to take time off from work and their families, and free law enforcement officers from lengthy waiting to give testimony in circuit court. Early resolution of cases at the front end of the process saves community resources by avoiding overloading of circuit court cases at the back end of the process.

The mere fact that preliminary examinations are regularly scheduled forces the prosecutor to personally meet with the complainant, investigator, and witnesses; forces the defense attorney to timely meet with the defendant; and forces both the prosecution and defense to timely meet with each other, so that dispositions can be achieved very early for the overwhelming majority of felony cases without the need for an actual preliminary examination.

The efficient and effective outcome of all of this is that many felony cases are dismissed outright, reduced to misdemeanors for which pleas are obtained at the district court level, or bound over with a specific plea agreement worked out. This results in a much more efficient disposition of those relatively few felony cases forced into the time consuming and expensive jury trial process at the circuit court level because both the prosecutor and defense counsel are prepared with a much greater understanding of the case.

### **The Important Gatekeeper Role of the Judicial Process at the District Court Level**

The judges who preside over preliminary examinations are the gatekeepers to the criminal justice system. One of the important benefits of preliminary examinations is that they serve to weed out cases that are without merit or overcharged. The current system has a built-in process of checks and balances that empowers our neutral judicial branch of government to decide what cases merit going forward to circuit court or being dismissed at the district court preliminary examination stage, rather than having these decisions made by the partisan prosecution process of the executive branch of government. Almost all states require either a grand jury indictment or a preliminary examination before an accused may be required to stand trial for a felony, and those few that do not nonetheless allow for a probable cause review by the trial judge before trial. 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. And contrary to the views of a few police officers and prosecutors, the mere arraignment of an accused by either a magistrate or judge at the district court level is by no means a substitute for the preliminary examination process.

### **Opportunity for Necessary and Reasonable Bonds that Ease Jail Overcrowding**

Preliminary examinations give the court the opportunity to evaluate bond because the court has all the relevant parties present to

review the bond: the prosecutor, the defense counsel, the complainant, the defendant, and all witnesses to the crime. Additional information that benefits both the prosecution and the defense can be heard, giving the judge the opportunity to lower or raise the bond or conditionally release the accused, thereby eliminating additional expenditures for a separate bond motion while reducing unnecessary jail overcrowding.

### Actual Innocence and the Opportunity for Discovery

It is usually because of the early discovery provided by preliminary examinations (plus, unfortunately, the often inadequate quality of representation of indigent persons as a result of Michigan being among the bottom three states in the nation when it comes to providing even minimally adequate compensation for appointed private practitioners)<sup>3</sup> that disposition can be achieved in approximately 75 percent of felony cases, primarily by pleas without the need for an actual hearing. And preliminary examinations must be held for the remaining 25 percent of cases in order to properly prepare or position them for pleas or trial.

Moreover, for the remaining 25 percent, the evidence may demonstrate the strength or weakness of the prosecution's case. This may encourage early plea or sentence bargaining or show the need to increase or decrease a charge or even release an innocent citizen who has been mistakenly charged. Thus, the entire process does not overload the circuit court with more time-consuming and expensive pre-trial conferences, hearings, and trials that prevent law enforcement officers from resuming their regular public safety duties.

Significant is the fact that this proposal by prosecutors from the executive branch is opposed by the judges who represent the judicial branch of our government and by citizens who recognize that it is counter to the principles enshrined in our Constitution. These principles are the bedrock of our country; they have stood the test of time in setting our course as a nation, defining Americans as a people, and serving as an enduring legacy of leadership for everyone in the world to emulate in promoting civil liberties, fairness, and justice.

### Conclusions Regarding the Proposal

The inevitable consequence of doing away with preliminary examinations would appear to be a significant increase in more expensive, time-consuming, and resource-diverting circuit court hearings and trials. This will exacerbate, rather than resolve, the legitimate problems raised primarily by some in the prosecutorial component of the criminal justice system.

It will unwisely shift most of the workload to the circuit court level, ultimately requiring greater judicial resources at the circuit court level and fewer resources at the district court level. Moreover, it will tie up law enforcement officers even more at the circuit court level rather than free them to more expeditiously return to their public safety duties. This will cause more accused persons, who are entitled to a presumption of innocence, to spend *more* time in jails, along with a substantial increase in costs.

### Recommendations

A better solution is to make needed improvements to the present preliminary examination process as follows:

- Hold mandatory pre-examination conferences (well before scheduled preliminary examinations) at which only the prosecutor and defense attorney are present, with the capacity for the prosecutor to communicate with law enforcement officers and for the defense counsel to communicate with the accused, either in person or electronically. (This would formalize what often happens in the hallways before preliminary examinations.) The best practice would be for the defense attorney to speak with the client and the assistant prosecutor to speak with the officer-in-charge, *before* the pre-examination conference. If a plea agreement is reached as a result of the conference, officers and witnesses would not need to be present.
- Police officers should be on standby and only called to the court when they are needed. Therefore, they would be free to continue providing safety and security to the community. It should be noted that, even under the current system, prosecutors often allow officers to be on standby with no objection by defense counsel.
- Prosecutors must be willing to make plea offers to defendants that are not conditioned on the appearance of witnesses at preliminary examinations. Prosecutors are often disinclined to make any offers until they know which witnesses will appear and are able to assess the strengths or weaknesses of a case. This means that cases cannot be resolved until the date and time of the preliminary examination. This proposal suggests a policy shift that is fully within the current discretion of the prosecutor.

A more beneficial alternative to the legislation passed by the Michigan House of Representatives is to simply make these easy and inexpensive improvements to our current preliminary examination process or, alternately, to accept the recommendations adopted on June 19, 2005, by the bi-partisan resolution of the Criminal Law Section of the State Bar of Michigan at its Biennial Policy Conference on Pre-Trial Procedures in Criminal Cases at Mackinac Island.<sup>4</sup>

In summary, preliminary examinations efficiently and effectively enhance our criminal justice system by enabling the overwhelming majority of felony cases to be readily resolved very early in the criminal justice process, saving time and resources while avoiding serious constitutional questions of due process and equal protection. Moreover, they further the ends of justice by keeping the neutral judicial branch of government in the preliminary examination process for all felonies at the district court level, instead of empowering only the partisan prosecutorial arm of the executive branch of government to decide the important question of what merits going forward to circuit court.

Thus, it would logically be in everyone's best interest for all major components of our criminal justice system (i.e., the police, prosecution, defense, courts, and corrections) to work together to strengthen and improve our existing preliminary examination process rather than to make changes that will only exacerbate the very problem we seek to solve with a purported cure that is much worse than the misdiagnosed malady. ◆



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No previous distinction in procedure at the PE stage has been made for habitual offenders. Why begin now?

### The Preliminary Examination is Not Constitutionally Required

The preliminary examination is not constitutionally required.<sup>2</sup> Although the Powell article asserts that the “ends of justice” require a preliminary examination, history shows that the source, scope, and application of the hearing have been changed a number of times. It originally appeared in early Michigan Constitutions, but was eliminated in 1850. Since then, its source has been purely statutory. When the district court was created in 1968, the hearing was retained only for felony charges.

### The Legislature Can and Should Conduct Periodic Reviews of the Legal System

The legislature establishes what conduct will be prohibited as a crime, and determines the punishment. As society and technology change, the legislature appropriately reviews and revises the state's criminal justice policy. Each year, it creates new crimes, repeals antiquated laws, or adjusts the penalties of crimes to reflect its policy decisions. The rules of criminal procedure seek to balance the competing interests of the protection of individual rights and the maintenance of an orderly society. From time to time, it is appropriate to review and revise the rules when they fail to reflect current reality.

### Due Process is Not a Fixed Concept

Opponents of PE reform ground their arguments in the assumption that all government sanctions require the same amount of procedural protection, as if due process is a fixed concept. However, there are many examples of how procedural due process—the amount of “process” that is “due”—varies with the level of potential punishment. Administrative proceedings require due process, yet differ markedly in procedure from criminal cases. Misdemeanants have the right to a fair trial, yet their due process does not include the right to a preliminary examination. The Michigan Court Rules provide more peremptory challenges in capital cases than in non-

## FOOTNOTES

1. On December 14, 2005, the Michigan House of Representatives passed as a package of bills HB 4796, 4799, and 4800; the package was referred to the Senate Judiciary Committee on January 11, 2006. The Senate is considering its own package of bills as SB 542, 543, 544, and 545.
2. A copy of Mr. Mogill's article, “Why Preliminary Examinations are Important for Michigan's Criminal Justice System,” is available from the Criminal Defense Attorneys of Michigan's website at <http://www.cdam.net> (last visited Feb. 28, 2006).
3. See Nancy Diehl, *What If You Couldn't Afford Perry Mason?*, 83 Mich B J 12 (Nov 2004).
4. See <http://www.michbar.org/publicpolicy/positionpdfs/positionPDF312.pdf>.

capital cases, and all felony charges involve more procedural protections than misdemeanor charges. Death penalty cases in other states require enhanced procedural protections.

History shows that the extent of procedural protection is routinely adjusted when the punishment is changed. For example, in the 1970s, many traffic offenses were decriminalized when the legislature created a procedure for civil infractions. When the offenses no longer resulted in criminal convictions, the legislature reduced the procedural protections for those charges: the right to a jury was eliminated and the burden of proof was lowered.

In that context, it is appropriate to discuss how the procedural protections should be in balance with the reality of felony punishment, especially since the creation of the statutory sentencing guidelines in 1998. When the preliminary examination was created in the 1800s, convicted felons were sent to prison. Today, less than 25 percent of convicted felons are ever committed to prison.<sup>3</sup> Those convicted of crimes in classes E to H of the sentencing guidelines have scores under the guidelines that generally result in probation; they are “locked out” of prison. Times have changed, and there is no legal or practical reason why the legislature should not now adjust the extent of the procedure for felonies on the basis of the current realities of punishment.

### The Preliminary Examination Procedure Has Been Changed Before

The Michigan Legislature and the Supreme Court have made periodic changes to the PE. In 1963, the legislature authorized Michigan State Police lab scientists to submit written reports for the examination.<sup>4</sup> Unfortunately, its intent was thwarted by defendants too often insisting on the lab expert's personal appearance. In 2004, the legislature authorized expert witnesses to testify at the PE by phone, voice, or video.<sup>5</sup> Moreover, that amendment extended the option of phone, voice, or video testimony to *any* witness if good cause is shown. Over four years ago, the Supreme Court revised MRE 1101 to allow expanded hearsay testimony at PEs to prove, with regard to property, “ownership, authority to use, value, possession and entry.” That amendment, aimed primarily at property crimes, made it possible to proceed without requiring the victim to personally attend the hearing on those issues. This history of procedural adjustments refutes the implication that the PE is legally sacrosanct or that any procedural reform is necessarily inconsistent with the pursuit of justice.

Unfortunately, those attempts have not provided the necessary relief. Victims are still required to appear, often multiple times because of adjournments, to relive and recount their victimizations. Citizen witnesses alter their work and personal schedules to stand around courthouses to wait for the case to be called, but 75 percent of the time defendants waive the hearing. Our citizens are disillusioned with a process that seems designed to waste their time. This treatment of crime victims conflicts with two important constitutional rights guaranteed to them in Michigan: “to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process” and “to be reasonably protected from the accused throughout the criminal justice process.”<sup>6</sup> Police administrators justifiably protest paying hundreds of thousands of dollars for overtime hours for probable cause hearings when their officers testify only a fraction of the time. Added together, this totals millions of dollars wasted each year when these officers could be investigating crime or patrolling roads.

The importance of the PE is further diminished when we consider that there is no right to the hearing if the criminal charge is brought by a grand jury indictment.<sup>7</sup> Defense attorneys have protested the grand jury indictment process for years, often claiming “that any good prosecutor can indict a ham sandwich.” But the defense bar cannot have it both ways: a grand jury cannot be both procedurally significant and deficient.

### The Preliminary Examination Procedure is Not Cost-Effective

The vast majority of felony dismissals in district court are because of witness problems. Less than 0.03 percent of felony charges are dismissed because of lack of evidence.<sup>8</sup> It is not cost-effective to continue to mandate hearings that weed out 0.03 percent of charges.

The plain, statutory purpose of a PE is to determine if a felony charge can cross a “probable cause” hurdle, especially as a prerequisite to extended restraint of liberty. However, in arguing to retain the current PE hearing for all felonies, it is telling that much of Mr. Powell’s article injects other practical—not legal—benefits of PEs as if they are co-equal “purposes” for the hearing. They are only ancillary or collateral benefits (usually for the defense) and do not necessitate mandatory district court evidentiary hearings.

*Early Resolution?* Mr. Powell notes that many felony cases are resolved at the PE stage and that early resolution benefits the justice system. True, but the article fails to evaluate the staggering cost to achieve those benefits or to consider that many of the benefits can be achieved without the PE.

*Screening/Weeding?* How important is “judicial gatekeeping” when defendants waive the chance 75 percent of the time? While the PE does superficially provide for judicial “screening” of felonies (as to what “can” be sent to trial on the basis of the evidence, not what “should” be prosecuted), the district court judge’s discretion is very limited.<sup>9</sup> Statistically, very few cases are “weeded out” (i.e., charges against the “actually innocent” are dismissed or reduced) as a result of PE proof problems. A majority of jurisdictions have shown a dismissal rate of less than 0.03 percent because of lack of

evidence. Is *this* a critical “screening” role? Indeed, as a result of evidence fleshed out at PEs, there are many cases in which additional counts are added, or higher charges are bound over to circuit court. Finally, the Powell article ignores the fact that a district court judge or magistrate makes a threshold determination of probable cause when the complaint is sworn and the warrant is authorized, before any preliminary examination occurs. Why are two district court probable cause hearings needed?

*Discovery?* Any implication that attorneys—with or without a PE—would go to trial “without discovery” is false and misleading. Our court rules require discovery. But PEs cannot be justified merely because they serve as discovery “fishing expeditions.” Discovery reform can be accomplished independent of PE reform; e.g., using e-mail and CD-ROMs to efficiently transmit police reports, photos, 911 calls, etc. to attorneys.

*Preserving Testimony?* The prosecution has the burden of proof and may be concerned about preserving fragile testimony. So far, every PE reform proposal has addressed this need.

*“Meaningful” Bond?* What is a “meaningful” bond? Bond is supposed to ensure the defendant’s future appearance at hearings and temporarily protect society. Bond hearings rarely require witnesses, since the Michigan Rules of Evidence do not apply at such hearings.<sup>10</sup> Mr. Powell offers no statistics to support his argument that defendants’ bonds are routinely affected by evidence offered at PEs. Motions for pre-trial release may be heard in circuit court. Under the proposal the Powell article attacks, the PE is retained for the most serious felonies, for which pre-trial release is more likely to be an issue. Thus, the very cases in which high bonds would be imposed would not be affected by that proposal.

*Avoiding Degrading and Expensive Trials?* What about the degradation that many crime victims endure when they must testify twice about being raped, rather than just once at trial? Beyond that, the argument that fewer cases will be resolved before trial falls of its own weight. Prosecutors, courts, and defender offices still have limited resources, and we will still need to resolve the majority of cases by plea.

### Adding Another Proceeding is Not an Alternative to Reform

The Powell article proposes an *additional* preliminary examination conference (PEC) to avoid PE reform. Several major problems are immediately apparent. First, adding another procedural stage for already overburdened prosecutors’ offices is not relief. Even where the PEC has been voluntarily implemented, prosecutors and police have added burdens to meet quick discovery demands and produce witnesses if PEs are demanded. There is undeniable benefit for the interested parties to meet at the district court level, since over 90 percent of charged defendants plead guilty at some point and a percentage of felony cases are resolved to misdemeanors. But the PEC is not an “alternative” to reform. In Eaton County, we have voluntarily used a PEC since 1996. However, *over 50 percent* of the defendants who demand a preliminary examination at the PEC end up waiving the hearing on the day the witnesses are produced!

## Conclusion

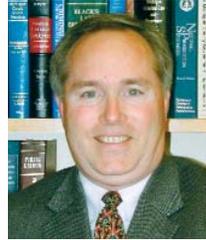
Government agencies at all levels are struggling to deliver needed services with reduced budgets. The leaders of these agencies have been challenged to re-examine the manner in which our business is done.

It follows, then, that proposals to revise the procedures used by our justice system should be met by thoughtful analysis, not emotionally laden rhetoric. Mr. Powell's claim that the ends of justice require a preliminary examination is simply not supported by the law.

The need for reform is plain and compelling. Citizens who have been drawn involuntarily into our justice system as victims and witnesses suffer greatly when the injury of the crime is compounded by a court system that repeatedly and indifferently requires them to appear for hearings that are more often waived than held. The waste of police resources totals millions of dollars each year. Of course we still have to protect the rights of defendants, but our system is out of balance and now is the time for reform. ♦



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## FOOTNOTES

1. MCL 791.234(15)(a).
2. *People v Glass (After Remand)*, 464 Mich 266; 627 NW2d 261 (2001), overruling in part *People v Duncan*, 388 Mich 489; 201 NW2d 629 (1972).
3. For the four quarters ending June 2005, the prison commitment rate was 20.3 percent. Michigan Department of Corrections, Office of Community Corrections Biannual Report, September 2005, p 4. This figure includes those initially sentenced to probation, but later committed to prison after probation violations.
4. MCL 600.2167.
5. MCL 766.11a, added by 2004 PA 20.
6. Const 1963, art 1, § 24(1).
7. *Glass*, supra at 283.
8. Michigan Attorney General Michael A. Cox's 2005 "More Cops on the Street" proposal.
9. See *Gerstein v Pugh*, 420 US 103, 119; 95 S Ct 854; 43 L Ed 2d 54 (1975) ("[W]e do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute.").
10. MRE 1101(b)(3).

