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POST-INDICTMENT PRELIMINARY HEARINGS?

In 1970, the delegates to the Sixth Illinois Constitutional Convention did not avail themselves of the opportunity to abolish the grand jury in spite of criticisms directed at the institution. Having been informed by proponents of the grand jury that its retention would be advantageous, the Convention decided to defer to the legislature the determination of whether the purported merits were illusory. Taking the path trodden one hundred years earlier by the delegates to the 1870 Convention, the 1970 Convention voted to leave responsibility for abolition or limitation of the grand jury to the General Assembly and the indictment was retained as a constitutional requirement.

However, despite this reluctance to reject the indictment as a constitutionally required condition precedent to being held to answer for a criminal offense in all cases but those excepted, the importance of a grand jury proceeding was diminished to a degree by the inclusion of a paragraph in the same section of the 1970 Illinois Constitution requiring a preliminary hearing to be held under specified circumstances. The Bill of Rights Committee, which drafted the indictment section, proposed a separate section on preliminary hearings. This section was

1. Hereinafter referred to as the Convention.
3. Id.
4. The 1870 Constitution provided in article II, section 8 that:
   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 imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger: Provided, that the grand jury may be abolished by law in all cases. Ill. Const. art. II, § 8 (1870).
7. Id.
amended,\textsuperscript{10} and incorporated into the indictment section. The end result was what is now section 7 of article I of the 1970 Illinois Constitution:

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.

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.

Although at least one other state has made a preliminary hearing a constitutional requirement,\textsuperscript{11} the majority of the Bill of Rights Committee viewed the preliminary hearing provision proposed for the 1970 Constitution as unique.

As a constitutional principle, this provision is entirely new. Some states require preliminary examination before a person can be prosecuted for felony by information, but none has applied the principle to prosecutions by indictment, and comparatively few have chosen to make any mention of the preliminary hearing in their constitutions.\textsuperscript{12}

By any reading of section 7 it is apparent that the constitution has been complied with when an accused is initially charged by complaint or information and is given a preliminary hearing before being indicted by the grand jury. It is equally clear that an accused’s constitutional right to a preliminary hearing has not been infringed when the initial charge is by indictment and he is subsequently arrested and is not given a preliminary hearing. In this situation the accused has no right to a preliminary hearing.\textsuperscript{13}

However, when the initial charge is other than an indictment and the accused is denied a preliminary hearing because an indictment was subsequently returned, the question of whether there has been a deprivation of the constitutional right to a preliminary hearing is not so easily answered. It is this problem of the intervening indictment—indictment before the pre-

\textsuperscript{10} There were two amendments which passed; those of delegates Lennon and Parkhurst. However, the Parkhurst amendment was a substitution for the Lennon amendment. See Verbatim Transcripts, vol. III at 1467-69.

\textsuperscript{11} E.g., OKLA. CONST. art. II, § 17.

\textsuperscript{12} Comm. Proposals, vol. VI at 77. See also E. Gertz, For the First Hours of Tomorrow: The New Illinois Bill of Rights 105 (1972) (Mr. Gertz was chairperson of the Bill of Rights Committee).

\textsuperscript{13} ILL. CONST. art. I, § 7 (1970).

\textsuperscript{14} In other words, a complaint or information.
liminary hearing an accused is entitled to by a literal reading of the constitution—which has proved to be a fertile source of litigation.

THE CONTROVERSY

The dispute generated by the second paragraph of article I, section 7 of the 1970 Constitution is whether an indictment procured after the initial charge is made by complaint or information, but before a preliminary hearing can be held, nullifies the preliminary hearing requirement. Illinois prosecutors generally take the view that once an indictment is procured the constitution no longer requires a preliminary hearing to be held.15

On the other hand, the criminal defense bar maintains that the constitution should be interpreted as requiring a preliminary hearing in all cases in which the accused is arrested before indictment and charged by information or complaint.16 According to this view, which is based on a literal reading of the second paragraph of section 7, if the grand jury indicts the accused before the preliminary hearing is held, the accused has a right to a preliminary hearing after the indictment.

THE RESOLUTION

The Convention

When the precursor of what is now the second paragraph of section 7 was drafted by the Bill of Rights Committee it was in the following form:

No person shall be held to answer for a crime punishable by death or imprisonment in the penitentiary without a prompt preliminary hearing to establish probable cause.17

The majority of the Bill of Rights Committee felt that this provision would require that a preliminary hearing be held after the indictment has been returned in "those comparatively infrequent instances where a grand jury has indicted a defendant before he is arrested."18 To require a preliminary hearing after indictment would force the prosecution to publicly disclose sufficient evidence to establish probable cause for holding the accused to answer the charges, i.e., to stand trial, and would prevent the determination of probable cause solely on the state's

16. Id.
evidence by the grand jury. Aware of possible objection to a duplication in the determination of probable cause, the majority of the Bill of Rights Committee addressed the point.

While it may seem anomalous to have a judge examining probable cause after the grand jury has indicted, this procedure is required to prevent prosecution without a public showing of probable cause.10

While the majority's proposal would have sharply limited the efficacy of the grand jury system, the more restrictive proposal of the minority of the Bill of Rights Committee would have made a preliminary hearing a condition precedent to an indictment.20

After debates on the floor of the Convention the proposed section on preliminary hearings was amended and incorporated into the indictment section to read as follows:

Unless the initial charge has been brought by indictment of a grand jury, no person shall be held to answer for a crime punishable by death or imprisonment in the penitentiary without a prompt preliminary hearing to establish probable cause.21

This amendment reflected the sentiment of the Convention, brought out in debate, that there are situations in which it may be desirable to proceed by way of indictment and avoid the publicity attendant upon a preliminary hearing. Specifically, it was pointed out that there are times when public or elected officials or prominent citizens are accused of crimes and that in such situations the secrecy of the grand jury determination of probable cause22 is preferable to a judicial determination of probable cause at a preliminary hearing open to the public and the press.23 The fact that a state's attorney is politically sensitive and not infrequently wishes to create the impression that the decision to prosecute or not to prosecute an individual was not made solely by him was also a relevant consideration in the minds of the supporters of the amendment.24

19. Id. at 76-77.
20. See id. at 41, 77.

Although the Committee was unanimous on the advisability of creating a constitutional right to a preliminary hearing, a minority of the Committee voted against the proposed provision because they favored treating the subject by requiring that an indictment could not be made until after a preliminary hearing.

Id. at 77.
22. A transcript of the grand jury proceedings may be obtained through discovery if one was made. ILL. REV. STAT. ch. 110A, § 412(a) (iii) (1973). However, there is no requirement that a transcript be made. If there is no transcript, then there is nothing to discover. It would appear to be unlikely that a transcript would be made unless it was to the prosecution's advantage. Hence, grand jury proceedings are secret for all practical purposes.
24. Id.
Although the amendment made it clear that a prompt preliminary hearing is not a requirement in all cases, as it would have been under the original proposal, the record of the floor debates indicates that a preliminary hearing was intended to remain a constitutional requirement in all felony cases other than those in which the accused is indicted before arrest. The situation in which a grand jury indictment intervenes between initial charge by complaint or information and the preliminary hearing was specifically discussed several times during the debate over the preliminary hearing provision and there is no indication that the amendment was intended to deny an accused the right to a preliminary hearing when charged by complaint or information before indictment. Indeed, the explanation of the amendment by its proponents clearly indicates that an accused is entitled to a preliminary hearing after indictment if the initial charge is not brought by indictment.

Opponents of the preliminary hearing provision argued that to allow an accused to insist upon a preliminary hearing after indictment would be to engage in an unnecessary duplication of the process of determining probable cause. It was contended that "a grand jury indictment is a preliminary hearing on probable cause." This criticism indicates a basic difference in the functions of a preliminary hearing as conceived by the supporters and the opponents of the provision.

According to the proponents of the preliminary hearing provision a preliminary hearing is "not a duplication of the grand jury proceeding." The Bill of Rights Committee majority saw a 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.

The manner by which probable cause is determined in a preliminary hearing is fundamentally different from the way in which a grand jury determines it, since a grand jury proceeding consists of the prosecutor presenting his evidence to the grand jurors without an adversary to challenge such evidence.

27. See, e.g., id. at 1451, 1458, 1460, 1462.
28. See id. at 1469.
29. See, e.g., id. at 1459-61; Comm. Proposals, vol. VI at 152.
31. Id.
32. Comm. Proposals, vol. VI at 75. The cross-examination and confrontation functions of a preliminary hearing were also discussed in debate. See Verbatim Transcripts, vol. III at 1454, 1464.
33. See Verbatim Transcripts, vol. III at 1458, 1463.
Maintaining that there is a basic distinction between the judicial standard for determination of probable cause and the standard employed by a grand jury and that the former standard offers more assurance that an accused will be held to answer for a felony only if there is a reasonable basis for subjecting the accused to a trial, the supporters of the preliminary hearing provision assented to the compromise represented by the amended provision.

From the floor of the Convention the provision on preliminary hearings went to the Committee on Style, Drafting and Submission which was responsible for the wording of the provision as it now appears in section 7. This Committee considered the difference between the preliminary hearing provision as adopted after the floor debates and as it appears in the 1970 Constitution to represent merely a stylistic improvement which did not alter the meaning intended to be conveyed by the preliminary hearing provision as it was worded after the debates. The change made by the Committee on Style, Drafting and Submission was intended to make it clear that a person must either be charged initially by grand jury indictment or given a prompt preliminary hearing before being held to answer for a crime punishable by death or by imprisonment in the penitentiary.

The proceedings of the Convention indicate unequivocally that the interpretation of section 7 sometimes advanced by defense attorneys that a finding of no probable cause at a pre-indictment preliminary hearing precludes a finding of probable cause by a grand jury on the same evidence at a later date, is erroneous. Nonetheless, the proceedings of the Convention do support the defense position that section 7 requires a preliminary hearing to be held, even after indictment, if the accused was initially charged by complaint or information and an indictment was obtained between arrest and preliminary hearing. In such a situation, if the judge finds an absence of probable cause he should quash the indictment and discharge the defendant without prejudice to the prosecution's ability to institute new charges upon being satisfied that evidence available at that time suffices to establish probable cause.

34. See id. at 1453, 1459, 1461, 1463.
36. See Comm. Proposals, vol. VI at 76; if the evidence does not show probable cause the defendant is entitled to be discharged. Such a discharge is of course without prejudice to the prosecution's ability to institute new charges upon being satisfied that evidence available at that time is sufficient to establish probable cause.
Post-Indictment Preliminary Hearings

Although the proceedings of the Convention indicate that the controversy over intervening indictments and preliminary hearings should be resolved in favor of the defense, the courts have taken a different view.

The Courts

People v. Kent

In Kent\(^{38}\) the defendant was given a preliminary hearing after arrest. After the judge who conducted the preliminary hearing ruled that probable cause had not been shown, the state’s attorney was able to induce the grand jury to return an indictment charging the defendant with armed robbery on the basis of the same testimony which had been given by witnesses at the preliminary hearing. When the case was assigned for trial the defendant moved to dismiss the indictment and such motion was granted by the trial judge on the ground that section 7 was to be interpreted to prevent indictment after a finding of no probable cause at a prior preliminary hearing.

Taking the case on appeal by the state, the court held that the language of the constitutional provision, as well as the history of its evolution, negates any thought that its purpose was to attach finality to a finding of no probable cause, or to establish mutually exclusive procedures so that grand jury proceedings would be barred if an accused had been discharged upon preliminary hearing.\(^{39}\)

This holding, which is firmly supported by the Convention debates\(^{40}\) and by the majority report of the Bill of Rights Committee,\(^{41}\) indicates that the 1970 Constitution did not effect a change in prior law as it pertains to the precise issue presented in Kent.\(^{42}\) Had the court confined its constitutional interpretation to the issue of the effect of the result of a preliminary hearing upon subsequent grand jury proceedings this case would have no relevance to the intervening indictment controversy.

However, in arriving at its holding the court remarked, in dictum, that the preliminary hearing provision of section 7 was

\begin{footnotes}
\item[39] 54 Ill. 2d at 163-64, 295 N.E.2d at 712.
\item[40] See Verbatim Transcripts, vol. III at 1451.
\item[41] See Comm. Proposals, vol. VI at 76. See also E. Gertz, For the First Hours of Tomorrow: The New Illinois Bill of Rights 105 (1972).
\end{footnotes}
"designed to insure that the existence of probable cause will be determined promptly either by a grand jury or by a judge." 43

This conclusion was deduced by analyzing the records of the Convention and is based on the premise that since the preliminary hearing provision proposed by the Bill of Rights Committee, which required that a preliminary hearing be held after return of indictment in all cases, was amended rather than accepted as proposed, the intention of the delegates to the Convention was that it was to make no difference whether probable cause is determined by the grand jury or by a preliminary hearing just as long as it is determined promptly. Hence, the court saw the grand jury and the preliminary hearing as performing the same constitutional function. The inference is that the court felt that either method of determining probable cause satisfies the mandate of article I, section 7 if alacritously performed—an interpretation not supported by a less selective reading of the records of the Convention. 44

Though cited for its decisive utterance that section 7 does not preclude indictment subsequent to a preliminary hearing concluded in favor of the defense, 45 it is the court's dictum in Kent which has bearing on the intervening indictment controversy.

**People v. Hendrix**

In Hendrix 46 a felony complaint was filed against the defendant, who had fled to Tennessee where he was arrested. 47 After waiving extradition the defendant was returned to Illinois and was indicted before a preliminary hearing could be held. 48 The prosecution's offer to hold a preliminary hearing even though an indictment had already been returned was rejected by the defendant. Subsequently, the defendant filed a motion to dismiss the indictment on the ground that section 7 requires a prompt preliminary hearing to be given to establish probable cause prior to indictment when the initial charge against the defendant is made other than by way of indictment. 49 In grant-

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43. 54 Ill. 2d at 163, 295 N.E.2d at 711.
44. See text accompanying notes 22-30 supra. The court appears to have ignored the views expressed by the proponents of the preliminary hearing provision in the Convention debates, which indicated that the amendment of the provision originally proposed did not establish determination of probable cause by the grand jury and by preliminary hearing as equivalent methods. However, judicial use of the records of the Convention is not infrequently of such teleological character. See Lousin, Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution, 8 J. MAR. J. 189 (1974-75).
46. 54 Ill. 2d 165, 295 N.E.2d 724 (1973).
47. Id. at 165-67, 295 N.E.2d at 725-26.
48. Id.
49. Id.
ing the defendant's motion to dismiss, the trial judge opined that the prosecution's offer to hold a preliminary hearing did not cure the defect and declared that part of a criminal procedure statute had been rendered unconstitutional by article I, section 7 of the 1970 Constitution.

The Illinois Supreme Court noted that

[w]hile section 7 of article I of the constitution provides that the General Assembly 'may abolish the grand jury, or further limit its use,' the General Assembly had not done either.  

A possible inference of this observation is that the court may have felt that there was some question as to whether the preliminary hearing provision of the 1970 Constitution is effective while the grand jury continues to function. An argument can be made that the right to a preliminary hearing conferred by article I, section 7 exists only if the General Assembly abolishes the grand jury. Such an interpretation of section 7 would require a strained reading of the section and would be without foundation in the Convention debates. Perhaps aware of this weakness, the court took a different tack.

After commenting on the failure of the General Assembly to abolish or limit the use of the grand jury the court made a further observation.

The Code of Criminal Procedure still provides: 'All prosecutions of felonies shall be by indictment unless waived understandingly by the accused in open court, and unless the State expressly concurs in such waiver in open court.' (Ill. Rev. Stat. 1971, ch. 38, par. 111-2) The offense involved in this case is a felony (Ill. Rev. Stat. 1971, ch. 38, par. 16-1), and there has been no waiver of indictment.

On the basis of these facts the court articulated its premises and reached a conclusion.

If the defendant was to be prosecuted for the offense, he had to be indicted. Without an indictment he could never have been 'held to answer,' or brought to trial, and the assertion of the public defender, acquiesced in by the trial judge, that the State had violated the Constitution, is patently unsound.

This eminently logical conclusion does not deny that a defendant has a right to a preliminary hearing if he is initially charged

50. Ill. Rev. Stat. ch. 38, § 111-2 (1971). The trial judge held that the following part of section 111-2 was unconstitutional in light of the 1970 Constitution:

If the defendant is charged with the commission of a felony . . . a preliminary hearing . . . shall be conducted . . . unless a Bill of Indictment upon the same felony charge is returned in open court prior to such hearing.

51. 54 Ill. 2d at 168, 295 N.E.2d at 726.
52. See notes 28 and 37 and accompanying text supra.
53. 54 Ill. 2d at 168-69, 295 N.E.2d at 726.
54. Id.
by complaint or information, even in the event an indictment is returned before the hearing is held.

Apparently viewing the defendant's rejection of the preliminary hearing proffered by the prosecution as a waiver of his right to such hearing under article I, section 7, the court concluded its opinion with the statement that

[w]hat 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.

Hence, the holding of Hendrix would appear to be that a preliminary hearing does not have to precede indictment if the initial charge is not by indictment. Although one could imply it, the court did not go so far as to say that a preliminary hearing held after an indictment, which is procured after the accused is initially charged other than by indictment, complies with the requirements of the second paragraph of article I, section 7. Nevertheless, this latter interpretation of section 7 is supported by the language of the section and by its history as recorded in the proceedings of the Convention.

In the penultimate and antepenultimate sentences of its opinion the court stated that

[t]he 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.

In view of the fact that the court found there to be no violation of the defendant's constitutional right to a prompt preliminary hearing, these statements were unnecessary to the disposition of the case and are thus dicta.

Hence, after analysis, one must conclude that the opinion of the Illinois Supreme Court in Hendrix did not resolve the controversy over intervening indictments. The court did not expressly state that an accused has a right to a preliminary hearing after an indictment which is returned after an initial charge which was not an indictment. On the other hand, the court, by declining to address itself to the constitutionality of the statute which the trial judge declared unconstitutional, apparently because it was not an issue between the parties in trial court, avoided saying

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56. 54 Ill. 2d at 169, 295 N.E.2d at 727.
57. See notes 28 and 37 and accompanying text supra.
58. 54 Ill. 2d at 169, 295 N.E.2d at 727.
Post-Indictment Preliminary Hearings

that an accused does not have a right to a preliminary hearing after an indictment procured after an initial charge is lodged against the accused other than by indictment.

Later Cases

The most recent case before the Illinois Supreme Court in which an intervening indictment had been obtained is People v. Howell. Here, the defendant was held in jail for 65 days before being indicted and he was not given a preliminary hearing. Although the court considered "the delays in giving an accused a prompt preliminary hearing to be a serious deprivation of his constitutional rights," it was able to dispose of the case on other grounds because the defendant had not raised the question of the violation of article I, section 7 in the trial court.

Nonetheless, the court in disposing of the case took advantage of the opportunity to add to the growing body of dicta bearing on the post-indictment preliminary hearing question. Relying on Kent and Hendrix the court stated that under section 7 the defendant held on a criminal charge punishable by imprisonment in the penitentiary must be afforded a prompt probable cause determination of the validity of the charge either at a preliminary hearing or by an indictment by a grand jury.

The implication of this statement, bolstered by another dictum in Howell, is that an accused is not entitled to a preliminary hearing when a true bill is voted by the grand jury before the preliminary hearing required by section 7 can be held. That this is the conclusion to be drawn from an examination of Kent and Hendrix had already been inferred by the lower courts. Indeed, the appellate courts have not shared the

59. People v. Hood, 59 Ill. 2d 315, 319 N.E.2d 802 (1974), also involved an intervening indictment. However, the court did not have to decide the case on the basis of article I, section 7 of the 1970 Constitution because the defendants were arrested prior to its effective date.
60. 60 Ill. 2d 117, 324 N.E.2d 403 (1975).
61. Id. at 122, 324 N.E.2d at 405-06.
62. The court, in affirming the defendant's conviction, found the defendant precluded from raising the question of the violation of the 1970 Constitution because he failed to properly preserve the issue for review by not presenting it to the trial court. Id. at 119, 324 N.E.2d at 404.
63. Id. at 119, 324 N.E.2d at 404.
64. Although not a dispositive issue, the court addressed itself to the question of the remedy provided for a violation of article I, section 7. Citing the dicta in Hendrix, see text accompanying note 58 supra, the court indicated that responsibility for formulating a remedy rests with the legislature. Id. at 120, 324 N.E.2d at 404.
Illinois Supreme Court's reluctance to comment on the status of a post-indictment preliminary hearing as an efficacious means of complying with the dictates of section 7.

A case in point is People v. Gooding.\textsuperscript{68} Although the facts of the case presented no intervening indictment situation, the appellate court nevertheless availed itself of the occasion to remark on the relationship between preliminary hearings and indictments. As the appellate court saw it, in \textit{Hendrix}

the court found that, notwithstanding the fact that a preliminary hearing has a constitutional character (Constitution of 1970, art. I, § 7, S.H.A.), it is not an absolute prerequisite to a criminal prosecution. An indictment is. In that case the court held when a defendant is properly indicted the necessity for a preliminary hearing to establish probable cause is vitiated.\textsuperscript{67}

Though indicative of the reception that an argument for a post-indictment preliminary hearing when there is an intervening indictment would get in the appellate courts,\textsuperscript{68} \textit{Gooding} is not as forceful as the most recent appellate court opinion addressing the problem, People v. Moore.\textsuperscript{69}

In \textit{Moore} the initial charge against the defendant was by information and before a scheduled preliminary hearing could be held the defendant was indicted. At the preliminary hearing the prosecution advised the court that because of the intervening indictment, it would not present evidence to establish probable cause. Defendant's motion to dismiss the indictment was granted and the state appealed.

The words chosen by the appellate court in arriving at its decision to reverse and remand made it plain that establishment of probable cause was its sole concern and the method by which this is accomplished is, at best, peripherally relevant.

Since the sole purpose of a preliminary hearing is to determine probable cause, which has already been determined, a post-indictment preliminary hearing would be an empty formality serving no legitimate purpose.\textsuperscript{70}

As support for viewing a post-indictment preliminary hearing as disutilitous it was stated that

if a grand jury makes a determination of probable cause and returns an indictment, their determination of probable cause is final and is not subject to direct attack in a subsequently held

\begin{thebibliography}{99}
\bibitem{E2d3051973} People v. Spera, 10 Ill. App. 3d 305, 293 N.E.2d 656 (1973).
\bibitem{E2d10641974} 21 Ill. App. 3d 1064, 316 N.E.2d 549 (1974).
\bibitem{Id} Id. at 1068, 316 N.E.2d at 551.
\bibitem{E2d893} 28 Ill. App. 3d 1085, 329 N.E.2d 893 (1975).
\bibitem{Idat1089} Id. at 1089, 329 N.E.2d at 896.
\end{thebibliography}
proceeding unless all the witnesses or all the testimony upon which it was founded is incompetent.\textsuperscript{71}

Despite the fact that \textit{Moore} is the only case in which a court of appellate jurisdiction has explicitly addressed itself to the argument that section 7 requires a preliminary hearing to be held after an intervening indictment, the course taken by the appellate court is simply a verbal ratification of the judicial attitude on the intervening indictment problem with which the opinions in cases involving intervening indictments have been imbued since \textit{Kent} and \textit{Hendrix} were decided.\textsuperscript{72}

Although lacking a definitive decision by the Illinois Supreme Court, the courts appear to have resolved the controversy over the interpretation to be given section 7 when there is an intervening indictment in a manner not supported by the Convention debates. The judicial resolution, unexpected by some\textsuperscript{73} and viewed as logical by others,\textsuperscript{74} indicates that section 7 effected no change in the legal status of the right to a preliminary hearing as it existed before the 1970 Constitution.\textsuperscript{75} While the courts have been receptive to the prosecution arguments that the preliminary hearing provision of the 1970 Constitution does not require a preliminary hearing after an indictment has been returned by the grand jury, persuasive reasons exist for urging the Illinois Supreme Court to sanction the converse interpretation should it have occasion to consider the question.

\textbf{JUSTIFYING AN ALTERNATE RESOLUTION}

Aside from the Convention debates and the language of section 7 itself, there are other bases for contending that a preliminary hearing should be held after indictment when the initial charge was not by indictment. Most of these reasons involve the differences between determining probable cause by grand jury proceeding and by preliminary hearing. Were these methods not essentially distinct there would have been no reason to constitutionalize the right to a preliminary hearing.

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} The court relied on \textit{People v. Hopkins}, 53 Ill. 2d 452, 292 N.E.2d 418 (1973) and \textit{People v. Jones}, 19 Ill. 2d 37, 166 N.E.2d 1 (1960). Both cases involved defendants arrested before the 1970 Constitution became effective and are thus questionable authority for the proposition asserted by the court.
\item \textsuperscript{72} \textit{See} \textit{cases cited in notes 65 and 68 supra.}
\end{itemize}
Despite the inability of the legislature to provide statutory definition of the scope of a preliminary hearing, the courts have recognized that a preliminary hearing has functions other than the determination of probable cause. It is these other functions, set out below, which account for the preference of defense attorneys for a preliminary hearing rather than a grand jury proceeding.

1. Screening. Though both grand jury and preliminary hearing provide a device whereby the facts are examined to determine whether there is a basis for having a trial, the preliminary hearing provides a more objective screening device in that the fact finder is independent of the prosecutor. The criticism that the grand jury deliberation is merely a rubber stamp of the decision of the prosecutor to charge, is not new and appears to be supported by statistical evidence.

2. Discovery. A preliminary hearing requires that the prosecutor make public sufficient evidence to establish that there is reason to believe that an offense was committed by the accused. This permits the defendant to discover at least part of the case against him. The accused has no such opportunity in a grand jury proceeding because it is secret. Though recognized by the courts as an aspect of the preliminary hearing important to the defendant, the discovery function by itself has not been sufficient to warrant reversal of an Illinois case in which a preliminary hearing was not held. Although the Illinois Supreme Court has formulated rules of discovery for


78. The significance of an independent fact finder lies in the fact that he neither owes allegiance nor is subservient to either part. Hence, he can exhibit more impartiality in weighing the evidence and is less inclined to readily acquiesce in the prosecutor's assertion that he has a viable case.


80. Indeed, in the federal system the defendant cannot be present while evidence against him is presented. See Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 969 (1974). On secrecy of Illinois grand jury proceedings see note 22 supra.


criminal cases, it is an open question whether they preempt the discovery aspect of a preliminary hearing.

3. Perpetuation of Testimony. Although the rules of evidence are relaxed in certain respects, testimony of prosecution witnesses cross-examined by defense counsel at a preliminary hearing can be used for impeachment purposes at a later trial. The defendant may also present witnesses on his own behalf. Though the perpetuation/impeachment aspect of preliminary hearings can be taken advantage of by the prosecutor as well, it appears to be of more importance to the defendant since a grand jury proceeding affords no similar opportunity to the defendant and in such a proceeding the prosecutor is in his own environs. As with the discovery function, the perpetuation of testimony function of preliminary hearings has been recognized by the courts but not as sufficient by itself to require reversal when no preliminary hearing was held.

4. Plea Bargaining. The preliminary hearing may convince a defendant of the strength of the prosecution's case and induce him to plead guilty to a lesser charge or to waive indictment. Since the defendant cannot present exculpatory evidence to test the strength of the state's case in a grand jury proceeding such a proceeding is not conducive to plea bargaining.

5. Suppression of Evidence. The defendant may contest the legality and admissibility of evidence at a preliminary hearing by moving for its suppression. Since People v. Taylor was decided, it has been the law in Illinois that an order suppressing evidence entered at a preliminary hearing is an appealable order and, therefore, is binding on the trial court where the state does not appeal from the order. Because a grand jury is not a judicial proceeding it is obvious that the defendant cannot contest the legality and admissibility of evidence presented to that body at the time it is presented.

85. Preliminary hearing testimony may also be admissible at trial as substantive evidence under the "prior testimony" exception to the hearsay rule. See McCormick, Evidence § 255 (2d ed. 1972).
86. See note 81 supra.
87. See note 82 supra.
88. An accused may enter a plea of guilty at a preliminary hearing. See People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527 (1967).
90. 50 Ill. 2d 136, 277 N.E.2d 878 (1972).
6. **Bail.** The defendant may use a preliminary hearing as a vehicle for securing terms for pretrial release or reduction of bail.92 Once again, this is a judicial function and therefore cannot be performed by the grand jury.

When coupled with the fact that the United States Constitution gives a defendant a right to counsel at a preliminary hearing,93 the functions of a preliminary hearing just discussed indicate that while such a proceeding is not a full fledged trial,94 it is still substantially adversary in nature. When contrasted with the non-adversary nature of a grand jury proceeding, it is logical to conclude that a preliminary hearing provides a more effective buffer between the defendant and the prosecutor than does the grand jury. Since a state's attorney can virtually assure indictment of the accused by presenting only testimony from witnesses for the prosecution to the grand jury,95 an interpretation of article I, section 7 of the constitution that would require a preliminary hearing after an intervening indictment would be enlarging the protective role of the preliminary hearing, though perhaps productive of inconvenience.96

That the protective function of the preliminary hearing should be broadened is not an unreasonable contention when one considers the fact that some prosecutors are predisposed to end run the preliminary examination. In other words, prosecutors sometimes avoid a preliminary hearing by requesting and being granted continuances until they have the opportunity to secure an indictment, which they have been successful in contending obviates the need for a preliminary hearing.97 This practice is not condoned by the Illinois Supreme Court98 and was seen by the proponents of the preliminary hearing provision in the Con-

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93. See Coleman v. Alabama, 399 U.S. 1 (1970); People v. Adams, 46 Ill. 2d 200, 263 N.E.2d 490 (1970). The United States Supreme Court's designation of a preliminary hearing as a critical stage in a criminal proceeding, in Coleman, has lead some commentators to formulate cogent arguments that there is an emerging right to a preliminary hearing as a due process requirement under the United States Constitution. See A. Amsterdam, Trial Manual for the Defense of Criminal Cases § 130 (3rd ed. 1974); A. Goldstein & L. Orland, Criminal Procedure 304-20 (1974). The judicial attitudes which such an argument presupposes have not been evident thus far. See Fed. R. Crim. P. 5(e), which states that if an indictment is handed down before a preliminary hearing can be held, the defendant is no longer entitled to a preliminary hearing.
95. See Verbatim Transcripts, vol. III at 1439.
96. On inconvenience and construction of state constitutions see T. Cooley, Constitutional Limitations 144-51 (1927).
98. See People v. Howell, 60 Ill. 2d 117, 121-22, 324 N.E.2d 403, 405 (1975).
vention as one of the evils the provision was designed to eliminate.\footnote{99}

Construing section 7 to require a post-indictment preliminary hearing when there is an intervening indictment would deprive prosecutors of the power, as well as the incentive, to moot the preliminary hearing. Although a finding of no probable cause at a preliminary hearing and the quashing of a previously procured indictment would not prevent a prosecutor from attempting to secure another indictment,\footnote{100} it would probably have the effect of normally dissuading the prosecutor from doing so until he had obtained additional evidence. Though unlikely, it is possible that the grand jury would vote a no bill if reindictment were sought on evidence found to be judicially insufficient to establish probable cause.

\section*{Conclusion}

The constitutionalization of the right to a preliminary hearing gives rise to the inference that the purpose of such a proceeding has been enlarged beyond its traditional bindover function.\footnote{101} However, the cases to date indicate that no judi-
cial recognition of this implication will be forthcoming and that the denial of the constitutional right to a preliminary hearing will continue to go unredressed. Nonetheless, the argument that section 7 requires a preliminary hearing to be held after an intervening indictment has yet to come squarely before the Illinois Supreme Court and the controversy is thus technically without final resolution. Though it seems likely that the court will concur in the opinion of the lower courts that a post-indictment preliminary hearing would be an empty formality, it is conceivable that the court will adopt an interpretation of the second paragraph of article I, section 7 which gives substance and meaning to the preliminary hearing provision and comports with the resolution supported by the proceedings at the Convention.

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plaint after preliminary hearing, or after a waiver of preliminary hearing in accordance with paragraph (a) of this Section, such prosecution may be for all possible offenses, and under all possible theories 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 possible offenses arising from that transaction or conduct.

On prosecution by information as compared with prosecution by indictment, see Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 968-80 (1974).

Though adoption of the information system of prosecution will possibly curb the practice of prosecutors mooting the preliminary hearing, such a system will not eliminate the tactic. A prosecutor can still get an indictment before the preliminary hearing which is required to be held after filing of the information. The question of the effect of an intervening indictment on the right to a preliminary hearing would once again rear its head. Interpreting section 7 to require a preliminary hearing after an intervening indictment would settle the issue and eradicate the tactic of obtaining an indictment to moot the preliminary hearing. The new statute does not resolve the intervening indictment-preliminary hearing controversy.