

UTILIZING THE PRELIMINARY EXAMINATION

Elizabeth Young
eyoung@ndsdetroit.org

SIMPLY

1. A felony has been committed
2. There is probable cause for charging defendant

MCL 766.13

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WHAT IS "PROBABLE CAUSE"?

There must be a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.



People v. Plunkett, 485 Mich 50, 57 (2010)

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How do YOU explain it?

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“the gap between probable cause and reasonable doubt is broad.”

Plunkett, 485 Mich at 57

“Mere suspicion is not the same as probable cause”

People v Fairey, 325 Mich App 645, 651-52 (2018)

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The district court abused its discretion in binding Fairey over for trial by failing to distinguish between a **suspicion of guilt and a reasonable belief** that Fairey was the person who committed the crime

People v. Fairey, 325 Mich. App. 645, 651 (2018)

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TIMING

Probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference.

MCL 766.4

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DISTRICT COURT JURISDICTION

- AOW
- PCC
- PX
- AOI (MCL 766.13)
- FY Plea taking (MCL 766.4(3))
- Cannot do FY sentencing

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“FELONY”

- Punishable by imprisonment more than 1 year. MCL 760.1 *et seq*
- Expressly designated as FY. MCL 761.1(f)
- Punishable by death or by imprisonment in state prison. MCL 750.7

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“MISDEMEANOR”

- Numerous definitions
- District court’s JX = misdemeanor punishable by not more than one year. MCL 600.8311(a)

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“HIGH COURT MISDEMEANOR”

- AKA “circuit court misdemeanors”
- Punishable by more than one year
- Not cognizable by the district court
- Considered FY for determining trial-court JX

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THE PCC

- Get discovery
- Request discovery (on the record)
- Address bond
- Refer to CFP?
- Sobriety court/other specialty courts at DC level
- Stipulations?

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TO HOLD OR WAIVE - WHOSE CHOICE?



- Client is entitled to a preliminary exam. MCL 767.42
- May waive exam with consent of prosecuting attorney. MCR 6.110 (A)

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TO HOLD OR WAIVE – WHOSE CHOICE?

Lawyer shall abide by client's decision regarding:

1. Plea to be entered
2. Whether to waive jury trial
3. Whether to testify

MRPC Rule 1.2, Scope of Representation

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EVER REGRET A WAIVER?



DEFAULT = HOLD

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WHY HOLD?

WHY WAIVE?

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WHY HOLD?

- Client wants it
- Feel out witnesses
- Discovery function
- Lock in testimony
- See if witness(es) show

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WHY HOLD?

- Tee up motions
 - Circuit court can rely on exam transcript: Mich. Ct. R. 6.110(D)
- Client needs to hear the evidence
- You never know what might happen
- Leverage better deals
- Talk to witnesses in the hallway
- Get charges dismissed/reduced

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WHY WAIVE?

- Added charges (does it matter?)
- Bond increase
- Client doesn't want it
- Don't want to preserve testimony
 - BUT:
 - Witness might show up at trial anyway
 - APA may not even try to admit transcript
 - No full opportunity to cross/new evidence

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TRANSCRIPT IN LIEU OF WITNESS AT TRIAL



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ADMISSIBILITY OF PX TRANSCRIPT

- Must bear “sufficient indicia of reliability”
- ^ satisfied if testimony falls within exception to hearsay rule
People v Meredith, 459 Mich 62 (1998)

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ADMISSIBILITY OF PX TRANSCRIPT

HEARSAY – MRE 804

- Unavailable?
 - Exempted, refuses, lacks memory, physical probs, pros unable to procure + due diligence
- Due diligence
 - Test of “reasonableness”
 - Morgue, jails, cell records, post office, and on and on
- Opportunity & similar motive?

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ADMISSIBILITY OF PX TRANSCRIPT

- Right to confront:
- Did you get a **full opportunity** to cross at PX? (hint: make sure you didn't)
 - Push the boundaries of “relevance”
 - Additional investigation/discovery

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BAD REASONS TO WAIVE

- Prosecutor threatens to punish your client – LAST BEST DEAL! (yeah right)
- You're tired
- There's a question of fact
- The judge, court depts, clerk, and court reporter all want to leave
- Co-defendant's counsel wants you to waive

TAKE ADVANTAGE OF A TIRED PROSECUTOR!

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ADJOURNMENTS

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ADJOURNMENTS

MCL 766.1. Client is entitled to a prompt examination

“The notion that a presumptively innocent [person] should remain in custody until a convenient time arrives for the magistrate to conduct the preliminary examination is exactly what the legislature precluded in MCL 766.1.” *People v Weston*, 413 Mich 371 (1982).

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ADJOURNMENTS

The failure to comply with the statute governing the holding of the preliminary examination entitles the defendant to his discharge.

People v. Weston, 413 Mich. 371, 376, 319 N.W.2d 537, 539 (1982).

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ADJOURNMENT

- If parties consent, **for good cause** shown, the court may adjourn the exam for a reasonable time. MCR 6.110(B)(1)
- If a party objects, the court may not adjourn unless it makes a finding on the record of **good cause** shown for the adjournment. MCR 6.110(B)(1)

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WHAT IS “GOOD CAUSE”?

- Good cause:
 - Material witness temporarily absent. *People v Den Uyl*, 320 Mich 477, 488 (1948)
 - Illness
 - Prior scheduling conflict
 - Appointed counsel needs time to prepare. *People v Eddington*, 77 Mich App 177, 186-190 (1977)
- NOT good cause:
 - “simple docket congestion without a showing of unusual circumstances.”
 - *People v Twomey*, 173 Mich App 247 (1988)

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DEFENSE REQUEST TO ADJOURN – WHY?

You need time to prepare!

- *U.S. v. Morris*, 470 F.3d 596 (CA6, 2006)
 - Spot-assignment minutes before PX denied client effective assistance of counsel
 - No time to consult privately
 - No time to investigate
 - Incomplete discovery
 - Defense counsel uneducated
- (Citing *U.S. v. Cronin*, 466 U.S. 648 (1984))

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APA’S REQUEST TO ADJOURN

- Is your client in custody?
- Negotiate bond
- Client is entitled to a PROMPT examination. MCL 766.1.
- Judge must state good cause on the record

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THE SURPRISE ATTACK

Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for **the probable cause conference** for the sole purpose of taking and preserving the testimony of the victim... MCL 766.4(4).

Argue:

1. Ineffective assistance, unable to effectively cross/confront the witness;
2. Individual is not a “victim”?

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“VICTIM”

- “Individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.” MCL 766.4(4).

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PREPARATION

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PREPARATION

- Review the discovery (trial mentality)
- Meet with client
- Talk to witnesses
- Read/print offense statutes
- Find misdemeanor to argue in lieu of felony
- Identify issues
 - Motions
 - Theories of defense
 - Witness issues
 - Mitigating evidence

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PREPARATION

Determine your goals:

- Dismissal
- Discovery
- Tee up impeachment for trial
- Let client hear/see evidence
- Tee up motion(s)
- Mixture of goals

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DISMISSAL LIKELY

- Focused cross
- Organize by chapter
 - Every chapter has a point
 - Every question goes to the point
 - Leading questions take you there
 - A few open ended questions may also get you there
- Sometimes less is more
- Impeach
- Object!

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DISMISSAL UNLIKELY

- Lenient on hearsay
- Lenient on open-ended questions
- Maybe don't impeach
- Ask as much as you can
 - -Bias, credibility, motive to lie always relevant
 - -Laying a foundation
 - -Can I have some latitude

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COMMON DISCOVERY QUESTIONS

- Who else was around? Know names?
- Were you wearing a body cam? Was it working?
- Fill out a run report?
- Dash cam on?
- Use gloves?
- Take pictures? Give them to APA?
- Record interrogations?
- Take statements from others?
- Talk to Witness X before coming here today?

Little seeds of reasonable doubt.

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MRE APPLIES AT PX

Evidence presented at preliminary examination must be legally admissible.

MRE 1101; *People v. Walker*, 385 Mich. 565 (1971), overruled on other grds by *People v. Hall*, 435 Mich. 599 (1990); *People v. Kubasiak*, 98 Mich. App. 529 (1980); *People v. Tait*, 99 Mich. App. 19 (1980). But see *People v. Hall*, above.

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MRE EXCEPTIONS - MRE 1101(b)(8)

Hearsay admissible to prove:

- Property ownership*
- Authority to use property
- Property value
- Possession and entry

*The definition of "ownership" includes the right to convey property to others. *People v. Caban*, 275 Mich. App. 419 (2007).

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OTHER EXCEPTIONS:

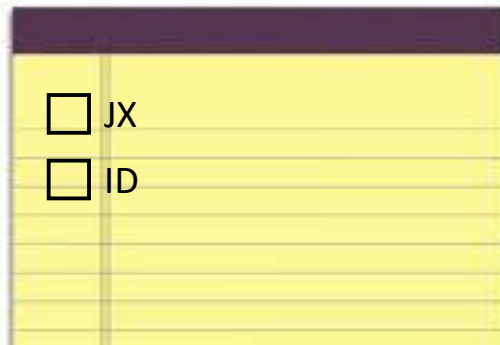
- MCL 766.11b
 - Drug analysis field testing
 - Court/government record
 - Report made in ordinary course of business
 - Lab reports, medical report, autopsy report...

Note,

Defense allowed to subpoena and call a witness from whom hearsay testimony was introduced on satisfactory showing that live testimony will be relevant to finding PC. MCL 766.11(b).

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NEVER FORGET



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COURT CLOSURE

- MCL 766.9
 - CSC case:
 - Need to protect witness/victim/client outweighs need for public access
 - Narrowly tailored to accommodate interests
 - Judge must state reasons on the record
 - Factors:
 - Psychological condition of witness/victim
 - Nature of offense
 - Desire for closure
 - May close to protect right to fair trial if:
 - Substantial probability that right to fair trial will be prejudiced by publicity
 - No reasonable alternatives

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SEQUESTRATION & SEPARATION

- Who's in the courtroom?
- Who's talking to who?

Judge may separate witnesses "so that they not converse with each other until they have been examined." MCL 766.10.

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WITNESS ISSUES

- Failure to appear
 - Credibility

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MCL 768.27c

When DV complainant FTA:

- APA will attempt to admit statements under 768.27c

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MCL 768.27c

- Hearsay statement admissible if:
 - Statement narrates/describes/explains threat or infliction
 - DV case
 - At or near time of threat/infliction (5 years + since filing not ok)
 - Circumstances indicate trustworthiness
 - You're at trial or in an evidentiary hearing

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MCL 768.27c

- OBJECT!
 - MCL 768.27c(6) “applies to trial and evidentiary hearings.”
- ARGUE:
 - Plain language/legislative intent
 - Exam is not an evidentiary hearing
 - Different rules, different functions
 - To support, not to initiate
 - Judicial efficiency
 - Circuit courts are split
 - Right to confrontation (See next slide)

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RIGHT TO CONFRONT (SHOULD APPLY AT PX)

PX “is a critical stage of our criminal process.”

People v. Bellanca, 386 Mich 708, 712 (1972)

“[T]he guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.

Bellanca at 713-714 (quoting *Coleman v. Alabama*, 399 U.S. 1 (1970)).

US Const, Ams VI, XIV; Const 1963, art 1, § 20. *Crawford v Washington*, 541 US 36 (2004)

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JUST WHEN YOU THINK YOU’VE WON

Even if you win the 768.27c issue you may still lose under an excited utterance exception.

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EXCITED UTTERANCE

- Excited utterance
 - Capacity to fabricate?
 - (time is not controlling). *People v. Straight*, 430 Mich 418, 425 (1988).
 - Testimonial?
 - If it’s not an ongoing emergency, and purpose of interrogation is to “prove past events potentially relevant to later criminal prosecution.” *Davis v Washington*, 547 US 813, 823 (2006).

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CREDIBILITY

“...the magistrate has not only the right but the duty to pass judgment on the weight and competency of the evidence and on the credibility of the witnesses.”

People v. Paille #2, 383 Mich. 621 (1970); *People v. King*, 412 Mich. 145 (1981). *People v. Anderson*, Docket No. 155172, Decided March 16, 2018.

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CREDIBILITY

- Impeachment by evidence of conviction
 - Containing element of dishonesty or false statement (MRE 609(a)(1))
 - Containing element of theft (MRE 609(a)(2))
 - Punishable by imprisonment >1 year
 - Probative
- Bias, credibility, motive to lie always relevant
 - (*People v. Springer*, 64 Mich. App. 260 (1975), aff'd 396 Mich. 116 (1976))



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OTHER EVIDENTIARY ISSUES

Corpus Delecti

- Proof of case required before admission of inculpatory statements. *People v. Burns*, 250 Mich. App. 436, 438 (2002)
 - Preponderance of evidence
 - Specific injury and criminal agency
 - Independent from statement
 - *People v. McMahan*, 451 Mich. 543, 548–549 (1996); *People v. Konrad*, 449 Mich. 263, 269–270 (1995)

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DURING THE EXAM

- Give client paper to write on
- Listen during direct
- Watch witness
- Determine if you actually need to ask questions
- Make your objections
- Co-defendant(s)?

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BRUTON

Co-defendant's statements inculcating your client not admissible

- But see *People v Hill*, 435 Mich 599 (1990) (harmless error).

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CROSS EXAMINATION

- Structure questions based on goals
- Listen to the witness
 - Have a conversation, be fluid
- Don't be rushed – slow down key moments
 - Timing
 - Visibility
 - Capacity to remember
 - Specific details (don't be afraid)

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THINK ABOUT FUTURE MOTIONS

- Bad stop/search/seizure
- Miranda violation
- Quash
 - Mere presence frequently succeeds
- Stanaway
- Suggestive ID
 - Ask to voir dire on identification procedure before in court ID →
 - MCOLES

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IN COURT IDENTIFICATION @ EXAM

- Where pretrial identification is unduly suggestive, the witness is not permitted to make an in-court identification unless the prosecution can show that there is an independent source for that identification.
People v Kachar, 400 Mich 78 (1977)
- Totality of circumstances. *Kachar; Wade*, 388 US 218 (1967)

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WITNESSES FOR THE DEFENSE?

Never say never! Consider credibility.

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CLOSING ARGUMENT

- Never concede the bindover
- Argue hard
 - Hammer on weakest elements
 - Hammer on credibility if you can
 - Constitutional violations
 - ID/JX
- Win your client's trust
- Put on a show, inspire the world
- If ridiculous, "object without argument"

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CIRCUIT COURT ARRAIGNMENT

- Within 14 days of the bindover. MCL 766.13.

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GETTING THE TRANSCRIPT

- Make sure it's ordered
- If not produced in time, show cause the court reporter. MCL 766.15.

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QUASH

- Venue and JX not established? Quash “must” be granted. *People v. Raymond Hall*, 375 Mich. 187 (1965)
- No P.C on one or more elements? MCR 6.110(H)

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QUASH

- Even if it’s a loser:
 - Get a feel for the judge
 - Consider a bench trial
 - Gain client’s trust
 - Get to know the facts
 - Get to know the law

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ADDING CHARGES AFTER PX

Amendment of Information OK, unless the proposed amendment would **unfairly surprise or prejudice the defendant**. MCR 6.112(H).

Object. Demand a remand.

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RULES OF REMAND

- Circumstances warranting remand:
 - Successful motion to quash where the prosecutor seeks to remedy the shortcoming in proofs
 - Defective waiver of the preliminary examination
 - Addition of new charges by the prosecutor.
- No counsel present at exam?
 - Exam = critical stage. 6th Amendment attaches. Demand remand. Harmless beyond a reasonable doubt analysis applies.
 - *People v. Carter*, 412 Mich. 214, 218 (1981)

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REINSTATEMENT OF CHARGES

“...prosecutor need only introduce additional, noncumulative evidence, not newly discovered evidence, at a subsequent preliminary examination.”

People v Robbins, 223 Mich App 355 (1997)

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CONCLUSION

- A stitch in time saves 9
- Holding exams makes you better at trials
- Going to trial make you better at exams
- So do both

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CONTACT INFO

Elizabeth Young
eyoung@ndsdetroit.org

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“Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.

First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the state's case that may lead the magistrate to refuse to bind the accused over.

Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.

Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet that case at the trial.

Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.”

Coleman v Alabama, 399 U.S. 9, 90 (1970); *People v. Carter*, 412 Mich. 214, 218 (1981).

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