An Overview of the Preliminary Hearing in Oklahoma

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AN OVERVIEW OF THE PRELIMINARY HEARING IN OKLAHOMA

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Introduction

This article provides a guide to Oklahoma attorneys for analyzing the several issues that arise at a preliminary hearing in a criminal trial. The selection of a "stage" in the criminal process, rather than a particular legal issue, is done for two reasons. The first reason is that a criminal trial proceeds in stages. Therefore, from a procedural standpoint, it is simply more convenient, without sacrificing accuracy, to develop an analytical overview of a particular stage. Second, such an overview allows the presentation of a broader range of the legal issues that are important at that point in the criminal proceedings. The reader will undoubtedly gain a more knowledgeable appreciation of the entire problem if he uses the article as an adjunct to his current experience and expertise.

A successful presentation by an attorney at a preliminary hearing must usually include more than a routine performance over the probable cause issue. One should realistically assess the amount and quality of evidence that is desirable to produce and also set realistic goals that are to be accomplished at this stage. Neither of the above standards can be successfully attained without a precise knowledge of the legal errors that can occur at this early stage. This article attempts to isolate and analyze the most prevalent of these issues to ensure that an accused receives the highest form of professional representation.

Functions and Purposes

Screening

In Oklahoma the preliminary hearing immediately follows the initial appearance of the defendant. The hearing is held before a magistrate of the state who determines whether probable cause exists to bind the defendant over for trial. The inquiry traditionally consists of two parts: (1) "whether the

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1. The following persons are magistrates under Oklahoma law: justices of the Oklahoma Supreme Court, judges of the Court of Criminal Appeals, judges of the court of appeals, and judges of the district court (including associate district judges and special judges). 22 Okla. Stat. § 162 (1981).
crime charged has been committed, and (2) whether there is probable cause to believe the accused committed it."

The hearing's primary function is to screen out those cases that are unsupported by the evidentiary standard of probable cause. Although the prosecution conducts its own screening process, the preliminary hearing has been construed as a "right given by the Bill of Rights for benefit of the defendant." The Court of Criminal Appeals has characterized the purpose of the preliminary hearing as being to prevent "a person from becoming the victim of an unjust and malicious prosecution." The hearing is "a most important part of our system of Jurisprudence," and "is always . . . conducted for the benefit of the accused."

Discovery

Few courts explicitly sanction the use of the preliminary hearing as a discovery process, but, as a practical matter, the discovery materials produced during the hearing may prove crucial to the defendant's selection of an appropriate defense or decision to plead guilty. In the majority of cases, the prosecutor will be able to demonstrate a prima facie case of probable cause linking the defendant to the crime charged. Cross-examination by the defense counsel will rarely destroy this proof. Consequently, most attorneys seek to stretch the limits of their cross-examination to areas relating to the hearing issues, but which were not expressly mentioned by the prosecution's witnesses. Such cross-examination strategy can prove to be the most reliable method for discovering the weaker aspects of the state's case.

Impeachment

The preliminary hearing also serves as a basis for the official recording of the testimony of the state's witnesses. This allows the defense the opportunity to review and analyze testimony at an early point, maximizing the possibility of impeachment at trial. The scope of allowed cross-examination will ultimately depend upon the trial court's discretion. While broad latitude has been the official policy, many judges move to terminate the cross-examination when it turns into a fishing expedition for facts unrelated to the establishment of probable cause. The extent of cross-examination will also depend upon the strategical choice of the defense counsel in risking exposure of the state's weaker points well before trial.

4. Id.
5. Id.
6. Id.
7. The Court of Criminal Appeals expressly recognized this purpose in Beaird v. Ramey. "Next, it is a procedure whereby defendant may discover what testimony is to be used against him at trial." Id.
8. Id.
Motion Practice

The hearing necessary for a motion to suppress evidence may be combined with the preliminary hearing. The Court of Criminal Appeals has long urged defense attorneys to file such motions at the earliest possible time in order to avoid waiver problems. An attorney may choose to delay the filing of such motions if he intends to further analyze the preliminary hearing testimony, or if he simply has not heard the story surrounding the arrest or search from anyone except his client. Such a delay may be advisable if it is perceived that the trial judge would be a more receptive and sympathetic audience than the examining magistrate.

Case law in this area is sparse, but it is established that an examining magistrate has a duty to rule on a properly filed motion to suppress.

We are of the opinion that filing the Motion to Suppress prior to the preliminary hearing would be the better practice, however, failure to do so does not bar a defendant from raising the issue of illegal search and seizure at such time as a question of same develops [sic] during the preliminary examination. We further conclude that if the question of illegal search and seizure is raised at the preliminary examination, the examining magistrate not only has the authority but the duty to hear and rule on the Motion to Suppress.

This duty may be set out in law, but the Court of Criminal Appeals has upheld the refusal of a magistrate to rule on such a motion by finding that no prejudice to the defendant occurred when the motion was heard by the trial court in due course. Since the defendant has the responsibility of seeing that his motion is heard, his failure to timely re-urge his motion before the trial court will constitute a waiver.

A Brady motion, demanding the disclosure of exculpatory evidence, should not be filed and heard at the preliminary hearing. In State v. Benson, the Court of Criminal Appeals held that a magistrate was not empowered to require the state to turn over exculpatory evidence within its possession.

Generally speaking, the duties of a Magistrate are to preside over and conduct the preliminary examination, and determine if a crime has been committed and if there is probable cause to hold the defendant for trial. The Magistrate, does not possess the authority vested in a district judge after the defendant has been bound over or "held" for trial.

13. Id. at 909. See also Stafford v. District Court, 595 P.2d 797 (Okla. Crim. App. 1979).
Thus, apart from Benson, the decision of when to file a motion to suppress does not turn on the requirements of the law, but rather local practice and tactical decisions made by the defense counsel.

**Perpetuation of Testimony**

Evidence produced at the preliminary hearing may be introduced during the criminal trial as an exception to the hearsay rule.\(^\text{14}\) This typically occurs when a witness is unavailable, despite the due diligence of counsel in attempting to secure his attendance at trial. The admission of preliminary hearing testimony is a matter for the sound discretion of the trial court.\(^\text{15}\) The limitations on the exercise of such discretion have been articulated as follows:

[T]hat the testimony was taken down by a reporter in the presence of the defendant and his counsel, who cross-examined him; that the testimony was filed with the clerk; that a proper predicate is laid for the introduction of such testimony, by showing the exercise of due diligence in attempting to locate the missing witness; and, that due diligence has been exercised in an effort to produce the witness, by timely issuance and service of subpoena. In the absence of such showing, the transcript of previous testimony should be denied by the trial court.\(^\text{16}\)

The major legal issue involved in the admission of prior testimony is whether it violates the defendant’s right of confrontation under the sixth amendment to the United States Constitution.\(^\text{17}\) In California v. Green,\(^\text{18}\) the United States Supreme Court outlined the fundamental considerations in admitting such testimony over the defendant’s objection that it violates his right to confrontation.

We also think that [the] preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. [The] statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. [The] witness was under oath; respondent was represented by counsel . . . [and] . . . had every opportunity to cross-examine [the witness] as to his statement. . . . [The] respondent’s counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness. [T]he right of cross-examination then afforded provides substantial compliance with

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17. “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” U.S. Const. amend. VI.
the purposes behind the confrontation requirement, as long as the declarant’s inability to give live testimony is in no way the fault of the State. 19

The Oklahoma Court of Criminal Appeals follows these guidelines by requiring that the prosecution establish: (1) the actual unavailability of the witness; (2) the demonstration of good faith and due diligence in attempting to secure the presence of the witness; and (3) sufficient indicia of reliability in the prior testimony so as to afford the trier of fact a satisfactory basis for evaluating its truth. 20

Due Diligence. The requirements of due diligence and good faith have been the most litigated elements of the rules regarding the admission of prior testimony. For example, in Smith v. State, 21 the Court of Criminal Appeals found that a lack of due diligence was present when the state merely served two out-of-county subpoenas on a witness located outside the state. The court held that the failure to utilize the procedures of the Uniform Act to Secure the Attendance of Witnesses 22 fell below “the required constitutional good faith effort.” 23 The court went on to note that some cases seem to indicate that the state must exhaust “all available means” to secure the attendance of the witness. 24

“Due diligence” is an obvious temporal consideration that requires the state to begin its search reasonably in advance of the trial date. In Newton v. State, 25 the court held that the prior trial testimony was improperly read at a second trial because the prosecution’s first efforts to serve a subpoena on a witness occurred only six days before the trial. This action was characterized by the court as a “last-minute activity,” and it said that a “search for [a] witness . . . at the last minute . . . is not due diligence.” 26

Unavailability. There must also be a showing that the witness is in fact unavailable and not simply inconveniently located outside the court’s jurisdiction. In In re Bishop, 27 the Court of Criminal Appeals’ opinion emphasized the importance of this requirement where the state did not make diligent efforts to secure the attendance of a witness who was incarcerated in a federal penitentiary. The state contended that there was no violation of the defendant’s right of confrontation because he had exercised his right of cross-examination at the preliminary hearing. The court correctly noted that the nature of the preliminary hearing does not include the same searching exploration into a multitude of issues, but rather focuses on the narrow ques-

19. Id. at 165-66.
21. Id.
23. 546 P.2d at 272.
24. Id. at n.3.
26. Id. at 916.
tion of probable cause. Thus, while the cross-examination may satisfy the requirements of the sixth amendment's confrontation clause, it does not automatically satisfy the constitutional requisite. This possible inequity supports the strict requirement that a witness must truly be unavailable.28

The applicable statute controlling the procedures of transcribing the testimony requires that it be reduced to writing and "filed with the clerk of the district court, by the examining magistrate."29 In a recent decision,30 the Court of Criminal Appeals reaffirmed that this language was not mandatory and that a transcript could be admissible as evidence if not filed, if it was otherwise competent and material.31 This rule notwithstanding, such practice may give rise to suspicions regarding the custody or accuracy of the transcript, and the admission should be vigorously opposed by defense counsel by specifically pointing out any questionable portions of the transcript.

Electronic Recording. In some instances, the defense counsel may desire to electronically record the testimony so he can maintain his own record for later comparison. In such event, he must apply to the examining magistrate for permission.32 The magistrate may grant such a request, but must clearly indicate that the recording "shall not be considered an official record" of the proceedings.33 Although the Court of Criminal Appeals has held that the defendant's recording "shall not be used to challenge the official record after it has been verified by the parties and filed with the district court clerk,"34 the recording may be used to challenge the accuracy of the court reporter at any time prior to the occurrence of those events. In addition, such a recording is more economical and accurately reflects any hesitation or inflection patterns that may prove to be analytically useful in preparing for cross-examination.

Defendant's Right to a Preliminary Hearing

In General

The defendant's right to a preliminary hearing emanates from the Oklahoma constitution: "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination."35 There is no federal constitutional right to a preliminary hearing.36 Since Oklahoma has bestowed the right to each defendant charged by information, the sixth amendment right

33. Id. at 717.
34. Id.
to counsel attaches because such a hearing has been held to constitute a "critical stage" where counsel is required "to preserve the defendant's right to a fair trial." The Oklahoma law further provides that a defendant has a right to a preliminary hearing after being indicted by a grand jury. The court has held that a prosecutor may not circumvent the judicial process by presenting the same evidence to a grand jury for an indictment where a magistrate has already dismissed an information in the same case at a prior preliminary hearing.

In a per curiam opinion of the Court of Criminal Appeals in Arnold v. District Court, it was determined that the state could prevent the defendant from waiving his right to a preliminary hearing by asserting its corollary right to have the hearing. Such a situation may benefit the state both by recording the testimony of some of its witnesses and by assuring that the jailed defendant remains incarcerated for an extended length of time. The court was unable to explain its unprincipled decision, except by reference to prior case law. If such a tactic is used by the state to keep a defendant incarcerated while continuing the probable cause hearing, it should provide him with an adequate basis for requesting a writ of mandamus to proceed to trial, or a writ of habeas corpus. At any rate, the right to a preliminary hearing is a personal right of the defendant's, created to guard against prosecutorial abuse of prosecution.42

Waiver

The problems surrounding waiver arise in several different issues in the context of a preliminary hearing. The most obvious situation is where the defendant voluntarily and knowingly waives his right to the hearing in open court. This occurs when he believes that there is no reason to dispute the probable cause issue and wishes to plead guilty or proceed to trial. This type of waiver is explicitly provided for in the state constitution and state statutes. It must conform with the constitutional requirements in waiver cases.

41. The state may have an independent interest in determining the existence of probable cause, but no such reason was offered by the court.
42. 462 P.2d at 336 (Nix, J., dissenting).
43. Okla. Const. art. II, § 17 provides that:
    No person shall be prosecuted criminally in courts of record for felony or misde-meanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint.
44. When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had. 22 Okla. Stat. § 251 (1981).
The actions of the defendant or defense counsel at the preliminary hearing may be construed as a waiver to certain irregularities if no specific objection is entered. In a case where the prosecution was allowed to amend the information at the preliminary hearing in order to reflect that the defendant was being bound over as a previously convicted felon, the court found that the assistance of the defense counsel in helping to explain the second page of the information contributed to the finding of a waiver of any error in the bindover determination. 46

Motion to Quash. The failure to file a motion to quash will constitute a waiver of any error occurring at the preliminary hearing. Though the state is required to prove the existence of any former convictions at the preliminary hearing, 47 it may be excused from this duty when the defendant proceeds to trial without filing a motion to quash the information. 48 There is further authority indicating that the entering of a plea to the information at the arraignment stage constitutes a waiver of any errors in the information. 49 In many counties, the preliminary hearing is immediately followed by the arraignment, which allows the defense counsel little time to draft, brief, and argue a motion to quash. The better practice in such a situation is to first reserve the right to file a motion to quash and then enter a plea. If the trial court refuses to recognize the attorney's reservation, the defendant should demand his mandatory 24-hour delay before entering his plea. 50

Waiver of Counsel. The waiver of counsel at a preliminary hearing is a formal procedure and will not be presumed from a silent record. In Rankin v. State, 51 the prosecutor at the preliminary hearing read into the record the fact that the defendants, one month earlier, represented that they did not wish to have appointed counsel. 52 Although the defendants did not object at the preliminary hearing, the Court of Criminal Appeals reversed because no waiver of counsel was sufficiently shown. 53 The trial court's duty in this situation is to "direct the cause back for a proper preliminary hearing." 54

Notice Problems

Former Conviction. Directly related to the waiver issue is the notice requirement involving proof of a former conviction. The state must offer proof

50. 22 Okla. STAT. § 491 (1981) provides that: "If, on the arraignment, the defendant requires it, he must be allowed until the next day, or such further time may be allowed him as the court may deem reasonable, to answer the indictment or information."
52. Id. at 643.
53. Id. at 644.
54. Id. at 645.
of a former conviction during the preliminary hearing if it intends to seek enhanced punishment.\textsuperscript{55} The notice component of due process requires that the defendant be informed of the facts of the offense for which the state intends to try him. In \textit{Carter v. State},\textsuperscript{56} the Court of Criminal Appeals held that:

We are of the opinion that when the statute imposes a higher penalty on a convict because of previous conviction, the former conviction forms an essential element to be set forth in the information so the accused may be fully informed as to the offense intended to be punished. The prior offense enters into the immediate charge forming the basis of the prosecution calling for enhanced punishment and the two cannot logically be separately considered in the preliminary complaint and the information. Hence, our conclusion the accused is entitled to be informed of such matters, in the preliminary complaint, before he can intelligently determine the disposition he should make of his constitutional and statutory rights.\textsuperscript{57}

In the event the prosecution attempts to try the defendant on an amended information after failing to offer proof of a former conviction, the defense counsel \textit{must} interpose a motion to quash that portion of the amended information that relates to the enhanced punishment, or be deemed to have waived it.

\textit{Death Penalty}. The above rule is not applicable to pleadings involving enhanced punishment in death penalty cases. In \textit{Johnson v. State},\textsuperscript{58} the issue raised was whether the defendant was entitled, by the authority of \textit{Carter}, to a preliminary hearing on a bill of particulars. In finding that no such right exists, the court distinguished between the functions of pleading a former conviction and filing a bill of particulars. The function of the latter instrument is thought to provide all necessary notice because it will only be deemed admissible if it was "made known to the defendant prior to his trial."\textsuperscript{59}

\textit{The Bindover Determination}

\textit{Standard}

The examining magistrate who presides over a preliminary hearing has the general duty to determine whether a "public offense" has been committed and whether "there is sufficient cause to believe the defendant [is] guilty."\textsuperscript{60} If the magistrate finds sufficient (probable) cause to believe the defendant committed the crime, he must order the defendant bound over for trial.

\textsuperscript{56} \textit{Id}.
\textsuperscript{57} \textit{Id.} at 440.
\textsuperscript{58} 665 P.2d 815 (Okla. Crim. App. 1982).
\textsuperscript{60} 22 \textsc{Okla. Stat.} § 264 (1981 & Supp. 1985).
The level of evidence required for a bindover is less than that required for a finding of guilty on the charges. The applicable standard is simply probable cause, not guilt beyond a reasonable doubt. There is also a judicial presumption that the state will present more evidence at the trial and strengthen its case beyond the probable cause demonstrated at the preliminary hearing.

In general, the state will usually put on the minimum amount of evidence at the preliminary hearing in order to avoid a wholesale discovery of its case by the defense. Thus, relevant and necessary evidence for establishing a conviction may be permissibly withheld by the state and there will be no denial of a fair trial to the defendant.

In addition to the relaxed proof requirements of a bindover, the court has construed the requirement of having independent corroboration in addition to accomplice testimony to be inapplicable to the bindover determination. Arguably, this decision misses the point about the screening process. If the purpose of the hearing is to examine the state's proof through a judicial officer, the lowest possible probable cause standard acceptable should be that of arrest. The testimony of an accomplice must be examined under the "totality of circumstances" rule set forth in Illinois v. Gates before assessing the sufficiency of the evidence.

Dismissal

In the event the state fails to establish the requisite probable cause, the magistrate will order the case dismissed. Upon a dismissal, the state has two choices: (1) refiling the case, or (2) pursuing a direct appeal.

Refiling. Since double jeopardy is not implicated in the dismissal of a case at the preliminary stage, the state has a limited right to refile the information on the same offense. The first limitation was expressed in Jones v. State and required the state to come forward with new evidence.

Therefore, when a magistrate at a preliminary examination rules the evidence insufficient to hold the defendant for trial, neither that magistrate nor any other magistrate should entertain another filing against the same defendant for the same offense unless the State makes an offer of additional evidence or proves other good cause to justify another preliminary examination. Additional or new evidence does not mean that which was known to the State.

at the time of the first preliminary or which could have been easily acquired.68

In addition, the magistrate is not to regard the refiling as one of "first impression [because] a prior dismissal is binding and final until overcome by additional evidence."69

The second major limitation established by case law is that the prosecution may not forum shop for a more sympathetic magistrate before whom it can present its evidence again. The refiling must be with the same magistrate who initially dismissed the case.70 If the first magistrate is absent, the case may be refiled with another one if the state sets forth the dismissed case number, the date of dismissal, the magistrate who dismissed the charge, and the additional evidence or good cause to be offered.71

Direct Appeal. Recent promulgations in the rules of the Court of Criminal Appeals have provided a method of direct appeal from the adverse ruling of an examining magistrate.72 This right of appeal covers orders that sustain a motion to suppress evidence, or quash an information, or discharge defendants because of insufficient probable cause showings.73 The state must "[a]t the time the adverse ruling is made . . . give notice of its intention to appeal the decision."74 During the limited time frame of the appeal, the magistrate must continue the case and retain the defendant on his present bond or return him to custody.75 Upon a successful appeal by the state, the reviewing judge shall remand the cause to the magistrate with directions to enter a proper order.76 If the state receives an adverse ruling from the reviewing judge, it may file an appeal with the Court of Criminal Appeals, but the defendant is entitled to be released on his own recognizance.77

68. Id. at 171.
69. Id. at 172. See also Morrison v. State, 529 P.2d 518 (Okl. Crim. App. 1974) (no hearing required for additional evidence if the refiled information is for a misdemeanor).
70. 481 P.2d at 171.
71. Id. at 171-72; Harper v. District Court, 484 P.2d 891, 897 (Okl. Crim. App. 1971).
72. OKLA. C.R. CRIM. APP. § 6, 22 OKLA. STAT. ch. 18, app. (1981) provides that:

The State of Oklahoma, by and through the district attorney or Attorney General, shall have the right to appeal an adverse ruling or order of a magistrate sustaining a motion to suppress evidence, quashing an information, sustaining a plea to the jurisdiction or a demurrer to the information, or an order discharging a defendant at the preliminary examination because of insufficiency of the evidence to establish either that a crime has been committed or that there is probable cause to believe that the accused has committed a felony.

73. Id. (preamble).
74. Id. at 6.1.
75. Id.
76. Id. at 6.5.
77. In the event the state's application is denied and the district court affirms the magistrate's ruling or order, that ruling or order shall become final; however, the state shall have the right to appeal from that final order to the Court of Criminal Appeals in the manner provided for an appeal by the state; PROVIDED that during the pendency of the appeal by the state, the district judge or associate district judge must admit the defendant to bail on his own recognizance. Because jeopardy
If the state fails to perfect its right of appeal under rule VI, the magistrate's order shall be deemed final for appeal purposes. Such waiver of appellate rights does not have an adverse effect on the state's right to refile the charge under the Jones limitations. Each method is viewed as a separate and independent procedure.

Preliminary Hearing Procedures

Rules of Evidence and Cross-Examination

The application of the rules of evidence at a preliminary hearing rests within the sound discretion of the trial court. Great variance between individual courts should be expected. The governing rule is that a strict application of the evidence rules is unwarranted. This is best understood when envisioning the proceeding as one would if investigating the probable cause question. Hear-say and other types of unreliable evidence may permissibly go into the consideration of probable cause, but they may ultimately be declared inadmissible at trial. Since the probable cause standard at the preliminary hearing should approximate the same level as that required for issuing an arrest warrant, prosecutors will make recourse to some of the same sources of evidence.

Since there is such a wide latitude of discretion with respect to the admission of evidence, defense counsel should object to any rulings that do not follow the rules of evidence; without an objection, any possible error will be waived. Furthermore, some inadmissible evidence may be deemed inherently untrustworthy and should play no part in a judicial proceeding.

The Court of Criminal Appeals has expressed a preference for allowing the defendant great latitude in exercising his right of cross-examination. The issue most frequently arising in cross-examining the state's witnesses is whether the defense counsel can use the event to discover the prosecution's case. There is no general, recognized right to discovery at the preliminary hearing. However, discovery is possible provided that the general line of questioning is directed toward the probable cause for linking the defendant to the crime committed. Therefore, great attention should be paid to routine details such as the precise moment of arrest, the nature of the search prior to the arrest, and the descriptions given by the witnesses. Often, a probing and exacting cross-examination will yield valuable impeachment evidence for the trial.

Witnesses

The prosecutor is required by statute to "endorse . . . the names and last-
known addresses of all the witnesses known to him at the time of filing" the information if he intends to call them at the preliminary hearing. This requirement may be excused by the district court if the prosecution invokes the procedure concerning witness protection or preservation of evidence. The requirement does not apply to the state's rebuttal witnesses. The trial court may allow an additional witness name to be endorsed during the trial. In such a situation, the defendant should claim surprise and withdraw his announcement of ready for trial and file a motion for continuance.

The defendant has an explicit right to call witnesses in his behalf. Normally, the defendant will not choose to call witnesses at the preliminary hearing in order to protect their testimony at trial. However, the refusal of the magistrate to hear defense witnesses on the proper issues at the preliminary hearing is clearly error. In Beaird v. Ramey, the Court of Criminal Appeals required the examining magistrate to assess the competence and relevance of the defense witness' testimony while he testified instead of preemptorily excluding him from the stand.

Since the hearing is conducted for benefit of an accused, he should be given broad latitude in the cross-examination of State's witnesses and in producing evidence that would tend to obtain defendant's release, or that which would be material or relevant. It appears to your writer that it would create a most difficult task for the magistrate to pass on the materiality or relevancy of the testimony of a witness without first hearing said witness and then pass upon any objection by the State as to its competency.

Preserving the Defendant's Objections

Bindover Determination. The defendant has the right to appeal the magistrate's decision to bind him over for trial. The identical issue, usually regarding the sufficiency of probable cause, should be presented to the district judge or associate district judge through a motion to quash the information. The legal issue on appeal is whether the magistrate has abused his discretion. If there exists competent evidence to support the bindover decision, the reviewing court will affirm the decision of the examining magistrate.

84. Id.
87. Id. at 291.
88. "At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him. He must, also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant." 22 Okla. Stat. § 257 (1981).
90. Id. at 589-90.
Motion for Continuance. The state may come to the realization during the preliminary hearing that its testimony will probably be insufficient to establish probable cause. The state may then move for a continuance in order to call more witnesses. The defendant must object to the motion for continuance in order to preserve his speedy trial rights. The Court of Criminal Appeals has outlined the applicable standard in Harper v. District Court:

[I]n the event the prosecutor miscalculates and fails to present sufficient evidence to show probable cause to bind over the accused, but possesses other witnesses whose testimony would strengthen his showing, it is clearly within the discretion of the examining magistrate to grant the state a continuance for that purpose. However, it is presumed that the additional witnesses, or other evidence, are reasonably available; and that a continuance will not be sought in order to conduct further investigation seeking that evidence, in a dilatory manner.

Although the court expressed that such a decision is within the discretion of the magistrate, the quoted portion also seems to indicate that the state has the burden to show that the witnesses are reasonably available and that the purpose of the continuance is not to further investigate the case for new witnesses or evidence.

Amendments to the Information. If the state amends the information at the preliminary hearing, the defendant must object in order to preserve any issue for appeal. If additional charges are added to the information, the defendant should claim surprise and move for a continuance in order to prepare for the new issues raised. If new witnesses are endorsed on the information, the defendant should move for a continuance for the purposes of interviewing the witnesses. This type of continuance was cited with approval in Coffer v. State.

If the amendment to the information is filed after the preliminary hearing, but before the arraignment, the defendant must not enter a plea at the arraignment. Any plea will have the effect of waiving any irregularity in the preliminary hearing. The proper procedure is to file a motion to quash, or alternatively, move to remand the case for another preliminary hearing.

Transcripts of the Preliminary Hearing

The defendant has a right to a transcript of the preliminary hearing. If the defendant is indigent, the state will furnish a transcript at its own ex-

95. Id. at 897 (emphasis added).
96. Id.
pense.\textsuperscript{101} This right is not absolute and may be waived expressly, through oversight, or through neglect. The failure to request a court reporter is the most obvious method by which waiver of the transcript occurs.\textsuperscript{102}

The defendant must exercise due diligence in requesting a copy of the transcript. A request for a transcript of a suppression hearing has been held to be lacking in due diligence because it was filed on the morning of the scheduled trial date.\textsuperscript{103} The request must be filed "far enough in advance of trial to give [the] State [a] reasonable amount of time to transcribe the minutes and avoid [the] necessity of suspending trial pending production of the transcript."\textsuperscript{104}

The other limitation on the right to receive a transcript arises from the availability of other sources containing the testimony. Case law indicates that if a trial court allows a defendant to use the tapes of the court reporter it will have provided an acceptable alternative to an actual written transcript.\textsuperscript{105} Where the defendant has not exercised due diligence in requesting the transcript or in seeing that his motion to request one is heard, a showing of actual prejudice from the unavailability of the transcript must be shown on appeal to constitute error.\textsuperscript{106}

\textit{Conclusion}

An attorney should be thoroughly prepared before participating in a preliminary hearing in Oklahoma. While the majority of these hearings are conducted as routine matters with a minimal showing of probable cause, case law has demonstrated repeatedly that crucial errors of judgment and omission by attorneys occur at the preliminary hearing. Perhaps the most troublesome aspect of these errors is the wide variety of legal issues that are implicated at such an early stage of the proceedings. The possibility of waiving objections to an information, failing to assert the right to counsel, and omitting to preserve one's right to speedy trial demonstrate the wide spectrum of legal matters affected.

A majority of defense attorneys continue to emphasize the discovery function by cross-examining the state's witnesses in an attempt to expose weaknesses in the state's case. In addition to performing that role, those attorneys must be aware that a host of unrelated or unforeseen issues may develop at this stage of the proceedings. In many cases solutions to these problems either will escape the attorney's notice or will be waived by taking imprecise action. The tone of a preliminary hearing is usually more routine, but an attorney representing an accused must not be lulled to believe that it is simply "business

as usual." The hearing remains an adversarial stage, and only a vigorous assertion of the defendant’s rights, coupled with complete preparation by the defense attorney, will provide the necessary protection for the accused.