GRIC

Foundations for Prosecution Conference

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Virtual Via Zoom

PRELIMINARY HEARINGS: ESTABLISHING ELEMENTS & PRESERVING TESTIMONY

Presented by:

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Distributed by:

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November 1997- Present

Preliminary hearing Bureau West November, 1997 – June, 1998
Juvenile Division June, 1998 – March, 2000
Preliminary Hearing Southeast March, 2000 – October, 2000
Trial Bureau C October, 2000 – August, 2002
Southeast Sex Crimes Bureau August, 2002 – January, 2005
Assistant Bureau Chief SE Major Crimes February, 2004 – January, 2005
Bureau Chief SE Major Crimes January, 2005 – November, 2009
Bureau Chief Family Violence Bureau November, 2009 – May, 2011
Sex Crimes Bureau May, 2011 – July, 2013
Charging/Grand Jury/IA July, 2013 – March, 2017
Mentor Preliminary Hearing and Justice Court March, 2017-October, 2017
Assistant Bureau Chief West Valley CBP October, 2017 – December, 2018
Bureau Chief West Valley Trial Bureau – December, 2018 - Present

PRELIMINARY HEARINGS

RULE 5 GRIC CODE §5.151 1

ANGELA ANDREWS

MARICOPA COUNTY ATTORNEY'S OFFICE

OCTOBER, 2020

TIMELINE

In custody defendant: preliminary hearing shall commence not later than **10 days** following defendant's arraignment

Out of custody defendant: preliminary hearing shall commence not later than **30 days** following defendant's arraignment

TIMELINE

- Time may be extended
  - Upon motion of any party
  - On the Court's initiative
  - If delay is indispensable to the interests of justice
  - With a written order
  - Notice to the parties

PURPOSE

- **Purpose:** Determine if there is probable cause to believe Defendant committed a crime.
- **Probable Cause:** reasonable ground to believe that a crime was committed and the defendant is the person who committed the crime. (More likely than not)

NATURE OF THE HEARING

- Shall admit only such evidence as is **material** to the question whether probable cause exists to hold the defendant for trial
- Right to **cross-examine** witnesses and **right to review their previous written statements**
- At the close of the prosecution's case **hearing officer shall state for the record if probable cause has been established**

AMENDING THE COMPLAINT

The **complaint may be amended at any time** to conform to the evidence

- **But:** The court shall not hold the defendant to answer for a crime different from that charged.

- **YOU CAN:** amend the date, a minor change in subsection, a name or simple error.
- **YOU CAN'T:** amend a substantive charge!

- Amendment of Complaint
  - You can amend at any time, however it may be best to do it at the beginning of the hearing.
  - "Your Honor, the State moves to amend the complaint, the date should read December 12, 2004 not December 21, 2004."

DISCLOSURE

- **Initial Disclosure in Felony Cases.** Unless otherwise ordered by the court or provided by local rule, at the arraignment, or at the preliminary hearing, whichever occurs first, **the prosecutor shall make available to the defendant all reports containing items listed in Rule 15.1(b)(3) and (4) that were in the possession of the attorney filing the charge at the time of the filing**.

RULE 15.1 DISCLOSURE

Rule 15.1(b)(3): All **then existing original and supplemental reports** prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged

Rule 15.1(b)(4): The **names and addresses of experts who have personally examined a defendant or any evidence** in the particular case, together with the **results of physical examinations and of scientific tests, experiments or comparisons that have been completed**

DISCLOSURE

- DUTY TO DISCLOSE
  - Police reports
  - Names and addresses of experts and their reports

<u>in the possession of the attorney filing the charge at the time of the filing</u>

PROBABLE CAUSE

Probable cause shall be based on **substantial evidence** which **may be hearsay** in whole or in part in the following forms:

- Written reports of expert witnesses.
- Documentary evidence without foundation if there is substantial basis for believing foundation shall be available at trial and is admissible.
- Testimony of a witness concerning the declarations of another or others where such evidence is cumulative or there is reasonable ground to believe that the declarants will be personally available for trial.

MATERIALS NEEDED

- Make extra copies of the police report
- Bring your statute book and a pad of paper with you to court

- CONDUCT A DONALD HEARING!

EVIDENCE IS LIMITED IN A PRELIMINARY HEARING

- **Not a trial** on the merits
- **Restricted to material issues** as to whether or not probable cause exists to bind the defendant over to Superior Court
- **Purpose of a preliminary examination is not to grant the defendant an opportunity for discovery** but to determine probable cause to hold the defendant.
  - State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975)
- **Cross is limited**!
  - We reject the notion that the defendant be given the opportunity for limitless cross-examination.
    - State v. Williams, 27 Ariz. App 279, 554 P.2d 646 (1976)

SUPPRESSION ISSUES

- Suppression issues should not be addressed in a preliminary hearing.
- They do not apply

SCOPE IS LIMITED IN A PRELIMINARY HEARING

NO *Corpus delicti* in Preliminary Hearings

- State v. Jones, 198 Ariz. 18, 6 P.3d 323 (2000)

Defendant Statements are sufficient to determine Probable Cause!!!

EVIDENCE

Hearsay is Admissible!!!

Hearsay: A statement made out of court, by someone other than the person testifying, offered in evidence to prove the truth of the matter asserted.

- **Hearsay is allowed in a Preliminary Hearing as long as it is <u>reliable</u>!**

RELIABLE HEARSAY

Documentary evidence without foundation where there is a substantial basis for believing foundation will be available at trial

Examples: Orders of Protection, priors, MVD records

Certified Records are self-authenticating

RELIABLE HEARSAY

Testimony of a witness concerning the declarations of another where there is reasonable ground to believe that the declarant will be personally available for trial

Question: How do you show the declarant will be available for trial?

FOUNDATION FOR HEARSAY

Normally a police officer will testify at the Preliminary Hearing

- Officer will need to speak to the witness and establish that they will be available for trial.

PREPARATION

- Subpoena Officer
- Ask Officer if he or she can identify the defendant
- Talk to the Officer about reliable hearsay
- Have the officer contact any witnesses necessary for reliable hearsay

PREPARATION

- Essential elements
  - Date
  - Time
  - Location
  - Jurisdiction
  - Identification
  - Elements of the crime(s)

PREPARATION

- Review the charges in the Direct Complaint
- List the elements of the crimes charged
- How are you going to prove these elements?
  - Read the police report and note what evidence you have to prove each element of the crimes charged

PREPARATION

- *Typically* one of the officers at the scene testifies at the Prelim.
  - Why is this preferable?

- Who decides who testifies?
  - Can officer identify defendant?

PREPARATION

- Officer Witness: Issues
  - Limited time on force
  - Works nights
  - Little time to review report
  - Does not know the potential issues in the case
  - Lack of experience testifying
  - Lack of knowledge of details of report

PREPARATION

- This officer is now giving testimony under oath that can be used later to impeach him!
- Defense will request a video of the hearing and prepare a transcript in preparation for trial

PREPARATION

- Review the police report with your officer
  - Ask him to tell you what happened
  - Tell the officer what you are going to question him about
  - Tell the officer what you are <u>not</u> going to question him about and why
    - "But he's a …"

RELIABLE HEARSAY

- Testimony of a witness where there is reasonable ground to believe that the declarant will be personally available for trial.
  - You will need to establish that other witness(es) are available should the matter go to trial.

DEFENDANT'S STATEMENT

- If you offer a defendant's statement it is a hearsay exception!
  - Admission by Party Opponent.
- If the defense offers a defendant's statement it is hearsay!
  - No exception applies

PREPARATION

- WHAT QUESTIONS TO ASK
  - Keep it Simple:
    - "Why am I asking this question?"
    - A simple prelim like a drug possession case can usually be done in 10 question or less

RELIABLE HEARSAY FOUNDATION

- If you have not established the witness is available for trial, the defense will object for lack of foundation.
  - Establish the foundation right away before you draw the objection
- Tip: Ask what foundation is missing

OFFER OF PROOF

- Made after a finding of Probable Cause
- Defense can make a specific offer of proof including the names of witnesses (including the Defendant) who would testify or produce the evidence offered.
- If it is sufficient to overcome a finding of probable cause:
  - Magistrate shall allow the defendant to present the offered evidence
  - Allow the State to cross-examine those witnesses! (including the defendant should he testify)
  - Should not be merely a question of fact that should go to the jury, it should be sufficient to negate a finding of probable cause!
- What is not an offer of proof?
  - Argument by defense prior to the finding of probable cause.

TIPS

- You freeze… What to do?
  - Ask the court to take a moment
- Before resting review your checklist and complaint
  - Did you satisfy all of the elements of the crime?
- Court will make us prove misdemeanors

PROFESSIONALISM

- Stand when you address the court
- Don't make faces, body movements, noises that can be construed as an attempt to unnerve defense counsel
- Do not coach your witness
  - Do not nod your head in agreement
  - Do not shake your head in disagreement

NOT HELD TO ANSWER?

- "Ooops I forgot…"
  - Ask to briefly reopen
  - Ask to take a brief recess
- If you cannot correct the problem:
  - Case will be dismissed without prejudice
  - Case can be refiled, but should it?
    - Staff case with supervisor

HELD TO ANSWER

- The court shall set the matter for a pretrial hearing

COMMON ISSUES

- Drug Possession
  - Constructive possession?
  - Field test?
    - FT not needed for marijuana
- Aggravated Assault on Officer
- Resisting Arrest
  - Physical force or risk of injury?
- Unlawful Flight
  - Lights and sirens?
  - Did officer lose sight of vehicle

SAMPLE QUESTIONS

- CHARGES:
  - COUNT 1:
  - COUNT 2:

- DEFENDANT_____
- OFFICER/WITNESS_____

SAMPLE QUESTIONS

- FOUNDATION
  - Officer please introduce yourself
    - Name
    - Where do the officer works
    - How long
  - How long have you worked there?
  - Briefly Describe your training and experience as it relates to drugs

SAMPLE QUESTIONS

- JURISDICTION/VENUE
  - Where you on duty on October 11, 2017 at 5:30 in the morning?
  - On that date and time, were you in the area of Solano Park Located at 5625 N. 17th Ave?
  - Is that location in Maricopa County and under the jurisdiction of this court?

SAMPLE QUESTIONS

- ID
  - On (Date) at (Location) did you talk to a person that you now know as (Defendant)?
  - Do you see that person in the courtroom today?
  - Please describe where he's seated and describe what he's wearing
    - "Let the record reflect that the witness has identified the Defendant"

SAMPLE QUESTIONS

- OFFENSE
  - Officer, was a search conducted on the defendant or their vehicle?
  - If searched, what was found?
  - Based on your training and experience, what did you believe the item to be?
  - Was it ever tested to determine whether (the item) was (what officer believed it to be)?
  - Ask this for <u>each item</u>

SAMPLE QUESTIONS

- OFFENSE
  - **Person who conducted the test:**
    - Who conducted the test(s)?
    - Where does (person who conducted the field/lab test) work?
      - (have testifying officer call the field testing officer/lab tech to see if they would be available if subpoenaed)
      - (Ask if officer/lab tech would respond to a subpoena by this court?)
      - (Get results of the test)
    - When was the last time you spoke with (Name)?
    - Did they say whether they would respond to a subpoena issued by this court?
    - Is (Name) certified to conduct drug field/lab tests?

SAMPLE QUESTIONS

- OFFENSE
  - What were the results of the test(s)?
    - If more than one item, go through each one – one at a time
  - Was the (Item) of a usable quantity?
    - If more than one item go through each one – one at a time
- Did you interview the Defendant?
- Did the Defendant make any statements regarding the drugs?

PRESERVING TESTIMONY

- When might you want to preserve testimony?
  - Uncooperative victim (DV)
  - Elderly witness
  - Issues with Grand Jury

QUESTIONS???

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