

**CAP SEMINAR**  
**October 20, 2006**

**PRELIMINARY EXAMINATION OUTLINE**

**I. Introduction**

- A. Defendant has a Statutory Right to a preliminary examination whenever he is charged with a felony.
  - 1. Felony.
  - 2. High-court Misdemeanor.
    - a. A high-court misdemeanor is a misdemeanor carrying a maximum penalty exceeding one year such as:
      - 1) Unauthorized use of a motor vehicle.
      - 2) Resisting arrest.
      - 3) 3<sup>rd</sup> degree child abuse.
      - 4) 4<sup>th</sup> degree criminal sexual conduct.
      - 5) Negligent homicide.
- B. Both Prosecution and Defendant have statutory right to Preliminary Examination MCL 770.9.
- C. Waiver of the Preliminary Examination by both the Accused and the Prosecution.
  - 1. Results in a "Bind-over" to the circuit court on the charged offenses
  - 2. Types of Waivers.
    - a. Unconditional Waiver – cannot be rescinded.
    - b. Conditional Waiver – Defendant agrees to waive contingent upon an event or promise.
      - 1) District judges do not like Conditional Waivers.
      - 2) Prosecution must agree.
- D. **The 14-day rule:** The Preliminary Examination must commence (and depending upon the case, be completed) within 14 days of the defendant's district court arraignment.
  - 1. Defendant can waive the 14 day rule.
  - 2. Judge can find Good Cause:
    - a. Defense needs additional time to prepare.
    - b. Key prosecution witness is unavailable through no fault on the part of the prosecutor or police agency.
  - 3. The examination ordinarily only needs to begin within 14 days; it can be completed beyond the 14-day stanza, unless the magistrate finds that a lack of good cause for the prosecutor's failure to present necessary witness.
  - 4. Once adjournment occurs 14 day Rule no longer applies.

- E. Defendant's remedy when 14-day rule is violated.
  - 1. A dismissal of the case without prejudice.
  - 2. Complaint can be reissued-New bond required for the Defendant.
  - 3. If the district judge refuses to dismiss, and the case is bound over to the circuit court following the adjourned preliminary examination, the defendant has to file a timely appeal at the circuit court level.

## II. Why would the Prosecution demand a preliminary examination.

- A. Preserve testimony.
  - 1. A witness might change his mind to testify.
  - 2. Infirm witness might die
- B. Defendant was under-charged, Request for addition or increase charges.
- C. Policy Cases-Homicide, Child Abuse.

## III. When should the Defense Attorney hold the exam.

- A. **MCL 770.9:** Prosecution and Defense have statutory right to preliminary examination.
- B. Client insists upon having one..."I don't believe they have a case on me."
- C. Capital cases:
  - 1. Charges can't be raised.
  - 2. Trial more likely in serious cases so there is a greater need for an exam transcript.
- D. To preserve testimony of defense witness, who likely will not be available to testify at trial.
- E. Dismissal of the charges likely based on the facts.
  - 1. Aiding and abetting cases.
  - 2. Poor Identification cases.
  - 3. Mere presence issues.
  - 4. Drug cases.
  - 5. CCW cases.
- F. To lock in police officers testimony concerning the specifics of the search and seizure, or the details regarding the defendant's alleged confession for an evidentiary hearing.
- G. To raise a statute of limitations defense.

H. Establish factual basis for motion to quash.

**IV. Reasons to waive Preliminary Exam.**

- A. The prosecutor may seek to add a charge or charges at the conclusion of the examination.
- B. The prosecutor may seek to increase the charge (from Felonious Assault tot A WIM) at the conclusion of the examination.
- C. The district judge on his/her own impetus may increase the charge or add charges.
- D. The prosecutor may seek to increase the defendant's bond.
- E. Testimony is preserved or perpetuated for trial (in the event a witness is unavailable to testify on account of illness, death, loss of memory, refusal to testify, or where the police cannot locate the witness).
- F. The prosecution may learn of various weaknesses in the case, giving the trial prosecutor an opportunity to enhance the prosecution's case, or correct weaknesses in the case.
  - 1. Often times the prosecutor who handled the preliminary exam will not be the same prosecutor at the circuit court.

**V. Negotiated Waivers.**

- A. Reduction in the bond.
- B. Agreement not to lodge charges regarding other criminal episodes of the defendant.
- C. A plea bargain at the circuit court level.
  - 1. Make sure it's on the record.

**VI. Evidentiary rulings made by the district court judge at the preliminary examination are not binding on the circuit court judge at trial.**

**VII. Affirmative Defenses which may be raised at exam – defenses which raise questions of law for the magistrate.**

- A. Statute of limitations.
- B. The confession was not voluntarily rendered by the accused.
- C. The interrogating officer failed to advise the defendant of his Miranda rights, or the defendant did not waive his Miranda rights.

- D. The validity of the officer's search and seizure.
- E. The propriety of any identifications and line-up procedure.
- F. Double jeopardy issues.
- G. Speedy trial issues.
- H. Prosecutorial vindictiveness.

**VIII. Conduct of Preliminary Exam.**

- A. Interview client.
- B. Obtain discovery before the exam.
- C. When possible do additional investigation .
  - 1. Interview defense witnesses.
  - 2. Visit the scene in serious cases.
- D. Know your judge.
  - 1. Some allow more latitude in questioning.
  - 2. Some raise or add charges sua sponte.
  - 3. Prepare for possibility that Judge will raise bond.
- E. Know your purpose.
  - 1. Discovery.
  - 2. Dismissal.
  - 3. Motion in circuit court.
  - 4. Mitigation for plea negotiations
- F. Don't give away Defense Strategy.
  - 1. Unnecessary impeachment at exam.
  - 2. **Information learned through your investigation (Scene visits, measurements, lighting, etc).**