

Legislative Analysis



PROBABLE CAUSE CONFERENCE/PRELIMINARY EXAM REVISIONS

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House Bill 5154 (Substitute H-1)
Sponsor: Rep. Tom Leonard

House Bill 5155 without amendment
Sponsor: Rep. John Walsh

Committee: Judiciary
Complete to 2-18-14

A SUMMARY OF HOUSE BILLS 5154-5155 AS REPORTED BY COMMITTEE 2-13-14

Brief Summary:

House Bill 5154 would, among other things, revise the procedure for a preliminary examination in a criminal proceeding and add a probable cause conference. In brief, the bill would:

- Require a probable cause conference to be held after the initial arraignment but before the preliminary examination.
- Allow a defendant to waive a preliminary examination with the consent of the prosecution.
- Allow an expedited preliminary examination at a prosecutor's request for the sole purpose of taking and preserving the victim's testimony if the victim is present.
- Eliminate a reference to Section 2167 of the RJA pertaining to the use of video or voice equipment to take testimony of certain expert witnesses and technicians at a preliminary examination. It would be replaced by provisions in the Code of Criminal Procedure to expand the categories of witnesses for which testimony at a preliminary examination may be given through the use of telephonic, voice, or video conferencing; require the testimony to be given by the telecommunication equipment upon motion of either party; provide that testimony given by video conference be admissible in a subsequent trial or hearing; and expand the exemption to the hearsay rule to allow certain documents as admissible at a preliminary examination.
- Allow a prosecutor or defense attorney to subpoena and call a witness from whom hearsay testimony was introduced in the preliminary hearing under the above provision on a showing of the relevance of the live testimony in determining probable cause that a felony had been committed and that the defendant committed the felony.

- Allow a magistrate to reduce a felony charge to a misdemeanor charge if, after the preliminary examination, it was determined that a felony had not been committed or there was not probable cause to charge a felony. As is currently allowed, the magistrate could also discharge the defendant.
- Allow a magistrate to conduct the circuit court arraignment for a felony charge.

House Bill 5155 would, among other things, revise the jurisdiction of a district court and the duties of a district court magistrate. Briefly, the bill would:

- Expand the jurisdiction of a district court to include probable cause conferences in all criminal cases not cognizable by the district court as well as matters allowed at the probable cause conference under House Bill 5154; to include all matters allowed under Chapter VI of the Code of Criminal Procedure; and to include circuit court arraignments in all criminal cases not cognizable by the district court. (Sentencing for those cases would be conducted by a circuit judge.)
- Revise the duties of a magistrate to include conducting probable cause conferences and clarify that certain duties could be authorized by a chief judge.
- Repeal Section 2167 regarding the use of video or voice equipment to take testimony of certain expert witnesses and technicians at a preliminary examination.

The bills are tie-barred to each other, meaning that both bills would need to be enacted before either could take effect.

Detailed Summary:

House Bill 5154 amends Chapter VI (Examinations of Offenders) of the Code of Criminal Procedure (MCL 766.4 et al.) to, among other things, create a probable cause conference.

Probable cause conference

A date for a probable cause conference would be set by a magistrate when a person was arraigned on a felony charge. It would have to be held not less than 7 days or more than 14 days after arraignment. At the same time, a date for the preliminary examination would have to be set; that date must be not less than 5 days or more than 7 after the probable cause conference. (Currently, unless waived by the prosecution and defense, a preliminary examination cannot be more than 14 days after arraignment; under the bill, depending on when the probable cause conference was scheduled, the preliminary examination could be scheduled up to 21 days after arraignment.)

The probable cause conference would have to include the following:

- ❖ Discussions as to a possible plea agreement among the prosecuting attorney, defendant, and the defendant's attorney.
- ❖ Discussions regarding bail and the opportunity to petition for a bond modification.

- ❖ Discussions regarding stipulations and procedural aspects of the case.
- ❖ Discussions regarding any other matters relevant to the case as agreed upon by both parties.

The probable cause conference could be waived by agreement of the parties, and the parties would have to notify the court of the waiver agreement and whether they will be conducting a preliminary examination, waiving it, or entering a plea.

Pleas and sentencing

Under the bill, a district judge would have the authority to accept a felony plea. If a plea agreement is reached, a district judge would take a plea to a misdemeanor or felony as provided by court rule. However, sentencing for a felony would be conducted by a circuit judge. The sentencing judge would be assigned and the judge's name made available to the litigants, pursuant to court rule, before the plea is taken.

Preliminary examination

A preliminary examination would be held as scheduled unless a plea agreement were reached, the examination waived by the defendant with the consent of the prosecuting attorney, or adjourned or waived as provided in Section 7 of Chapter VI. The examination could be scheduled earlier than 5 days after the probable cause conference if the parties agreed and the court approved.

Upon request by the prosecuting attorney, the preliminary examination would have to begin immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. The bill would define "victim" to mean that term as defined in the William Van Regenmorter Crime Victim's Rights Act. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the magistrate would have to adjourn the examination to the date set at arraignment. A victim who testifies under this provision could not be called again to testify at the adjourned preliminary examination absent a showing of good cause.

The bill also provides a method for consolidating felony cases involving defendants and codefendants so that only one joint conference or one joint preliminary examination would be held (unless a severance is granted or a defendant is unavailable and does not appear at the hearing).

The bill would also specify that the defendant could waive the preliminary examination with the consent of the prosecuting attorney. A magistrate could adjourn, continue, or delay an examination for good cause shown without the consent of the defendant or prosecutor. A magistrate could also adjourn, continue, or delay the examination of any cause with the consent of the parties; currently, the act specifies the magistrate cannot adjourn, continue, or delay the examination of any cause by the consent of the parties unless in his discretion it shall clearly appear by a sufficient showing to the magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of the cause cannot then be had, or a manifest injustice will be done (this language would be eliminated).

Testimony at a preliminary examination

Currently, a magistrate must examine the complainant and the prosecution witnesses on oath and in the presence of the defendant. An exception is allowed under provisions of Section 2167 of the Revised Judicature Act. Section 2167 allows a Michigan Department of State Police technician to submit a written report of his or her findings in lieu of appearing at the hearing. The defendant may request the technician to appear at the hearing, but this may be done by video or two-way voice communication equipment. If suitable equipment is not available, the technician must testify in person. Upon good cause shown, a court must allow a forensic pathologist or medical examiner to also provide testimony by video or two-way voice communication, if motioned by the prosecutor.

The reference to Section 2167 of the RJA would be eliminated. Instead, the bill would reference Sections 11a and 11b of the code. Section 11a would be revised to require a magistrate to permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephone or video conferencing. (Currently, this provision allows a magistrate to permit the testimony of an expert witness or, upon a showing of good cause, any witness via phone or video conferencing.)

Testimony taken above by video conferencing would be admissible in any subsequent trial or hearing as otherwise permitted by law.

Hearsay evidence presented at a preliminary examination

Currently, Section 11b specifies that evidence of the results of properly performed drug analysis field testing is admissible in a preliminary examination solely to establish that the substance tested is a controlled substance, and is sufficient to establish that the substance tested is a controlled substance for purposes of a preliminary examination. The underlined text would be eliminated.

Instead, the bill would specify that the Rules of Evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and would be admissible without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:

- ❖ A report of the results of properly performed drug analysis field testing solely to establish that the substance tested is a controlled substance.
- ❖ A copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any Michigan court or governmental agency, duly authenticated by a representative of the court or agency.
- ❖ A report other than a law enforcement report that is made or kept in the ordinary course of business.
- ❖ Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Permitted reports would include, but not be limited to, a report of the findings of a MSP technician concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, or an autopsy report.

The magistrate would have to allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under Section 11b on a satisfactory showing to the magistrate that live testimony will be relevant to the magistrate's decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.

The bill would delete a provision applying Section 11b to preliminary examinations that began on or after December 29, 2007.

Duties of a magistrate

The bill would specify that a district court magistrate could not preside at a preliminary examination or accept a plea of guilty or nolo contendere (no contest) to an offense not cognizable in the district court.

Currently, if the magistrate determines at the conclusion of the preliminary examination that an offense had not been committed or that there is not probable cause to charge the defendant with an offense, the magistrate must discharge the defendant.

Under the bill, if the determination of the magistrate is that a felony has not been committed or that there is not probable cause to charge the defendant with committing a felony, the magistrate would either have to discharge the defendant or reduce the charge to an offense cognizable by the district court (in general, a misdemeanor). (Note: The revision appears to comport with Section 14 of the act, which is not being amended by the bill. Section 14 specifies that if at the conclusion of the preliminary examination "of a person charged with a felony that the offense charged is not a felony or that an included offense that is not a felony has been committed, the accused shall not be dismissed but the magistrate shall proceed in the same manner as if the accused had initially been charged with an offense that is not a felony".)

If the determination is that a felony has been committed, and probable cause exists to charge the defendant with a felony, the magistrate would have to bind the defendant to appear within 14 days for arraignment in circuit court. The magistrate could conduct the circuit court arraignment as provided by court rule. (Highlighting denotes new language.)

House Bill 5155 would amend the Revised Judicature Act (MCL 600.8311 and 600.8511). The bill would expand district court jurisdiction to include:

- ❖ Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under provisions of House Bill 5154. (District courts have jurisdiction over misdemeanors punishable by a fine and/or imprisonment not exceeding a year.)
- ❖ Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under Section 13 of the Code of Criminal Procedure (as revised by House Bill 5154). Sentencing for felony cases and

misdemeanor cases not cognizable by the district court would be conducted by a circuit judge.

- ❖ All matters allowed at the preliminary examination under Chapter VI of the Code of Criminal Procedure.

The bill would also expand a magistrate's duties to include conducting probable cause conferences and all matters allowed at the conference, except for the taking of pleas and sentencing, under Section 4 of Chapter VI of the Code of Criminal Procedure, when authorized to do so by a district court judge.

In addition, the RJA lists acts and parts of acts for which a magistrate may, under certain conditions, arraign and sentence for violations upon pleas of guilty or no contendere (no contest). The bill would make a technical revision to include the full range of offenses listed in Chapter LXXXV (Trespass), as is standard protocol, even though not all of the added violations would meet the conditions necessary to place them within the jurisdiction and authority of a magistrate.

Lastly, the bill would repeal Section 2167, as described above under the heading of *testimony at a preliminary examination* in the description of House Bill 5154.

FISCAL IMPACT:

A fiscal impact statement is in process.

POSITIONS:

The following entities testified in support of or indicated support for the bills on 2-6 and/or 2-13-14:

Michigan District Judges Association
State Bar of Michigan
Criminal Defense Attorneys of Michigan
ACLU of Michigan
Wayne County Prosecutor's Office
Prosecuting Attorneys Association of Michigan
Michigan Judges Association
State Court Administrative Office

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ 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.