The Determination of Probable Cause in Illinois - Grand Jury or Preliminary Hearing

John C. Robinson Jr.
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Every one threatened with the charge of the commission of a crime has two rights. One is, of course, the right to a fair and impartial trial upon which the question of his guilt is determined; the other is the no less valuable right, and practically the more valuable right, that he shall not be even called upon to answer to a criminal charge until some duly constituted tribunal has passed upon the preliminary question of whether he ought to be brought to trial.¹

In Illinois, there are two stages in the criminal process at which a determination is made as to whether there is probable cause to believe that an offense has been committed by an accused person. These two stages are the indicting grand jury and the preliminary hearing. This article discusses an accused’s right to a grand jury indictment and to a preliminary hearing. Further, it attempts to clarify the relationship between these two stages in the criminal process which appear to perform the same function.²

THE RIGHT TO A GRAND JURY INDICTMENT

Origin of the Grand Jury in England

The grand jury in Illinois is derived from the common law of England.³ The foundation for the grand jury in England was laid by the Assize of Clarendon promulgated by King Henry II in 1166 and the Assize of Northampton issued in 1176. The ancient predecessor of the modern grand jury was a body consisting of twelve men from each county and four men from each township or village in the hundred summoned by the sheriff. They were enjoined to inquire into the commission of certain felonies and to report to the royal

judges on circuit or eyre all persons accused or suspected of committing a crime. It is generally accepted that in 1681, in the cases of the Earl of Shaftesbury and Stephen Colledge, the grand jury found real independence from the Crown and became a barrier between the accused and the accuser.

The Grand Jury In Illinois

The right to a grand jury indictment in Illinois is a matter of state law. Although the fifth amendment to the United States Constitution provides for a right to a grand jury indictment, this provision is not applicable to the states through the due process clause of the fourteenth amendment.

The right to a grand jury indictment has long been of constitutional status in Illinois. The state's first constitution adopted in 1818 did not specifically mention the grand jury, but implicitly recognized the existence of the grand jury which was a well known feature of the common law before the organization of the State of Illinois. The 1848 Constitution specifically mentioned the grand jury, but made no substantive change in the 1818 provision. The corresponding provision in the 1870 Constitution, article II, section 8, provided:

No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or

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4. L. Levy, Origins Of The Fifth Amendment 10-11 (1968); L. Orfield, Criminal Procedure From Arrest To Appeal 137-42 (1947) [hereinafter cited as Orfield]; Calkins, supra note 2, at 428-30; Schwartz, supra note 2, at 703-10.

5. Calkins, supra note 2, at 429; Duff and Harrison, supra note 2, at 639. But see Schwartz, supra note 2, at 710-21.


7. Ill. Const. art. VIII, § 10 (1818) provided:

That no person shall, for an indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the militia when in actual service, in time of war or public danger, by leave of the courts, for oppression or misdemeanor in office.

8. Ill. Const. art. XIII, § 10 (1848) provided:

No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger: Provided, that justices of the peace shall try no person, except as a court of inquiry, for any offense punishable with imprisonment or death, or fine above $100.

public danger; Provided, that the grand jury may be abolished by law in all cases.

The major substantive contribution of this provision was to authorize the legislature to abolish the grand jury "in all cases." Also, in excluding the indictment requirement for criminal offenses in which punishment was by fine or non-penitentiary imprisonment, the framers, for the first time in this area, distinguished felonies and misdemeanors. 10

The grand jury provision in the 1970 Constitution is substantially identical to that of the 1870 Constitution except that the new provision authorizes the legislature to "abolish the grand jury or further limit its use." The 1970 Constitution provides in relevant part:

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use. 11

This provision eliminates the question that may have arisen under the 1870 Constitution as to whether use of the grand jury could be limited, without a total abolition "in all cases."

The Illinois General Assembly has enacted provisions setting forth the procedures for the impanelling of grand juries, the number of grand jurors, the duties of grand juries, and the procedure to be followed at grand jury sessions. A grand jury consists of 23 persons selected and qualified by law, 16 of whom shall constitute a quorum. 12 If 12 grand jurors concur that the evidence before them constitutes "probable cause that a person has committed an offense," a Bill of Indictment shall be returned into open court. 13

The cloak of secrecy surrounding grand jury proceedings has been removed to some degree and a very limited right to counsel has been extended. However, the grand jury proceeding in Illinois is, in general, a secret, ex parte inquiry guided by the State's Attorney at which the accused is denied the opportunity to confront his accusers, or to have the assistance of counsel.

Prior to a recent amendment which became effective on October 1, 1975,\textsuperscript{14} section 112-6(a)\textsuperscript{15} of the Code of Criminal Procedure provided:

Only the State's Attorney, his reporter and any other person authorized by the court may attend the sessions of the Grand Jury. Only the grand jurors shall be present during the deliberations and vote of the Grand Jury. If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court, on petition of the foreman and 11 other grand jurors, may for good cause appoint such reporter.

Disclosure of matters occurring before the grand jury is governed by section 112-6(b)\textsuperscript{16} which provides in part:

Matters other than the deliberations and vote of any grand juror may be disclosed by the State’s Attorney solely in the performance of his duties. Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs.

The recent amendment to section 112-6(a) insures the presence of a reporter at grand jury sessions. Section 112-6(a) as amended now provides in part:

If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court shall appoint such reporter. Furthermore, the amendment added a new section 112-7, which insures that there will be a transcript of all grand jury testimony.

A transcript shall be made of all questions asked of and answers given by witnesses before the grand jury.

Since the adoption of Supreme Court Rule 412(a)(iii), which became effective on October 1, 1971, the defendant, upon written motion, has been entitled to disclosure of “a transcript of those portions of the grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as a witness at the hearing or trial.”\textsuperscript{17} However, it has been held by the Illinois Supreme Court that this provision does not

\begin{footnotes}
\item[15] ILL. REV. STAT. ch. 38, § 112-6(a) (1973).
\item[16] ILL. REV. STAT. ch. 38, § 112-6(b) (1975).
\end{footnotes}
impose a duty on the State's Attorney to record grand jury testimony and that the failure to do so does not entitle a defendant to a dismissal of the indictment. In light of the amendments to section 112-6 and the addition of section 112-7, there should now be no question regarding the defendant's right to a transcript of grand jury testimony or the state's duty to insure that such transcripts are available. However, there appears to be no requirement that the statements of the State's Attorney to the grand jury be recorded, transcribed and disclosed to the defense.

While grand jury proceedings have become less secret by virtue of the recording of testimony and the disclosure of transcripts, the actual proceedings remain essentially ex parte and closed. The proceeding is ex parte in that only the state's case is heard. Section 112-4(a) of the Code of Criminal Procedure provides that "The Grand Jury shall hear all evidence presented by the State's Attorney." As well as not having the right to confront witnesses or the right to present evidence on his own behalf, a defendant has no right to be heard or even to be present at a grand jury session at which the case against him is presented. As a consequence, the State's Attorney has virtually complete control over what evidence is presented to the grand jury. However, it appears that the State's Attorney's control is not unlimited. The Illinois Supreme Court has indicated that in cases where this prosecutorial control will result in a deprivation of due process or a miscarriage of justice, the court may exercise its supervisory power over the grand jury to compel the State's Attorney to call witnesses.

In addition, recently amended section 112-422 of the Code of Criminal Procedure authorizes the grand jury to subpoena and question the accused and requires the State's Attorney to advise the grand jury of this right. The new subsection (b) provides in part:

The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment. Prior to the commencement of its duties and, again, before the consideration of each matter or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of this right.

Any person so subpoenaed is afforded a very limited right to counsel which falls far short of affording the right to confront or cross-examine state witnesses. The new subsection (b) of section 112-4 further provides:

Any person subpoenaed who is already charged with an offense or against whom the State’s Attorney is seeking a Bill of Indictment shall have the right to be accompanied by counsel who shall advise him of his rights during the proceedings but may not participate in any other way.

Prior to a recent amendment, which became effective on October 1, 1975,\(^{24}\) section 111-2(a)\(^{25}\) required that “[a]ll prosecutions of felonies shall be by indictment unless waived understandably by the accused in open court, and unless the State expressly concurs in such waiver in open court.” The failure to advise a defendant of this right to a grand jury indictment and to obtain a waiver of such right is reversible error, a guilty plea notwithstanding.\(^{26}\)

The amendment, enacted under the authority of the 1970 Constitution to “further limit” the use of the grand jury, amended section 111-2(a) so as to provide:

All prosecutions of felonies shall be by information or by indictment. No prosecution may be pursued by information unless a preliminary hearing has been held or waived in accordance with Section 109-3 and at that hearing probable cause to believe the defendant committed an offense was found.

By virtue of this amendment, the State’s Attorney in Illinois now has an option as to the method of commencing the prosecution of felonies. The prosecutor can proceed by indictment after a finding of probable cause by a grand jury or by information after a finding of probable cause by a judge following a preliminary hearing.

**The Right to a Preliminary Hearing**

*Origin Of The Preliminary Hearing In England.*

The preliminary hearing is a modern development of criminal procedure. The procedure has its roots in two statutes, enacted during the reign of Philip and Mary, which gave justices of the peace authority to examine accused felons and witnesses.\(^{27}\) In its original


\(^{27}\) 1 & 2 Phil. & M., c. 13 (1554-1555) and 2 & 3 Phil. & M., c. 10 (1555). See J. LANGBEIN,
form, the preliminary examination was inquisitional in nature; the magistrate was acting more as a public prosecutor than a judicial officer. Through the centuries the preliminary examination has evolved into a judicial proceeding which is considered a privilege of a defendant.\(^{28}\)

**The Federal Right to a Probable Cause Determination**

The United States Constitution does not provide for a preliminary hearing and the United States Supreme Court in *Lem Woon v. Oregon*\(^{29}\) held that the due process clause of the fourteenth amendment does not require the states to provide a preliminary examination prior to the commencement of a criminal prosecution by information. Recently, however, the Court in *Gerstein v. Pugh*,\(^{30}\) held that under the fourth amendment a person arrested under a prosecutor's information is entitled to a judicial determination of probable cause as a prerequisite to extended restraints on liberty following arrest. This probable cause determination is distinguishable from an adversary preliminary hearing and more closely resembles the hearing that is held by a judge upon the application for an arrest warrant. Under *Gerstein*, the hearing need not be adversary in nature and need not be accompanied by the full panoply of adversary safeguards — counsel, confrontation, cross-examination, and compulsory process for witnesses.

In reaching its decision, the *Gerstein* Court specifically noted its continuing adherence to its holding in *Lem Woon* that a judicial hearing is not a prerequisite to prosecution by information.\(^{31}\) Thus, like the right to a grand jury indictment, the right to an adversary preliminary hearing is dependent upon state law.

**The Preliminary Hearing in Illinois**

Prior to July 1, 1971, the right to a preliminary hearing in Illinois was a matter of legislative grace; it was well established that there was no constitutional right to a preliminary hearing.\(^{32}\) Section 109-1 of the Code of Criminal Procedure\(^{33}\) provides that a person arrested

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31. *Id.* at 119.
either with or without a warrant shall be taken before a judge without unnecessary delay and that:

(b) The judge shall:

(3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense.

The courts have found the right to a preliminary hearing under section 109-1 to be dependent upon the jurisdiction of the particular judicial officer before whom an arrested person is first taken.\(^\text{34}\) In *People v. Miner*,\(^\text{35}\) the defendant was charged with a misdemeanor and brought before a magistrate in a county where, by administrative order, magistrates had been given authority to try misdemeanor offenses. Since the magistrate had jurisdiction to try the offense with which the defendant was charged, the defendant had no right to a preliminary hearing.

It is well settled that a person can be arrested on a complaint or information and held without a preliminary hearing and then be directly indicted.\(^\text{36}\) A returned indictment cures any defect arising out of the failure to hold a preliminary hearing.

The Illinois Constitution of 1970, which became effective on July 1, 1971, elevates the right to a preliminary hearing to constitutional status. The framers attempted to guarantee a right to a preliminary hearing to accused felons.\(^\text{37}\) The second paragraph of article I, section 7, of the new constitution provides:

No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.\(^\text{38}\)

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If the defendant is charged with the commission of a felony, and there is no waiver of prosecution by indictment with concurrence by the State, a preliminary hearing or examination upon the complaint or information shall be conducted in the manner provided by Section 109-3 of this Act unless the defendant waives such hearing or examination or unless a Bill of Indictment upon the same felony charge is returned in open court prior to such hearing or examination.
From the language of this new provision, it would appear that the right to a preliminary hearing is guaranteed in all felony cases except where the initial charge is brought by grand jury indictment. The Illinois Supreme Court first interpreted this new preliminary hearing provision in People v. Kent, where the defendant had been indicted after a finding of no probable cause at a preliminary hearing. The issue before the court was not whether the defendant had a right to a preliminary hearing, but whether an order releasing a defendant for want of probable cause after a preliminary hearing is conclusive so as to bar a subsequent indictment and prosecution for the same offense. In resolving this issue, the court interpreted the new constitutional provision providing for a preliminary hearing.

As we read the provision before us, it appears to be designed to insure that the existence of probable cause will be determined promptly either by a grand jury or by a judge.

Citing this language from Kent, the Second District Appellate Court, in People v. Spera, construed the new constitutional provision even though it held that the new provision was not applicable to the pre-July 1, 1971, factual situation before the court. The court stated:

It is to be noted that this constitutional provision is in the alternative using the word "or." It must be given its common accepted usage, i.e., a defendant may be charged by indictment "or" given a prompt preliminary hearing.

The Kent and Spera courts interpret the new preliminary hearing provision as though the word "initial" is deleted. Under this interpretation, the requirement that there be a prompt preliminary hearing in those cases where the initial charge is not brought by indictment can be met by either the holding of a prompt preliminary hearing or the prompt return of an indictment. That the initial charge is not brought by indictment is apparently of little, if any, significance. Further, in so construing the new provision, the courts were primarily, if not totally, concerned with the question of

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39. 54 Ill. 2d 161, 295 N.E.2d 710 (1972).
40. Id. at 163, 295 N.E.2d at 711.
41. 10 Ill. App. 3d 305, 293 N.E.2d 656 (2d Dist. 1973).
42. Id. at 309, 293 N.E.2d at 658.
"when" rather than "how" the probable cause determination should be made.\textsuperscript{44}

In People v. Hendrix,\textsuperscript{45} the Illinois Supreme Court applied the new preliminary hearing provision to a situation where defendant had been initially charged by complaint and subsequently indicted without a preliminary hearing. The record indicated that defendant was arrested in Tennessee, but the exact date of his arrest and return to Illinois were not certain. Although the complaint was not in the record, the parties agreed that 12 or 13 days prior to indictment, defendant had been charged in some type of complaint with the same offense charged in the indictment. Also, the day before indictment, defendant had been brought before the trial court and a preliminary hearing was ordered with no specific date for the hearing being set. Upon defendant’s motion, the indictment was dismissed upon the ground that defendant had been initially charged by a criminal complaint rather than by indictment and no preliminary hearing had been held. At the hearing on the motion to dismiss the indictment, the defense rejected the state’s offer to hold a preliminary hearing. On the state’s appeal of the dismissal of the indictment, the Illinois Supreme Court, after closely examining the facts, concluded:

What is a prompt preliminary hearing must, of course, depend upon an appraisal of all of the relevant circumstances, and in this case it does not appear that there was any violation of the defendant’s constitutional right to a prompt preliminary hearing.\textsuperscript{46}

Specifically referring to the "initial charge" language of the new provision, Justice Ward in his dissenting opinion stated:

It is clear to me from the language of the paragraph that if the "initial charge" against an accused has not been brought by indictment, that "No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless . . . the person has been given a prompt preliminary hearing to establish probable cause."\textsuperscript{47}

Justice Ward further commented that as he read the majority opinion, it left meaningless the new constitutional provision for a preliminary hearing.

\textsuperscript{44} Comment, The Illinois Constitution, Article I, Section 7—Seeking A Rational Determination Of Probable Cause, 24 DePaul L. Rev. 559, 578 (1975).
\textsuperscript{45} 54 Ill. 2d 165, 295 N.E.2d 724 (1973).
\textsuperscript{46} Id. at 169, 295 N.E.2d at 727.
\textsuperscript{47} Id. at 171, 295 N.E.2d at 727.
Citing Hendrix and Kent as authority, the appellate courts have held that a defendant's constitutional right to a prompt preliminary hearing was not violated despite delays of nine days, 48 17 days, 49 22 days 50 and 48 days 51 between arrest and indictment, absent a preliminary hearing. However, a delay of 65 days between arrest and indictment with no preliminary hearing being held 52 and a delay of 66 days between arrest and the holding of a preliminary hearing 53 have been held to be violations of the right to a preliminary hearing. Further, defendant's right has been violated where defendant had been indicted 168 days after his arrest and a preliminary hearing was not held until 235 days later. 54

Under the new constitutional provision a defendant can be directly indicted without a preliminary hearing. In People v. Brown, 55 defendant was arrested and indicted nine days later. No preliminary hearing had been held. On appeal, defendant contended that he was entitled to a preliminary hearing. The court noted that prior to the 1970 Constitution it had been uniformly held that an accused is not entitled to a preliminary hearing as a matter of right, but could be indicted directly. Citing Hendrix, Kent and Spera as authority, the court stated:

We therefore conclude a defendant under the 1970 Constitution may be indicted directly by the grand jury without the necessity of a preliminary hearing. 56

The language of the new provision indicates that if the “initial charge” against a person has not been brought by indictment and the person has not been given a “prompt preliminary hearing to establish probable cause,” then “no person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary.” Thus, if a person's right to a preliminary hearing is violated, a strong argument could be made that further prosecution of defendant on the charge would be barred.

However, a violation of the right to a preliminary hearing is ap-

56. Id. at 70, 296 N.E.2d at 79.
parently nonjurisdictional in nature. The Illinois Supreme Court has held that the new provision does not provide any sanctions for its violation, and has called upon the legislature to implement the new provision by providing sanctions. The supreme court first discussed the question of sanctions in People v. Hendrix. While holding that there was no violation of the right to a preliminary hearing in the case before it, the Hendrix court stated:

The second paragraph of Section 7 does not provide a grant of immunity from prosecution as a sanction for its violation. Nor would an interpretation make sense which required the dismissal of the present indictment and the discharge of the defendant, to be followed by his reindictment and rearrest upon a new indictment.

Relying upon this language, the appellate courts have found that a violation of the right to a preliminary hearing neither invalidates a defendant’s conviction nor entitles defendant to a dismissal of the charges against him. It has also been held by the appellate court that if an indictment is dismissed because of a violation of the right to a preliminary hearing, prosecution on a new indictment is not barred.

Subsequent to the Hendrix decision, the Illinois Supreme Court, in People v. Hood, indicated that sanctions might be imposed for future violations of the right to a preliminary hearing. In Hood, the defendant, in a pre-1970 Constitution prosecution, was indicted without a preliminary hearing after a scheduled hearing had been continued on the motion of the State’s Attorney. In denying defendant’s contention that he had been deprived of his right to a preliminary hearing, the court stated:

It is to be noted, however, that our resolution of defendants’ contentions relating to a preliminary hearing is not to be construed as condoning the tactics employed by the State’s Attorney in this case. Under present constitutional safeguards appropriate sanc-

60. Id. at 169, 295 N.E.2d at 727.
64. 59 Ill. 2d 315, 319 N.E.2d 802 (1974).
tions might be considered in order to curtail similar methods if they are used in the future.\textsuperscript{65}

The fashioning of sanctions was again considered by the supreme court in \textit{People v. Howell}\textsuperscript{66} where the court questioned whether a delay of 65 days between arrest and indictment, violating defendant's right to a preliminary hearing, would invalidate defendant's conviction. The Illinois Supreme Court agreed that defendant's rights had been violated, but avoided the issue by holding that defendant had waived the issue by failing to raise it in the trial court. The court then discussed the possible consequences flowing from a violation of the right to a preliminary hearing.

The \textit{Howell} case presented the court with the opportunity to consider appropriate sanctions referred to in \textit{Hood}. However, the court regarded sanctions to be a question better left to the General Assembly for resolution:

The delay in this case of 65 days is the most severe violation of section 7 that has been called to our attention. Considering the frequency of the violations and the possibility of future abuse, the time is appropriate to fashion certain sanctions to assure and protect the right to a prompt preliminary hearing guaranteed by section 7 of article I.

We consider the delays in giving an accused a prompt preliminary hearing to be a serious deprivation of his constitutional rights and we are deeply concerned about the number of cases in which an accused has not had a prompt probable cause determination. We consider this a subject for appropriate legislative action and we strongly urge the General Assembly to consider the prompt implementation of this constitutional provision.\textsuperscript{67}

Thus, it appears that until the legislature provides for sanctions the reviewing courts will impose no judicially created sanction for violation of the constitutional provision requiring a preliminary hearing\textsuperscript{68} unless, however, the denial of the right to a preliminary hearing deprives a defendant of "a substantial means of enjoying a fair and impartial trial."\textsuperscript{69}

\textsuperscript{65} Id. at 324, 319 N.E.2d at 808.
\textsuperscript{66} 60 Ill. 2d 117, 324 N.E.2d 403 (1975).
\textsuperscript{67} Id. at 122-23, 324 N.E.2d at 405-06.
\textsuperscript{68} People v. Moore, 28 Ill. App. 3d 1078, 327 N.E.2d 84 (4th Dist. 1975); People v. Daily, 30 Ill. App. 3d 413, 332 N.E.2d 146 (4th Dist. 1975), petition for leave to appeal denied; People v. Todd, 34 Ill. App. 3d 844, 340 N.E.2d 669 (5th Dist. 1976); People v. Sanders, No. 75-23 (5th Dist., March 4, 1976).
\textsuperscript{69} People v. Price, 32 Ill. App. 3d 610, 336 N.E.2d 56 (5th Dist. 1975).
Preliminary Hearing Procedure

The procedure to be followed by the preliminary hearing judge is set forth in section 109-3(a) and (b) of the Code of Criminal Procedure:70

(a) The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.

(b) If the defendant waives preliminary examination the judge shall hold him to answer and may, or on the demand of the prosecuting attorney shall, cause the witnesses for the State to be examined. After hearing the testimony if it appears that there is not probable cause to believe the defendant guilty of any offense the judge shall discharge him.

In contrast to the grand jury session, the preliminary hearing in Illinois is an open proceeding where the accused, accompanied by counsel, may cross-examine prosecution witnesses and introduce evidence on his own behalf on the issue of probable cause. Section 102-1771 defines "preliminary examination" as "a hearing before a judge to determine if there is probable cause to believe that the person accused has committed an offense." The Bill of Rights Committee of the 1970 Constitutional Convention characterized the preliminary hearing as "a judicial proceeding in which the defendant has an opportunity to confront and cross-examine the witnesses who appear to give evidence against him and an opportunity to give evidence in his own behalf."72

Even though there is no federal constitutional right to a preliminary hearing, the United States Supreme Court held in Coleman v. Alabama73 that a preliminary hearing under Alabama law, although not a required step, is a "critical stage" to which the right to counsel attaches. The Illinois Supreme Court in turn held in People v. Adams74 that the preliminary hearing in Illinois under section 109-3 is substantially similar to that of Alabama and, therefore, is a "critical stage" to which the right to counsel attaches.

70. ILL. REV. STAT. ch. 38, §§ 109-3(a)-(b) (1975).
71. ILL. REV. STAT. ch. 38, § 102-17 (1975).
72. VI RECORD OF PROCEEDINGS SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 75.
73. 399 U.S. 1 (1970); Samuel Dash contends that the indicting grand jury is a more critical stage than the preliminary hearing and that the Court's reasoning in Coleman applies equally well to the grand jury so that a defendant should be entitled to the assistance of counsel before the grand jury. Dash, The Indicting Grand Jury: A Critical Stage?, 10 AM. CRIM. L. REV. 807 (1972) [hereinafter cited as Dash].
When the procedures at an indicting grand jury and a preliminary hearing are compared, the distinction between the two, as well as the advantages to a defendant in having an adversary preliminary hearing, is readily apparent. As pointed out in Coleman, a defendant can greatly benefit from the assistance of counsel at a preliminary hearing. Counsel may, by cross-examination, expose a fatal weakness in the state's case leading to a finding of no probable cause, fashion an impeachment tool for use at trial, preserve favorable testimony, and discover the state's case to aid in the preparation of a proper defense. Merely furnishing the defendant with a transcript of grand jury testimony elicited by a State's Attorney, in the absence of defendant and his counsel, cannot duplicate the benefits derived from an adversary preliminary hearing.

**Relationship Between the Indicting Grand Jury and the Preliminary Hearing**

An examination of the statutory and constitutional provisions for the indicting grand jury and the preliminary hearing discloses that an identical standard of probable cause is applied at each proceeding. What, then, is the relationship between these two stages in the criminal process which appear to perform the same function?

*Functions of the Grand Jury and Preliminary Hearing Probable Cause Determination*

In order to discuss the relationship between these two stages, the function of the probable cause determination made at each stage must be explained. One writer contends that the same functions are performed by the indicting grand jury and the preliminary hearing. In Illinois, however, there is a distinction between the functions of the two probable cause determinations. The preliminary hearing is custodial in that it determines whether the accused may be kept in custody pending further proceedings; the grand jury is accusatory in that it determines whether a criminal charge should be brought against the accused. The Illinois Supreme Court implied such a distinction in *People v. Kent* where it held that a finding of no probable cause at a preliminary hearing does not bar the State's Attorney from seeking an indictment for the same offense which was

76. ILL. REV. STAT. ch. 38, §§ 102-17, 109-3(a), 112-4(d) (1975); ILL. CONST. art. I, § 7.
77. Dash, supra note 71, at 808.
78. Duff and Harrison, supra note 2, at 637.
79. 54 Ill. 2d 161, 295 N.E.2d 710 (1972).
the subject of the preliminary hearing. The purpose of the preliminary hearing is to insure that an accused person will not be held in custody or on bail without a showing of probable cause.\textsuperscript{80}

However, the preliminary hearing in Illinois is not merely a fourth amendment probable cause determination, addressed only to pretrial custody, required by \textit{Gerstein v. Pugh}.\textsuperscript{81} Even before the adoption of the 1970 Constitution, it was held by the Illinois Supreme Court that the Illinois preliminary hearing was similar to the adversary Alabama preliminary hearing, which was the subject of the court's consideration in \textit{Coleman v. Alabama}.
\textsuperscript{82} The Court in \textit{Gerstein} distinguished the Coleman-type preliminary hearing from the probable cause determination mandated by the fourth amendment.\textsuperscript{83}

\textit{Relationship Between the Indicting Grand Jury and the Preliminary Hearing Prior to the 1975 Amendment}

Prior to the recent amendment\textsuperscript{84} it was well established that under article I, section 7, an accused felon was entitled to a probable cause determination by either a judge at a preliminary hearing or by a grand jury. Even though both the preliminary hearing and grand jury were of constitutional status, the preliminary hearing was not an absolute prerequisite to a felony prosecution. A grand jury indictment was a required step.\textsuperscript{85} In light of the \textit{Kent} case, it is clear that the two proceedings are not mutually exclusive. No finality attached to a finding of no probable cause at a preliminary hearing so as to bar a subsequent indictment. Also, a grand jury could return an indictment for offenses in addition to those previously charged at a preliminary hearing.\textsuperscript{86} Furthermore, the necessity for holding a preliminary hearing could be eliminated by the returning of an indictment before the holding of a preliminary hearing.\textsuperscript{87}

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\item \textsuperscript{80} See People v. Moore, 26 Ill. App. 3d 1078, 327 N.E.2d 84 (4th Dist. 1975); People v. Moore, 28 Ill. App. 3d 1085, 329 N.E.2d 893 (5th Dist. 1975).
\item \textsuperscript{81} \textit{420 U.S. 103} (1975).
\item \textsuperscript{83} Gerstein v. Pugh, 420 U.S. 103, 122-23 (1975).
\item \textsuperscript{85} People v. Goodin, 21 Ill. App. 3d 1064, 316 N.E.2d 549 (4th Dist. 1974), \textit{rev'd on other grounds}, 61 Ill. 2d 298, 335 N.E.2d 769 (1975).
\item \textsuperscript{86} People v. Brown, 16 Ill. App. 3d 692, 306 N.E.2d 561 (1st Dist. 1973).
\item \textsuperscript{87} People v. Hunt, 26 Ill. App. 3d 776, 326 N.E.2d 184 (1st Dist. 1975); People v. Moore, 28 Ill. App. 3d 1065, 329 N.E.2d 893 (5th Dist. 1975).
\end{itemize}
Thus, the accusatory function was primarily, if not totally, performed by the grand jury. The preliminary hearing performed primarily a custodial function and played little, if any, role in making the final determination as to whether or not criminal charges would be brought against an accused. Furthermore, when an indictment was returned before a preliminary hearing was held, the grand jury not only performed an accusatory function, but also the custodial function of the preliminary hearing, thus eliminating the necessity for a preliminary hearing.

The Relationship Between the Indicting Grand Jury and the Preliminary Hearing Under the 1975 Amendment

As previously discussed, the Code of Criminal Procedure has been amended so as to authorize the commencement of felony prosecutions by either indictment or information. If the latter method is utilized it must be preceded by a preliminary hearing finding of probable cause. This amendment amended subsection (a) and added a new subsection (e), which provide:

(a) All prosecutions of felonies shall be by information or by indictment. No prosecution may be pursued by information unless a preliminary hearing has been held or waived in accordance with Section 109-3 and at that hearing probable cause to believe the defendant committed an offense was found.

(e) Where the prosecution of a felony is by information or complaint after preliminary hearing, or after a waiver of preliminary hearing in accordance with paragraph (a) of this Section, such prosecution may be for all offenses, arising from the same transaction or conduct of a defendant even though the complaint or complaints filed at the preliminary hearing charged only one or some of the offenses arising from that transaction or conduct.

Under this amendment, the State’s Attorney now has an option as to the method of commencing felony prosecutions. He can either seek an indictment from a grand jury or he can proceed by information after a preliminary hearing. The State’s Attorney’s option to prosecute by information alters to some degree the existing relationship between the grand jury and preliminary hearing. First, when the State’s Attorney elects to prosecute by information, the accusatory function of the grand jury is shifted to the preliminary hearing.

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88. See text accompanying notes 24 through 26 supra.
and the State’s Attorney, thereby increasing the role of the preliminary hearing in the accusatory process. Secondly, the grand jury is no longer an absolute prerequisite to a felony prosecution since a finding of probable cause at a preliminary hearing permits the State’s Attorney to proceed by information, thereby eliminating the necessity for an indictment.

Other than these two alterations, it appears that the amendment authorizing prosecution of felonies by information does not alter the existing grand jury-preliminary hearing relationship. There is nothing to indicate that finality will attach to a determination of no probable cause at a preliminary hearing. If the State’s Attorney fails to establish probable cause at a preliminary hearing, he could then seek and obtain an indictment. In such situations, the grand jury could still return indictments for offenses in addition to those included in the charges filed at the preliminary hearing.

Subsection (e) of amended section 111-2 specifically authorizes the State’s Attorney to prosecute by information or complaint all offenses arising from the same “transaction or conduct” as the offense or offenses charged at the preliminary hearing. Since there is no recognized federal right to either a grand jury indictment or a judicial determination of probable cause before prosecution by information, this procedure is not violative of the United States Constitution. However, there may be a question as to the validity of such a procedure under article I, section 7, of the Illinois Constitution. It is clear that under article I, section 7, an accused felon is entitled to a probable cause determination by either a grand jury or a judge. When a State’s Attorney prosecutes by information felony offenses in addition to those charged at the preliminary hearing, these additional offenses are being prosecuted without a probable cause determination as to the specific offense by either a grand jury or a judge. The issue to be resolved is whether the prosecution of a felony offense by an information after the establishment of probable cause at a preliminary hearing on another charge arising from the same “transaction or conduct” satisfies the provision of article I, section 7, that no person be held to answer for a felony “unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.” The possible constitutional issue aside, subsection (e) will probably generate much litigation as to whether a particular additional offense does or does not arise from the same “transaction or conduct.”

CONCLUSION

In Illinois probable cause is determined at two stages in the criminal process—indicting grand jury and the preliminary hearing. The rights to a grand jury indictment and preliminary hearing are dependent upon state law. The grand jury has long been of constitutional status in Illinois while the preliminary hearing was elevated to this status by the Constitution of 1970. In addition, the 1970 Constitution authorized the General Assembly to limit the use of the grand jury. In 1975, the General Assembly, acting under this provision, authorized the prosecution of felonies by information or complaint after a preliminary hearing.

In light of these developments and judging from the English experience, it appears that there may be a trend in Illinois toward the eventual replacement of the grand jury by the more modern preliminary hearing and information procedure. The grand jury in England was abolished in 1933 with minor exceptions and replaced by a preliminary hearing held by justices of the peace and stipendiary magistrates.91 Some, perhaps prophetically for Illinois criminal process, attribute the decline of the grand jury in England to the full implementation of the preliminary hearing which caused the grand jury to become a useless appendage to the criminal justice system.92

92. Calkins, supra note 2, at 430.
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