

TO WAIVE OR NOT TO WAIVE

A look into Preliminary Examinations and when a criminal defendant should or should not waive that right

Under Michigan law, a criminal defendant who is charged with a felony has the right to have a Preliminary Examination at the district court level within 14 days of his first court appearance or arraignment. At a preliminary exam (also known as a “probable cause” hearing), the prosecution has to show that a crime has occurred and it is more likely than not that the criminal defendant committed the crime. Unlike the “beyond all reasonable doubt standard” at trial, the probable cause standard at this stage is very low and as a result, most cases where a preliminary exam is held, is almost always bound over to the circuit court.

A preliminary exam is like a mini version of a trial, absent the jury. The judge assigned to the case will alone decide whether the prosecution has met their burden of proof. The prosecution presents their case first. The defendant has the right to cross examine those witnesses through his attorney and if the defense chooses, can present evidence and witnesses of their own. After all testimony and evidence has been presented, both sides proceed to the argument stage. The prosecution will argue that they have met their burden of proof and will ask the judge to bind the case over to the circuit court. The defense usually argues that the prosecution has not their burden and will ask the judge to dismiss the charges or in the alternative reduce the charges to a misdemeanor which is within the judge’s discretion.

The right to a preliminary exam belongs to the criminal defendant as well as to the prosecution. No one can take that right away. Unless the defendant decides to waive (voluntarily give up that right), then the prosecution must proceed with one and must meet their burden of proof for the case to continue to the circuit court level.

In this article, we are going to discuss some tactical, practical, and strategic reasons as to why and when a criminal defendant should or should not waive his right to his preliminary exam.

When and Why a Criminal Defendant Should Waive His Right to a Preliminary Exam

- Defendant intends on pleading guilty. The prosecution’s case is so strong that pleading guilty will save unnecessary time and expense, especially if the defendant is represented by private counsel.
- If the defendant believes that the witnesses against him are likely to not show at trial or if they would refuse to testify at trial. This creates a problem for the prosecution because if they proceed to trial, there is no prior testimony on the record which means that the case is likely to get dismissed.

- If the testimony is likely to bring out facts that could lead to the defendant being charged with either additional crimes or a worse crime than the one he is currently charged with.
- If the defendant intends on pleading guilty anyway, this alleviates the problem of “nasty facts” on the record for the judge to consider at the time of sentencing.

When and Why a Criminal Defendant Should Not Waive His Right to a Preliminary Exam

- If the defendant believes that the prosecution’s case is weak, then he should run the exam to expose the prosecution’s weak spots regarding credibility or perception. This may reduce to a reduction or dismissal in the charges.
- The preliminary exam will allow testimony to be placed on the record which can later be used at trial to impeach a witness. This should especially be used when the defense believes that a particular witness has credibility problems or is likely to change their testimony or lie at trial.
- The preliminary exam gives the defense a chance to see how certain witnesses act on the stand and perform under pressure.
- It will allow for testimony to be placed on the record which can later be used at evidentiary hearings or suppression motions.
- If the prosecution doesn’t offer a plea deal or at least a good one, the defendant might as well run the exam unless one of the situations exists as to why he shouldn’t. The defendant’s right to a preliminary exam is an important one, and like all other rights, should not be given up unless there is a really good reason to do so. If the defendant waives his right to a preliminary exam, he better be getting something really good in return for it.
- If the witnesses or victims are likely not to show for the preliminary exam, then the defendant should keep the preliminary exam date on because if they do not show, the defense can get a dismissal.

Other reasons may or may not exist for waiving or not waiving your right to a preliminary exam. The decision is too important to be made on your own. Never make such a decision about waiving any of your rights without first consulting with an attorney.

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