

# PRELIMINARY HEARINGS

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# WHAT ARE THEY?

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- OPPORTUNITY TO QUESTION WITNESSES AND LEARN MORE ABOUT YOUR CASE
- OPPORTUNITY TO HONE IN ON ISSUES
- HELPS WEED OUT THE BAD CASES
- HELPS YOUR CLIENT UNDERSTAND THE CASE

# WHAT ARE THEY NOT?

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- NOT A TRIAL
- NO JURY
- LOWER BURDEN ON STATE
- JUDGE DOESN'T CARE WHO IS TELLING THE TRUTH
- JUDGE DOESN'T CARE ABOUT YOUR DEFENSES
- STATE NOT LIKELY TO SHOW WHOLE HAND



# BEFORE THE PH

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- PREP CLIENT ON WHAT WILL HAPPEN
- PREP CLIENT ON WHAT WON'T HAPPEN
- DEFENDANT **NEVER** TESTIFIES – EVER!!!
- RARELY, IF EVER, SHOULD YOU CALL DEFENSE WITNESSES

# RULES, RULES, RULES

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- 22.09 – TIME LIMITS
- 25.03(a) - DISCOVERY
- 32.06 – CHANGE OF JUDGE



# RULE 22.09 – TIME LIMITS

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Preliminary Hearing. After the filing of a felony complaint, a preliminary hearing shall be held within a reasonable time, but no later than 30 days following the defendant's initial appearance if the defendant is in custody and no later than 60 days if the defendant is not in custody.

- For good cause, the court may extend the time limits one or more times. Upon each showing of good cause, the court may extend the time for holding a preliminary examination for up to 30 days each time if the defendant is in custody, and up to 60 days each time if the defendant is not in custody. When the court considers whether to extend the time for holding a preliminary hearing under this Rule, the defendant may request and the court may review the defendant's detention or conditions of release pursuant to Rule 33.05.

# RULE 25.03(a)- DISCOVERY

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- (a) Disclosure upon filing of felony complaint. Except as otherwise provided in these Rules, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel the following material and information in the possession of the prosecutor: any arrest reports, incident reports, investigative reports, written or recorded statements, documents, photographs, video, electronic communications and electronic data that relate to the offense for which defendant is charged.



# RULE 32.06- CHANGE OF JUDGE

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A change of judge shall be ordered before a preliminary examination upon the filing of a written application therefor not later than ten days prior to the initial date set for examination or within ten days of the designation of the judge, whichever is later; provided that the change of judge shall be requested prior to the commencement of the preliminary examination. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party.

- YOU STILL GET ANOTHER CHANGE IN CIRCUIT COURT



# AND MORE RULES

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- 544.280 – RULES OF EVIDENCE
- 544.360 – THE “RULE” ON WITNESSES
- 544.370 - HOMICIDES
- 544.376 – LAB REPORTS
- 478.240 – FREE CHANGE OF JUDGE!

# SECTION 544.280

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- The order of conducting the trial or **hearing**, with respect to the introduction of the evidence and the examination of witnesses, shall be the same as governs in the trial of criminal cases before circuit judges, as far as practicable.
- This is a particularly good argument for those judges that love allowing hearsay at the prelim.



## SECTION 544.360

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- While any witness for or against the prisoner is under examination, the associate circuit judge may exclude from the place in which such examination is had all witnesses who have not been examined, and he may cause the witnesses to be kept separate and prevented from conversing with each other, until they shall have been examined.

# SECTION 544.370

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- In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the associate circuit judge, or under his direction, and shall be signed by the witnesses respectively.



# SECTION 544.376

- At any preliminary hearing conducted in the courts of this state, a report from any crime laboratory in the state, or from any federal crime laboratory, relating to the testing, analysis, identification, or comparison of evidence and certified under the seal of that laboratory shall be received into evidence on the issue of the results of scientific tests. The accused or his attorney of record shall be provided with a copy of such report at least ten days prior to the preliminary hearing and shall have the opportunity before the hearing upon notice to the state of the time and place to conduct the interview, which may be recorded, of any person who conducted the testing, analysis, identification, or comparison of evidence which is the subject matter of the report. Nothing in this section shall affect the right of the accused to subpoena such person.

# SECTION 478.240.2

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- Call it a free Change of Judge
- Judge who hears the PH cannot preside over the trial.
- Assignment of a judge to hear the trial of a felony case when he or she has previously conducted the preliminary hearing in that case, unless the defendant has signed a written waiver permitting the same judge to hear both the preliminary hearing and the trial, or unless the defendant has indicated on the record that the defendant is permitting the same judge to hear both the preliminary hearing and the trial;



# REASONS TO HAVE IT

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- Having it should **ALWAYS** be the default position
- Build rapport with client
- Hone your skills
- Get discovery
- Laying the trap(s)
- WIN!!!!

# REASONS NOT TO HAVE IT

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- THERE ARE REALLY ONLY TWO REASONS:
- 1. OFFER/BOND
  - DON'T JUST RELAY THE OFFER- TELL YOUR CLIENT WHAT IT MEANS AND WHAT YOU THINK
- 2. CONFRONTATION CONCERNS
  - AND THIS IS WHERE SHIT GETS COMPLICATED...



# THE PROBLEM WITH RECORDINGS

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- State and/or court plans to record the preliminary hearing
- What does that mean to you?
- State v. Aaron, 218 S.W.3d 501 (W.D. 2007)
- Nothing to gain, much to lose
- Live to fight another day

# NEVER FORGET

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IF YOU “LOSE” THE PRELIM, YOUR CLIENT ENDS UP IN THE EXACT SAME SPOT AS IF YOU WOULD HAVE WAIVED IT.



# QUESTIONS?

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- BUELLER?
- BUELLER?
- BUELLER?

