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PRELIMINARY EXAMINATION LEGISLATION (HB 5154/5155)

Chairman Cotter and Members of the House of Representative Judiciary Committee:

Thank you for the opportunity to testify today on HB 5154/5155, making significant adjustments to the Preliminary Examination system, used before criminal trials in Michigan today.

First, please consider this context to CDAM's disposition on the legislation: it is important to bear in mind that 90-95% of felonies are resolved by negotiation--that is, plea deals are struck. A high percentage of those resolutions occur *at or as a result of* the preliminary exams, because that is the first stage at which the parties have occasion to discuss what underlies the charges and, where a preliminary exam is held, they are able to take the measure of the case through the important witnesses. This means that, for the bulk of felony cases, *the preliminary exam is the single most important hearing in the criminal justice process.* Absent a meaningful preliminary exam, which is a meaningful testing process of the felony charge, you can expect to have fewer resolutions at that stage, b/c prosecutors charging weak cases will have an easier time getting them bound over anyway, and defendants facing strong evidence against them won't have the same opportunity to be confronted with that evidence (some defendants need to see and hear that evidence). This would mean more inefficiency in the long run, as cases stay open longer, more trials are demanded, more people remain in jail longer awaiting those trials, and negotiated resolutions that ordinarily could occur earlier in fact don't occur until later in the process if at all.

That said, the bills aim to make the preliminary exam process more efficient, which CDAM understands and applauds. In fact, for some time, CDAM has advocated for Preliminary Examination Conferences (outlined in these bills). However, efficiency should not come at the expense of fairness, nor at the expense of the core purposes underlying preliminary exams.

There are two core purposes behind preliminary exams: to test the charging decision by a probable cause standard; and to provide notice to the defendant not only of the charges against him but what underlies those charges. This is a cornerstone of American jurisprudence: to understand what Government is

charging you with and why. Additionally, it is not enough to provide a test and notice; those two items must be meaningful. Meaningful means: the prosecutor is required to put on a probable cause case; and the defense tests it via cross examination.

Another cornerstone of our justice system is that each side is on a level playing field. In order for both sides to be on a level playing field, and to allow for the meaningful testing that the process assumes (as above), discovery is provided *as a matter of course* before the preliminary examination.

These bills mandate preliminary exam conferences, which, as this testimony opened with, is laudable. However, they go further and seek to alter preliminary examination procedures, which have implications for fairness and for the core purposes of the preliminary exam process.

First, presuming this is for witness efficiency, the legislation permits certain categories of witnesses to testify from an off-site location. This is a profound break from ordinary hearing processes, in which witnesses testify in court. Conventional wisdom dictates that it is important for a judge to be able to see, not just hear, the witness. If such a provision like this is to stay, it should be limited to witnesses testing in a video recorded fashion, especially when we consider that sometimes preliminary exam testimony is later admissible at trial, when a jury must evaluate this evidence as well.

Second, the legislation would permit a great deal of preliminary exam evidence to be provided via hearsay reports. Some of this may seem minor, for instance the admission of public records without having to call the public records custodian. However, other examples are not so minor, for example the admission of a medical examiners autopsy report in a homicide case. CDAM objects to these provisions in the legislation because it undermines the meaningful testing of the preliminary exam process; it is awfully difficult to cross-examine a report, for instance. However, if this kind of provision is to remain, at least preserve the defense's right to call the witness live, where it would be relevant to an issue that is important to the bind over decision. This same point could be important to prosecutors as well, where the defense seeks to admit the same sorts of hearsay documents in opposition to a bind over and the prosecutor might seek to admit in support of a bind over.

Third, the legislation would permit the prosecutor to call a complainant to testify at the preliminary exam conference. We feel this is inconsistent with the purpose behind the preliminary exam conference, which is for the prosecutor and defense to identify and review issues, consider plea offers, and generally determine whether a preliminary exam needs to be held at all. There is a sentiment that avoiding victim inconvenience should rule here. CDAM is not sure why victims need to be at the preliminary exam conference at all; after all the goal is supposed to be trying to avoid making witnesses appear, until they are necessary.

Again, however, if this provision is to remain in the legislation, and if a prosecutor is permitted to call a complainant to testify at the preliminary exam conference, at the very least it should be required that the defense first receive the discovery that they ordinarily receive before preliminary examination, and have an adequate opportunity to prepare for cross-examination. Defense attorneys cannot be expected to meaningfully cross examine the central witness in the prosecutor's case, and meaningfully test the prosecutors charging decision as the process contemplates, absent adequate information and time to prepare. This is what discovery is for, this is what the rules at present already call for, and we ask for nothing *more*. If the prosecutor elects to speed up the preliminary exam in this fashion, that's fine, but the prosecutor should provide discovery in that event.

A note on discovery: "Discovery" means that information *already required to be disclosed by court rule* which law enforcement has at the time: police reports, witness statements, and related investigation and forensic materials. Nobody is discussing information that doesn't exist or is otherwise not yet obtained.

CDAM has been discussing these issues with PAAM very productively. I believe we are in agreement on the first two issues listed above. On the last one, we are not. Our understanding of PAAM's position is that prosecutors wish to be obligated to provide us with the victim's witness statement, not the rest of the discovery that traditionally defense attorneys get. This simply is insufficient. As any trial lawyer will tell you, cross-examination requires knowledge of the *case*, not knowledge simply of the particular witness whom one is cross examining. Again, we are asking for *nothing more than what presently we are entitled to under the rules and governing case law*, and what ordinarily is provided to the defense prior to preliminary exams anyway. CDAM cannot find justification for restricting that, especially in connection with such an important witness as a victim. No one would argue that due process and fundamental fairness requires defense counsel to be adequately prepared before cross-examining such an important witness, or any witness for that matter. This equality between the parties is fundamental to our criminal justice system. CDAM has provided suggested language, and we hope that the negotiations here will bear fruit.

By all means, the attempts in this legislation to make the preliminary exam process as efficient as possible is ultimately a good goal for a number of cost, convenience, personnel, and courtroom reasons. But let's not do that in a fashion that sacrifices long-term efficiency for short-term efficiency, and most importantly, let's not do it in a way that sacrifices fundamental fairness and balance, and the core purposes of preliminary exams that have served MI well for well over 100 years.