Preliminary Examinations and Probable Cause: What's Wrong Here?

By Hon. Dennis Powers and Dan Allen

Fast Facts:

Michigan courts have notoriously employed strict constructionism when interpreting statutes.

Absent strict adherence to the grand jury process, the preliminary exam is an indispensable right.

Applying the same standard as that required for issuance of a complaint and warrant renders the preliminary exam process superfluous.

The words and phrases used, such as "shall appear," "essential," and "must show," imply a degree of greater certainty, not mere probable cause.

Recently, some (most notably Attorney General Mike Cox) have proposed that Michigan should eliminate preliminary examinations from the criminal process. However, before such a serious measure is considered, perhaps it would be prudent to assess recent legal history to determine how the value, purpose, and spirit of a procedure with more than 100 years of history in Michigan's criminal justice system has become so diminished that our legislature is contemplating eliminating the preliminary exam.

As a substitute for a grand jury,[1] the primary purpose of the preliminary exam is to determine whether there is enough evidence to bind one charged with a felony over to the circuit court for trial. In a nutshell, the bindover statute, MCL 766.13, requires the examining magistrate to find (1) that a crime has been committed and (2) probable cause that the accused committed it.[2] On its face, the statute clearly defines probable cause as the burden related to finding the defendant's connection with the crime (prong two of the test); however, it specifies no burden for prong one.

From at least 1876 to 1981,[3] the Michigan Supreme Court's application of the bindover statute and its predecessors seemingly indicated that the first prong of the statute requires an actual showing that a crime was committed,[4] that is, something more than mere probable cause.[5] However, no case on point during that time actually stated what that burden is.

In 1989, Michigan's Supreme Court promulgated MCR 6.110(E), basically giving effect to the bindover statute. Specifically, the rule states that a defendant should be bound over for trial if probable cause exists to believe both that a crime was committed and that the defendant committed that crime.[6] At first glance, this appears to be an accurate reflection of the statute; closer examination, however, reveals that the court rule adds the two-word phrase "probable cause" to the first prong of the test.

In 1992, in *People v Fiedler*,[7] the Court of Appeals addressed this precise issue. The trial court had dismissed a case that was bound over for trial upon a showing of only probable cause that a crime was committed, holding that MCR 6.110(E) conflicted with and substantively modified the meaning of MCL 766.13 and was therefore invalid. The Court disagreed, however, concluding that the court rule did not change the burden but simply defined it.[8] The Court reasoned (1) that the Supreme Court was acting within its power to promulgate court rules for procedural and administrative issues, (2) that the discussions in the primary cases on topic were simply dicta and nonbinding, and (3) that the committee that drafted the court rule originally proposed had cited those cases in a comment and the Supreme Court was thus aware of those cases.[9] Accordingly, the *Fiedler* Court held that the court rule was the best reflection of the Supreme Court's position on the legislative intent of prong one of the test in MCL 766.13.[10]

However, the primary issue surrounding the Supreme Court's promulgation of MCR 6.110(E) is that there was no precedent concerning whether "probable cause" should be added to the first prong of MCL 766.13. In fact, the caselaw on point suggested otherwise. The committee comment to proposed MCL 6.107(E), on which the *Fiedler* Court primarily relied, indicated that the caselaw had arguably been misread.[11] The comment, however, offered no analysis of what cases might have been misinterpreted. The only precedent that the comment noted was that some jurisdictions with similar statutes apply the probable cause standard.[12] However, the comment to the proposed court rule was not included with MCR 6.110(E) when the Supreme Court adopted that rule, and the comment is available only if one researches the court rule originally proposed, as the *Fiedler* Court apparently did.

Consequently, there are questions surrounding the *Fiedler* Court's analysis of this issue as well because it also failed to analyze the statute or the caselaw and explain how the caselaw was misinterpreted. Instead, the Court simply agreed with the committee comment to the proposed rule, labeling the discussions in the opinions it cited dicta because the Supreme Court was not asked to define the burden in those cases.[13] This was misleading, however, because it was not until 1989, when MCR 6.110(E) was adopted, that the conflict between the rule, the statute, and caselaw arose. Until that time, there simply was no conflict to appeal, and when a decision regarding a bindover was appealed, the appellate courts apparently applied a higher standard. In addition, those courts were not giving opinions beyond the scope of the matters before them, but were applying the law as it stood at that time.[14] Nonetheless, even though it was nonbinding and not published along with MCR 6.110(E), the *Fiedler* Court ultimately relied on the prior committee comment as a reflection of the Supreme Court's current position rather than scrutinizing the reasoning employed in the comment, applying rules of statutory construction, or analyzing the caselaw.

Had the *Fiedler* Court conducted a more traditional and thorough legal analysis, it seems likely that the Court would have reached a different conclusion. The ultimate goal of statutory interpretation is to determine and give effect to the legislative intent, using the words of the statute as the most reliable indicator. This is done by giving effect to every word, phrase, and clause, by considering both the plain meaning of the words and their placement and the purpose of the statutory scheme, and by avoiding interpretations that render any portion of the statute surplusage or nugatory. And if the statute is unambiguous on its face, then nothing should be read into that statute, and the legislative intent should be enforced as written.[15]

In MCL 766.13, the legislature provided probable cause as the burden for the second prong of the test, but not the first. It must be presumed that the legislature was conscious of this decision, and failing to give effect to this distinction would render it nugatory. Most importantly, the first prong of the test in MCL 766.13 indicates that a defendant should be bound over if it appears that a crime was committed, not if it appears that probable cause exists to believe that a crime was committed, as the court rule states. The statute clearly implies that a crime must be shown. By adding the phrase "probable cause," the court rule effectively changed the plain meaning of an otherwise unambiguous statute and negated the legislature's conscious decision to add the phrase "probable cause" to prong two but not prong one.

Some might argue that by failing to provide a burden for the first prong of the test the legislature left it open to the Court's interpretation because anything required to be proven in court must be established by some burden—which is completely accurate. However, historically and up until the promulgation of the court rule, our court of highest jurisdiction appears to have agreed with that interpretation—that the examining magistrate must be

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convinced that a crime was committed. In *People v Asta,* the Court said that it is "essential…under the provisions of [MCL 766.13], to determine that the offense charged had been committed….The matter of 'probable cause', as the expression is used in the statute, has reference to the connection of the defendants with the alleged offense rather than to the *corpus delecti*…."[16] Years later, in *People v Doss,* the Court said, "It is axiomatic that at the preliminary examination the prosecutor must show that the offense charged has been committed."[17] The words and phrases used, such as "shall appear," "essential," and "must show," imply a degree of greater certainty, not mere probable cause.

But if not probable cause, what is the burden to be applied? It is clear that beyond a reasonable doubt is simply too high a standard[18] and is one traditionally reserved for criminal trials. An argument could be made that the clear and convincing evidence standard complies with the verbiage of the statute as well as the language in the caselaw interpreting that statute; however, it too seems to be too high a standard and is one traditionally used in specialized circumstances—which this might very well be if a court were to so decide. The remaining standard is by a preponderance of the evidence, which seems pragmatically correct, considering that the preliminary exam is the next phase of the criminal process after the arraignment on the complaint and warrant.

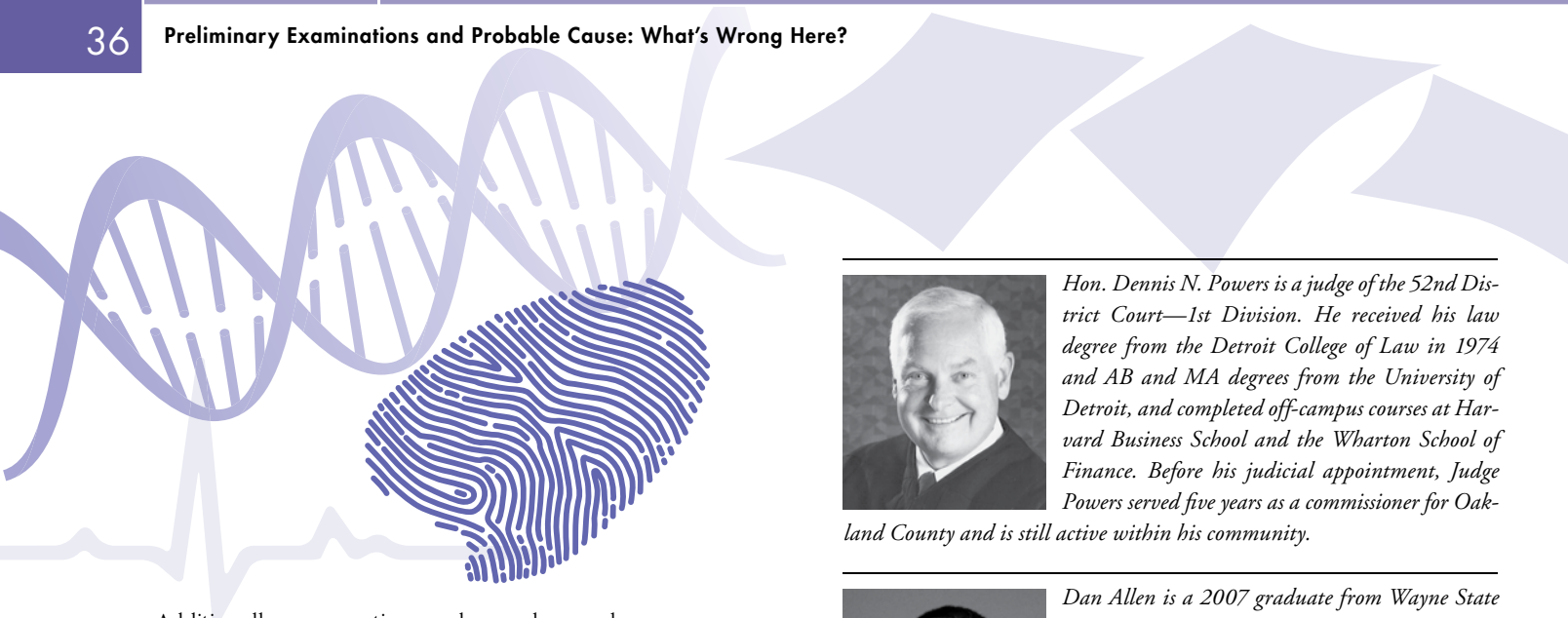
In other words, what is the practical purpose of conducting a preliminary exam to determine probable cause when a neutral magistrate has already made that exact determination before issuing the complaint and warrant? Some may argue the need for cross-examination, preserving testimony, or some other ancillary reason that is useful to both parties,[19] but no part of MCL 766.13 suggests that it was enacted for any such purpose or that either party has the right to a preliminary exam for any of those reasons. The fundamental function of a preliminary exam is to measure whether there is enough evidence to bind the accused over for trial. Applying the same standard as that required for issuance of a complaint and warrant renders the preliminary exam process superfluous, even though it serves some secondary function distinct from that for which it was created.

The practical benefit of requiring the higher standard is every bit as apparent as the redundancy of holding an examination to determine the same issue already decided by a magistrate. For instance, the examining magistrate would serve as a gatekeeper, filtering cases from overly burdened trial courts. Prosecutors would be deterred from overcharging or bringing weak, unripe cases. The purpose lost in the preliminary exam process would be reestablished by requiring the prosecution to gather its proofs and show that a crime was actually committed, as the statute requires, thereby relieving our trial courts' dockets and, more importantly, reaffirming defendants' rights to due process. Moreover, the adverse effect, if any, on the prosecution is minimal because, if the prosecution were unable to meet its burden, the charge would simply be dismissed without prejudice. Nothing would preclude the prosecution from bringing the case again if new information arose, resulting in unlimited bites of the proverbial apple.

In opposition to the application of the preponderance of the evidence standard, the committee comment to proposed MCR 6.107(E) suggested that the difference between probable cause and a preponderance of the evidence is so negligible as "to split hairs without appreciably furthering the interests of either party."[20] Extending this logic, would the committee, then, also have agreed that neither party in a civil action would be appreciably advantaged or disadvantaged if judgments were now to be awarded upon a mere showing of probable cause?

Put simply, "preponderance" implies majority—more likely than not—which can be quantified as at least 51 percent one way or the other. In contrast, "probable cause" reflects a mere likelihood or feasibility that a possible interpretation reasonably exists. As such, to suggest that there is a negligible difference in requiring the prosecution to show that it is more likely than not that a crime was committed versus simply requiring a showing that a reasonable likelihood exists is simply inaccurate. Moreover, it undermines our judicial system, which has aimed to give objective meaning to these otherwise subjective standards.

Considering the defendant's rights to liberty and due process, is it the goal of our justice system to force people to stand trial when the prosecution is unable to establish that a crime was indeed committed? That is, should prosecutions be allowed to proceed when a judge is not convinced that it is more likely than not that a crime even occurred? Preponderance of the evidence is not an incredible or unreasonable burden. In fact, given the current state and spirit of the law, in which legislation is being proposed to eliminate this filtering process, it appears to be a necessary and intended burden.



Additionally, comparative caselaw and secondary sources support the proposition that the preponderance standard is indeed the appropriate burden. In *Asta,* the Court, perhaps not coincidentally, referred to the first prong of the bindover statute as the *corpus delecti.*[21] This is notable because, as it relates to the *corpus delecti* rule, one treatise, Michigan Criminal Law and Procedure by Gillespie, suggests that the burden by which the *corpus delecti* must be established before the introduction of a defendant's confession is the preponderance of the evidence standard.[22] Ironically, this is in direct contradiction to the probable cause standard that both the court rule and Gillespie indicate should be applied to the *corpus delecti* of MCL 766.13.[23]

Consequently, if Gillespie is accurate, a hypothetical situation would exist in which a defendant could be bound over for trial on a showing of probable cause that a crime was committed, but that same defendant's confession could not be introduced because the *corpus delecti* was not established by a preponderance of the evidence. At a minimum, this paradox highlighted by a reputable secondary source illustrates the incongruence between these two comparable, if not identical, legal concepts. Even more, it shows the ripple effect created in our criminal law when the conflicting court rule was promulgated.

Nevertheless, as a result of the court rule and the *Fiedler* Court's affirmation of it, a new burden was read into the law with minimal precedent, if any, supporting it, substantively changing the plain meaning of the bindover statute. In turn, the fundamental purpose of the preliminary examination was undermined, devalued, and, perhaps, lost. The lowered burden rendered the process redundant, resulting in the cry to eliminate the historic process.

So, eliminate preliminary examinations? Given the state of the law since the promulgation of the court rule, there certainly is probable cause to believe that this is a good idea. But upon review, the preponderance of the evidence suggests otherwise. Due process is best satisfied by (1) enforcing the bindover statute as intended and unambiguously written and (2) continuing the process with what appears to be a legally reasonable, appropriate, and practical burden that requires one to stand trial on a showing that a crime was indeed committed versus a mere reasonable likelihood that a crime occurred. ■

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FOOTNOTES

1. *Yaner v People,* 34 Mich 286, 287 (1876).
2. MCL 766.13 states:

   > If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

3. See *Yaner,* n 1 *supra,* and *People v King,* 412 Mich 145; 312 NW2d 629 (1981).
4. See *People v Matthews,* 289 Mich 440; 286 NW 675 (1939).
5. See *People v Asta,* 337 Mich 590; 60 NW2d 472 (1953).
6. MCR 6.110(E) states:

   > If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial.

7. *People v Fiedler,* 194 Mich App 682; 487 NW2d 831 (1992).
8. *Id.* at 689–690.
9. *Id.* at 690.
10. *Id.*
11. Committee comments to proposed MCR 6.107(E), quoted in *Fiedler,* 194 Mich App at 691. The proposed court rule and comments were published in the advance sheets for 422A Mich 27 (1985) only. The comments are thus not generally available any longer.
12. Committee comments to proposed MCR 6.107(E), quoted in *Fiedler,* 194 Mich App at 691.
13. *Fiedler,* 194 Mich App at 690.
14. See *Matthews,* n 4 *supra; Asta,* n 5 *supra.*
15. *People v Waltonen,* 272 Mich App 678, 684–686; 728 NW2d 881 (2006).
16. *Asta,* 337 Mich at 609–610 (emphasis added).
17. *People v Doss,* 406 Mich 90, 101; 276 NW2d 9 (1979).
18. *Asta,* 337 Mich at 609.
19. 21 Am Jur 2d, Criminal Law, § 524.
20. Committee comment to proposed MCR 6.107(E), quoted in *Fiedler,* 194 Mich App at 691–692.
21. *Asta,* 337 Mich at 610.
22. 1 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 1.28, pp 96–97.
23. *Id.* at § 15.21, pp 828–832.