

Legislative Analysis



ELIMINATE PRELIMINARY EXAMINATION FOR SOME FELONY CRIMES

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4796 (Substitute H-3)
Sponsor: Rep. Bill McConico

House Bill 4797 (Substitute H-2)
Sponsor: Rep. Kevin Elsenheimer

House Bills 4799-4800 (Substitutes H-1)
Sponsor: Rep. William VanRegenmorter

Committee: Judiciary
First Analysis (9-27-05)

BRIEF SUMMARY: The legislation would eliminate preliminary examinations as a right for many felony offenses, and instead, require preliminary exams only for specified offenses. In the case of a felony that did not entitle a defendant to a preliminary examination, the court would be required to schedule a conference within 14 days, at which the prosecutor, defendant, and the defendant's attorney could review the charges, discuss bail, and determine the procedural aspects of the case.

FISCAL IMPACT: The bills would have no fiscal impact on the state and an indeterminate fiscal impact on the judiciary and local units of government. There apparently are no statewide data to indicate how many charges are brought annually for the more serious offenses for which preliminary examinations would continue to be required. However, sentences for those offenses accounted for only about 22 percent of the felony dispositions in 2003, suggesting that the bulk of felony charges would be brought in situations where, under the bills, preliminary examinations would be optional, although pretrial conferences would be required. Further, information provided by the Attorney General indicates that under current law, most preliminary examinations are waived.

The impact on local courts and law enforcement would depend on how the bills changed local pretrial practices. To the extent that police officers are on overtime pay when attending preliminary examinations, local law enforcement agencies could experience savings. The potential impact on trial courts is less clear, given that a court would have to either preside over the pretrial conferences held under the bills, or be available during them to dispose of any plea agreement or determine bail.

THE APPARENT PROBLEM:

Under Michigan law, criminal defendants have the right to preliminary examinations. During a preliminary exam, prosecutors present witnesses and evidence to a district judge to show that a crime was committed, and to demonstrate that the defendant probably was the perpetrator. If the judge believes enough evidence exists against the defendant, he or she sends the case on to circuit court for trial.

In a decision dating from 1972 [*People v. Duncan* 388 Mich 489 (1972)], the Michigan Supreme Court concluded that the preliminary examination "has become recognized as a fundamental right in most criminal cases," and then exercised its "inherent power" to require a preliminary examination for an accused indicted by a grand jury for a felony. However, in 2001, the Michigan Supreme Court, in *People v. Glass* [464 Mich 266, 283 (2001)] ruled that the earlier court had erred. In the 2001 case, the justices ruled instead that there is no federal or state constitutional or statutory requirement for a preliminary examination on top of a grand jury indictment.

The requirement of a preliminary examination in felony cases—75,000 of which are filed each year—has become the subject of growing criticism among prosecutors. They note that the preliminary examination is not exercised by defendants charged with felonies in 75 percent of cases statewide. In cases involving less serious felonies the rate is even higher—the preliminary exam is waived in 86 percent of cases.

Currently, the law allows defendants to waive their right to a preliminary exam without prior notice to the prosecution, subpoenaed witnesses, and police officers. Prosecutors note that customarily, the exam is waived by defendants and their attorneys *after* the police officers, alleged crime victims, and witnesses appear in court ready to participate in the preliminary examination, but *before* the examination of the evidence gets underway. Consequently, the victims and witnesses are sent home without undergoing any questioning. This practice wastes time and resources. For example, in 2004, the Michigan State Police's Metro South Post in Wayne County estimated that troopers from the post spent a total of 219 hours waiting in court to testify, but provided only seven hours of testimony.

Legislation has been introduced to require a preliminary exam only in serious felony cases, with the intent that it will save time and costs for the prosecutors, courts, police agencies, and citizens.

THE CONTENT OF THE BILLS:

The legislation would eliminate preliminary examinations as a right for most felony offenses. Instead, preliminary examinations would be required only for specified offenses. Generally speaking, these would include crimes such as murder, criminal sexual conduct, arson, certain controlled substance violations, acts of terrorism, and crimes that result in death or serious injury to a victim. The bills are tie-barred to each other so that none could become law unless the others also were enacted. They would take effect August 1, 2006.

In the case of a felony that did not entitle a defendant to a preliminary examination, however, the court would be required to schedule a conference within 14 days, at which the prosecutor, defendant, and the defendant's attorney could review the charges, discuss bail, and determine the procedural aspects of the case.

[The purpose of a preliminary examination is to determine whether or not a felony has been committed and whether or not probable cause exists to believe that the defendant committed it. It is not to determine guilt or innocence. Currently, under state law, a person charged with a felony offense has the right to a preliminary examination and one must be conducted unless the defendant waives that right.]

House Bill 4797 (H-2) would amend Chapter IV of the Code of Criminal Procedure, entitled *Arrests*, (MCL 764.1a) to allow a prosecutor, for all complaints alleging the commission of a felony filed after January 1, 2006, to file either a complaint for which an examination is to be provided or a complaint for which an examination is not to be provided. The provision would not prohibit a prosecutor from filing an indictment under Chapter VII (Grand Juries, Indictments, Informations and Proceedings Before Trial). On a complaint filed for which an examination would not be provided, the prosecutor would have to state that the requirements for an examination did not apply.

The bill lists numerous felonies for which a preliminary examination would have to be provided. As mentioned earlier, generally speaking, these include crimes such as murder, criminal sexual conduct, arson, certain controlled substance violations, acts of terrorism, and crimes that result in death or serious injury to a victim.

House Bill 4799 (H-1) would amend Chapter VII of the Code of Criminal Procedure (MCL 767.40 and 767.42). Under existing law, an information (the same as an indictment except that it is presented by a prosecutor while an indictment is presented by a grand jury) cannot be filed against a person for a felony until the person has had a preliminary examination. The bill would apply this provision only to those cases where the prosecutor filed a complaint for which an examination is to be provided.

Moreover, the bill would specify that an accused is not entitled to an examination if the prosecuting attorney filed a complaint for which an examination is not to be provided under Section 1a(2) of Chapter IV (the provision that would be added by House Bill 4797). For these cases, the information could be filed in district or municipal court within seven days of arraignment. (In contrast, a preliminary hearing must be scheduled within 14 days of arraignment.)

In addition, the bill would eliminate the requirement that a proper return be filed by the examining magistrate and prosecuting attorney before an information can be filed in court. Instead all informations would have to be filed in the court having jurisdiction over the offense specified in the information.

House Bill 4796 (H-3) would amend Chapter VI of the Code of Criminal Procedure, entitled *Examination of Offenders*, (MCL 766.1 and 766.4) to specify that an accused is not entitled to an examination if the prosecuting attorney filed a complaint for which an examination is not to be provided under Section 1a(2) of Chapter IV (the provision that would be added by House Bill 4797). Currently, this chapter ensures that both the state and the accused are entitled to a prompt examination and determination by the examining

magistrate in all criminal cases, and all courts and public officers in connection with such examinations are required to bring them to a final determination without delay.

The bill also specifies that if an individual is charged with committing a felony for which he or she is not entitled to an examination, then the court would be required to set a conference on the matter within 14 days after arraignment to allow an opportunity for the prosecuting attorney and the defendant and his or her attorney to review the charges, discuss bail, and determine the procedural aspects of the case. Probable cause would not be required to be shown during the conference. The court would have to require that the prosecuting attorney, the defendant, and the defendant's attorney attend the conference, unless it was waived by the defendant in accord with the Crime Victim's Rights Act. The victim would be notified of the conference, and have an opportunity to discuss the conference with the prosecuting attorney before it was held. The bill specifies that the court could, but would not be required to, preside over the conference. If the court did not preside, the judge would have to be available during the period in which the conference was held to dispose of any plea agreement, or to determine bail.

The bill also specifies that the rules of evidence would not apply to a conference, and witnesses could not be presented. In addition, the bill would require the prosecuting attorney to provide the defendant and his or her attorney with all the following information relating to the case during a conference, and if additional information was obtained after the conference, promptly after that information was obtained:

- A copy of each investigative report prepared by or on behalf of law enforcement;
- A copy of each witness statement; and,
- A copy of each recorded confession and, if the confession was transcribed, a copy of that transcription.

House Bill 4800 (H-1) would amend the Revised Judicature Act (MCL 600.8311) to reflect the proposed changes in House Bills 4797 and 4799. Currently, the act gives jurisdiction to the district court for misdemeanors punishable by a fine or imprisonment of one year or less; ordinance and charter violations punishable by a fine and/or imprisonment; and preliminary examinations in all felony cases and misdemeanor cases that the district court does not itself have jurisdiction over (i.e., a misdemeanor offense punishable by up to two years imprisonment). The bill would specify that those provisions would apply "*except as otherwise provided by law.*"

ARGUMENTS:

For:

These bills modify a proposal made by the Attorney General to eliminate an accused person's right to a preliminary examination in lesser felony cases. Under the bills, the preliminary examination requirement would continue in 150 listed serious felony cases, unless it was waived by the accused. In addition, the prosecutor would retain the option to have a preliminary examination for lesser felonies. Further, in instances in which defendants were charged with a felony that did not entitle them to an examination, the

court would be required to schedule a conference within 14 days, at which the prosecutor, defendant, and the defendant's attorney could review the charges, discuss bail, and determine the procedural aspects of the case. These bills ensure defendants their right to due process, while revising the preliminary examination system.

For:

The system of preliminary examinations is fraught with inefficiency. It wastes the time and financial resources of prosecutors, courts, police agencies, victims, and witnesses—since all must appear in court for the preliminary exam, although the exam is generally waived by the defendant. In fact, according to a recent study conducted by the office of the attorney general, the preliminary exam is waived by the defendant in 75 percent of all cases, statewide. For lesser felonies, the waiver rate is higher—85 percent. According to the attorney general, only three percent of cases are dismissed during the preliminary exam phase—most of those due to the fact that witnesses fail to appear. A very small number of cases—less than three-tenths of one percent—are dismissed for lack of evidence. These bills streamline the preliminary examination process, saving courts, prosecutors, police agencies, crime victims, and witnesses time and money.

Against:

Preliminary exams are hearings held to determine whether a crime has been committed, and whether there is probable cause to believe a particular defendant committed the crime. Consequently, a preliminary examination provides an important protection for defendants. This legislation trades away rights of the accused that have been a critical part of the state's criminal jurisprudence for over a century. The Criminal Defense Attorneys of Michigan point out that a better way to reform the preliminary examination system would be to require pre-exam conferences and mandatory discovery, followed by a demand for exam within a certain number of days after the conference. In this instance, an exam would be waived, if the defendant failed to file. This approach—endorsed by the State Bar Criminal Law Section Policy Conference in June 2005—would allow for exams in cases where they are needed, while dispensing with the current practice of waiving at the last minute which is, indeed, an inconvenience to the many people involved in a criminal case.

Against:

This legislation weakens the state's ability to protect evidence. A preliminary examination allows the judge to weed out weak cases and helps prosecutors and defense attorneys assess witness credibility. During the preliminary exam, witnesses are better able to remember what they saw shortly after the crime was committed, rather than wait for their first opportunity to testify months later at trial, when their memories are less vivid. Consequently, the current practice of a preliminary exam protects evidence for the trial.

POSITIONS:

The Attorney General supports the bills. (9-21-05)

The Michigan Association of Chiefs of Police supports the bills. (9-21-05)

The Prosecuting Attorneys Association of Michigan supports the bills. (9-21-05)

The Michigan Municipal League supports the bills. (9-21-05)

The Michigan Association of Police Organizations supports the bills. (9-21-05)

The Fraternal Order of Police supports the bills. (9-21-05)

The Michigan Association of Counties supports the bills, as amended. (9-21-05)

The Criminal Defense Attorneys of Michigan oppose the bills. (9-23-05)

The American Civil Liberties Union opposes the bills. (9-21-05)

The Justice Caucus of the ACLU opposes the bills. (9-21-05)

The Michigan Judges Association opposes the bills. (9-21-05)

The Michigan District Judges Association opposes the bills. (9-21-05)

Legislative Analysts: J. Hunault
Susan Stutzky
Fiscal Analyst: Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.