



## Report on Public Policy Position

**Name of Committee:**

Criminal Jurisprudence and Practice Committee

**Contact Person:**

Valerie Newman/Marty Krohner

**Email:**

valerie@sado.org/marty@mich.com

**Bill Numbers:**

**HB 4796** (McConico) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 1 & 4, ch. VI of 1927 PA 175 (MCL 766.1 & 766.4).

**HB 4797** (Elsenheimer) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 1a, ch. IV of 1927 PA 175 (MCL 764.1a). TIE BAR WITH HB 4796, HB 4799, HB 4800

**HB 4799** (Van Regenmorter) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 40 & 42, ch. VII of 1927 PA 175 (MCL 767.40 & 767.42). TIE BAR WITH: HB 4796, HB 4797, HB 4800

**HB 4800** (Van Regenmorter) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 8311 of 1961 PA 236 (MCL 600.8311). TIE BAR WITH: HB 4796, HB 4797, HB 4799.

**SB 542** (Cropsey) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 40 & 42, ch. VII of 1927 PA 175 (MCL 767.40 & 767.42). TIE BAR WITH: SB 0543, SB 0544, SB 0545

**SB 543** (Patterson) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 1a, ch. IV of 1927 PA 175 (MCL 764.1a). TIE BAR WITH: SB 0542, SB 0544, SB 0545

**SB 544** (Cropsey) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 1 & 4, ch. VI of 1927 PA 175 (MCL 766.1 & 766.4).

**SB 545** (Patterson) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 8311 of 1961 PA 236 (MCL 600.8311). TIE BAR WITH: SB 0542, SB 0543, SB 0544

**Date position was adopted:**

June 16, 2005

**Process used to take the ideological position:**

Committee meeting

**Number of members in the decision-making body:**

12

**Number who voted in favor and opposed to the position:**

13 opposed to these packages of bills dealing with preliminary examinations and 2 in favor

**Position:**

Please see attached for the majority position.

The two who were in favor of these bills indicated that the objective of saving police officer time is a worthy goal and that this is a worthy first step because the courts will not do anything unless forced to by the legislature and there are serious problems with the way things work under the present system.

**The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4796>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4797>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4799>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4800>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0542>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0543>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0544>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0545>

**RECOMMEND STATE BAR ACTION ON THIS ISSUE:**

**Arguments for the position:**

See attached.

**Arguments against the position (if any):**

See above minority position indicating that this is a worthy first step in trying to correct problems with the preliminary examination process.

**If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.**

Given the diversity of views from the legal community on the issue, the State Bar of Michigan takes no position but supports the involvement of State Bar sections and committees to weigh in on the legislation.

**Fiscal implications of the recommended policy to the State Bar of Michigan:**

None.

**This position falls within the following Keller-permissible category:**

- The regulation and discipline of attorneys
- ✓ **The improvement of the functioning of the courts**
  - The availability of legal services to society
  - The regulation of attorney trust accounts
  - The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

**Keller-permissible explanation:**

This directly affects the functioning of the courts

**Criminal Jurisprudence and Practice Committee –  
Majority position in opposition to proposed legislation to eliminate preliminary examinations**

The preliminary examination has long demonstrated its importance in the facilitation of an evenhanded felony prosecution, and the concrete benefits it is capable of providing for the prosecution, the defense, and the criminal justice system as a whole. Although not constitutionally mandated, where it is available, as in Michigan, the preliminary examination is a critical stage of the prosecution which aids in yielding more just and accurate outcomes at trial.<sup>1</sup> However, recently proposed legislation would effectively abolish preliminary examinations in most felony cases unless requested by the prosecution. The “More Cops on the Street Proposal” would retain the existing procedure only for those crimes designated by the legislature as serious felonies. It is imperative for several reasons that Michigan’s current preliminary examination system be protected and improved upon instead of abandoned.

The preliminary examination serves as Michigan’s conventional screening method, requiring the state to produce sufficient evidence before a district court judge that probable cause exists to believe that a crime has been committed and that it was committed by the accused. The exam is 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.

The current procedure has properly ensured that district judges, acting as neutral representatives of the judicial branch, make the ultimate decisions regarding what charges the accused will face at trial. In this respect, the preliminary examination plays a crucial role in upholding traditional checks and balances within the criminal justice system, which benefit witnesses, prosecutors, victims, law enforcement, and the accused alike. Unsupported or overcharged cases are dismissed. Those with merit are allowed to proceed, which allows an early opportunity for a resolution that is fair and satisfactory to all involved.

The prosecution usually has access to more investigative resources and tools than does the defense. The disclosure of information may be obtained by means of police interviews, search warrants, and subpoenas. The preliminary examination helps alleviate the consequences of this disparity by allowing the defense an opportunity to

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<sup>1</sup> Coleman v Alabama, 399 US 1 (1970).

scrutinize and cross-examine prosecution witnesses. It also provides important opportunities for both sides to assess witnesses' credibility and demeanor, identify the strengths and weaknesses of their respective cases and determine which issues need to be addressed in discovery and other aspects of trial preparation. Conversely, abandoning the right to take deposition testimony or issue discovery subpoenas would result in felony cases going to trial with virtually no discovery process at all.

The preliminary examination also preserves as admissible substantive evidence the testimony of a witness who becomes unavailable to testify at trial.<sup>2</sup> This aspect of the system is frequently of considerable help to the prosecution.<sup>3</sup> But the proposal would allow for preliminary examinations only at the behest of the prosecution, thereby depriving the defense of a right that should be equally afforded to both sides, and arguably resulting in a breach of due process.

Preliminary examination testimony leads to a more precise and dependable record at trial, because it is taken under oath closest in time to the pertinent events – when witnesses' recollections are as fresh as possible. The prosecution and the defense may use this earlier testimony to bolster the reliability of trial witnesses, refresh a witnesses' memory, and/or impeach recollection which has been subsequently altered.

In addition, witness testimony at a preliminary examination has the potential to demonstrate to an overly confident defendant just how strong the prosecution's case is against them. As a result, the examination experience – a far more economical process than going to trial – will often persuade the accused to accept a negotiated guilty plea.

Although supporters of the proposal have attempted to frame Michigan's current preliminary examination system as antiquated, and atypical, nothing could be farther from the truth. The federal system requires either a preliminary hearing or a grand jury indictment in every felony case, unless the defendant waives those rights. Fed R Crim Pro 5.1 and 7(b) 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

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<sup>2</sup> *California v Green*, 399 US 149 (1970).

<sup>3</sup> Kamisar, *et al.*, *Modern Criminal Procedure* (11<sup>th</sup> ed) p 1030).

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.<sup>4</sup> 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.

In bringing about the dismissal of unsubstantiated cases, or the altering of unsupported charges, the preliminary examination's screening function can save both the prosecution and the defense valuable time, money, and other resources that would otherwise be spent on unwarranted trials. On the other hand, the judge or magistrate has authority to bind over on an offense for which probable cause has been established at a preliminary examination. Where appropriate, this will occasionally lead to greater or additional charges.

Because initial bond decisions are nearly always made with minimal information provided to the arraigning magistrate, another integral feature of Michigan's preliminary examination system is the opportunity it provides for examining magistrates to learn more about the accused's circumstances, adjust bond accordingly, and avoid the additional expenditure of a separate bond motion. While Supporters of the proposed legislation, particularly those within the law enforcement profession, assert that eliminating the preliminary examination would alleviate overcrowding in county jails, eradicating the opportunity for bond evaluation at an examination would cause more bond reduction motions to be brought in circuit court. In turn, this would magnify the workload of circuit judges, hinder a final decision on bond reduction, and increase rather than decrease the inmate population of a given jail.

As its name implies, the reform package also seeks to address the valid yet readily solvable goal of reducing time spent in court by officers who are needed to perform traditional enforcement duties in the field. Proponents cite that 75 percent of preliminary examinations are waived by defendants, only after police officers have spent hours in court.<sup>5</sup> But even if this contention is true, using it to fuel an attack on the system completely negates the 25 percent of felony accusations where a preliminary exam is crucial in properly preparing or positioning the case. Many of these individuals are innocent, or at least innocent of the actual charge. Furthermore, it is estimated that

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<sup>4</sup> Kamisar *et al.* at 1036: "All direct-filing systems provide an opportunity for judicial review of the decision to charge (typically by the felony trial court rather than the magistrate)."

<sup>5</sup> Pierce, Allison, "More Cops on the Street Proposal Unveiled", [www.michigan.gov/ag](http://www.michigan.gov/ag) (May 11, 2005).

the overwhelming majority of those preliminary examinations purportedly waived are for pleas that make speedy, efficient and economical dispositions of cases that would otherwise end up in circuit court for a much more time consuming and expensive process – a process that ties up law enforcement officers rather than to more readily free them to return to their regular public safety duties.

The high incidence of preliminary examination waivers can also be directly tied to poor representation by defense counsel. While it is often considered a strategic maneuver, incompetent defense attorneys are waiving exams in cases where they should not be waived. This problem is made worse by the fact that Michigan is among the three lowest states in the country when it comes to assigned counsel pay rates.<sup>6</sup> Because the current system creates a conflict between the attorney's need to be fully compensated for his services and acquiring the full cavalcade of rights for the client<sup>7</sup> it is vital that the reimbursement format be improved across the state.

It cannot be overemphasized that *all* felonies are serious offenses. The maximum statutory penalty is determined according to an individual's criminal history, and the indirect consequences of a felony conviction can often be far more devastating than the sentence imposed. For these reasons, the categorization of "lesser felonies" which should not require a preliminary examination emerges as misleading, arbitrary, and capricious. To the accused person who is innocent, there is no such thing as a less serious felony charge.

Ultimately, the aforementioned benefits derived from Michigan's preliminary examination system supersede the concerns of critics, which can be easily remedied through the employment of more effective, less drastic means than abandonment. To better meet the objectives of efficiency, economy and keeping police on the street, prosecutors and defense attorneys should begin scheduling mandatory pre-examination conferences where only they are present. So long as the prosecutor has some means of communication with law enforcement officers, and the defense with the accused, the conference will formalize what often happens in the hallways prior to preliminary examinations. If the meeting results in a plea agreement, there will be no need for officers or witnesses to appear at

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<sup>6</sup> Diehl, Nancy, "What If You Couldn't Afford Perry Mason?", Mich Bar J 83:11 (November 2004).

<sup>7</sup> Recorder's Court Bar Association v Wayne Circuit Court, 443 Mich 110, 115 (1993), findings of the Special Master Hon. Tyrone Gillespie.

a preliminary examination. This way, police officers can remain on the street placed on standby status, and called to court only if and when they are needed.

The Committee opposes this legislation and suggests that the Bar and the Supreme Court Administrative Office work together to explore alternative means of accomplishing the objective of making the preliminary examination process both meaningful and efficient for the court and all the parties involved in the process.