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PRELIMINARY HEARINGS IN VIRGINIA

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If there is any area of criminal practice in Virginia that could be considered the neglected child, it is the preliminary hearing.¹ That neglect has all too frequently manifested itself in conduct by lawyers at preliminary hearings that could only be grounded in a basic misunderstanding of the purposes, procedures, and substantive law governing preliminary hearings. It appears that many lawyers conclude that they know the law of preliminary hearings simply because they know the general field of criminal law and the adjuncts of trials. Such a conclusion does not necessarily follow. A preliminary hearing is a specialized procedure in Virginia that is not the same as a criminal trial. Thus, it is important for a lawyer to understand precisely both what the preliminary hearing is, and what it is not.

This Article is an attempt to provide to the practitioner a concise summary of the law of preliminary hearings in Virginia in an effort to promote a better understanding of the procedure by the criminal bar. It also attempts to eliminate some of the more common misconceptions concerning these hearings. Because many of these misconceptions are widespread and could color the reader's perception of a discussion of what the preliminary hearing is, this Article will begin with what it is not.

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1. In Virginia, the term "preliminary hearing" refers to a statutory proceeding in which probable cause to prosecute, based on evidence designed to show that a felony has been committed by the accused, is determined. Care should be taken not to confuse this procedure with the many other types of probable cause determinations that are sometimes referred to in the literature as preliminary hearings. In Virginia, for example, five formal or informal probable cause determinations are made in a typical felony case: (1) the determination by the magistrate whether to issue a warrant; (2) an initial determination by a judicial officer whether to release an accused on bond; (3) the determination at the preliminary hearing whether to certify the case to the grand jury; (4) the determination by the grand jury whether to indict the accused and put him to trial; and (5) the determination by the Commonwealth's attorney whether there is sufficient evidence to prosecute the trial. This Article will deal only with the third determination, the preliminary hearing in Virginia.

WHAT IT IS NOT

Constitutional Right

The preliminary hearing is not a right guaranteed by the Constitution of the United States;² nor is it a right guaranteed by the constitution of Virginia.³ It is a creature of statute and was first introduced in Virginia in 1804.⁴ The present statute provides:

No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any person prior to such hearing unless such hearing is waived in writing by the accused.⁵

This statute is not a broad guarantee of a preliminary hearing to criminal defendants. The statutory right has been limited to cases in which the accused is arrested on a felony charge prior to indictment.⁶ The right under the statute has been further limited to arrest on a warrant, and the Supreme Court of Virginia has refused to extend the meaning of arrest to a case in which the defendant voluntarily went to a police station for questioning before his eventual indictment and conviction.⁷

Even when arrested on a felony charge prior to indictment, the accused may be denied a preliminary hearing without violating due process. In *Benson v. Commonwealth*,⁸ the defendant had been arrested on a warrant and had insisted on a preliminary hearing before the witnesses appeared before the grand jury. The Commonwealth's attorney dismissed the warrant and took the case directly to the grand jury for indictment. On appeal, the defendant contended that he had been denied a preliminary hearing. In affirming the conviction, the supreme court stated:

2. *Ashby v. Cox*, 344 F. Supp. 759 (W.D. Va. 1972).

3. *Benson v. Commonwealth*, 190 Va. 744, 58 S.E.2d 312 (1950).

4. See generally 5B MICHIE'S JURISPRUDENCE *Criminal Procedure* § 17, at n.16 ().

5. VA. CODE ANN. § 19.2-218 (Repl. Vol. 1975). See also VA. SUP. CT. R. 3A: 5-1(b)(1).

6. *Webb v. Commonwealth*, 204 Va. 24, 129 S.E.2d 22 (1963). In *Webb*, the Supreme Court of Virginia stated that due process was not denied when the defendant was not given a preliminary hearing, because the defendant had not been arrested before indictment. The court then proceeded to reverse the lower court on other grounds.

7. *Land v. Commonwealth*, 211 Va. 223, 176 S.E.2d 586 (1970).

8. 190 Va. 744, 58 S.E.2d 312 (1950).

The Commonwealth's attorney had complete authority over the conduct of the prosecution and was at liberty to dismiss the warrant if he thought it would expedite the proceedings. We hold under the circumstances, the defendant had no right, either statutory or constitutional, to be afforded a preliminary hearing prior to the finding of the indictment or to his trial thereof.⁹

This proposition was recently affirmed by the supreme court in a slightly different form in *Waye v. Commonwealth*.¹⁰ In that case, the defendant was convicted of capital murder, although he had originally been arrested on a non-capital charge of first degree murder. Thereafter the Commonwealth's attorney obtained both capital and first degree murder indictments. He proceeded to trial only on the capital offense. The court held that this did not circumvent the defendant's statutory right to a preliminary hearing. Citing the statute, the court held that he was not denied his statutory right because he had not been arrested on capital murder, but had been indicted directly on that charge. It further held that this was not manipulative.¹¹

Finally, the statute does not guarantee a second preliminary hearing on retrial. In *May v. Peyton*,¹² the United States District Court for the Western District of Virginia denied the defendant's petition for a writ of habeas corpus when the petition was based on the lack of a second preliminary hearing before retrial after the defendant's original trial and sentence had been set aside. The court held that the defendant had no right to a second hearing under the statute.

Discovery Vehicle

The preliminary hearing is not a discovery vehicle. Despite some language in the opinion of the Supreme Court of the United States in *Coleman v. Alabama*¹³ that suggests a broader interpretation, the Supreme Court of Virginia would seem to limit discovery of the type discussed in *Coleman* to that which naturally flows from the presentation of the evidence.¹⁴ Although two of the relevant cases were

9. *Id.* at 750, 58 S.E.2d at 314.

10. 219 Va. ___, 251 S.E.2d 202 (1979).

11. *Id.* at ___, 251 S.E.2d at 206.

12. 268 F. Supp. 928 (W.D. Va. 1967).

13. 399 U.S. 1 (1970).

14. *Davis v. Commonwealth*, 215 Va. 816, 213 S.E.2d 785 (1975); *Foster v. Commonwealth*, 209 Va. 297, 163 S.E.2d 565 (1968); *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

decided before *Coleman*, this proposition was affirmed five years after *Coleman* in *Davis v. Commonwealth*.¹⁵

Double Jeopardy and Related Matters

The most recent Virginia case detailing the many things that a preliminary hearing is not was *Moore v. Commonwealth*.¹⁶ In *Moore*, the defendant was arrested in 1974 on two felony warrants and charged with possession of marijuana with intent to distribute and possession of hashish, respectively. At the preliminary hearing, after all the evidence was introduced, the District Court judge " 'dismissed' " ¹⁷ both warrants. Subsequently, the Commonwealth's attorney obtained indictments on both charges. After a motion to quash the indictments was denied, the defendant was convicted in a bench trial. She thereafter appealed, alleging numerous grounds arising from the dismissal of the charges at the preliminary hearing.

In *Moore*, the supreme court stated clearly there was no double jeopardy on these facts because jeopardy does not attach until the defendant is "put to trial before that trier of facts," and a preliminary hearing is not a trial.¹⁸ The defendant had contended that the district court was required under Virginia law to try her at the preliminary hearing on lesser included offenses if there was a finding of no probable cause with respect to the felony charge and if the lesser included offenses were misdemeanors, thus within the jurisdiction of the district court. She argued that the failure to try her on these lesser offenses following a full evidentiary hearing and her release following the hearing must be taken as an acquittal on the lesser included offenses. The court noted that while the Code of Virginia¹⁹ permitted the district court to try the accused on the lesser offense, no such immediate trial was required.²⁰ The court further stated that the defendant had not been put to trial, absent a showing that she had been arraigned on a misdemeanor. The court refused to assume, absent any record to the contrary, that she was tried and acquitted of a misdemeanor.²¹

15. 215 Va. 816, 213 S.E.2d 785 (1975).

16. 218 Va. 388, 237 S.E.2d 187 (1977).

17. *Id.* at 389, 237 S.E.2d at 189.

18. *Id.* at 392, 237 S.E.2d at 190.

19. VA. CODE ANN. § 19.1-106 (1950) (recodified at § 19.2-186).

20. 218 Va. at 391-92, 237 S.E.2d at 190-91. *But see* *Rouzie v. Commonwealth*, 215 Va. 174, 207 S.E.2d 854 (1974).

21. 218 Va. at 392, 237 S.E.2d at 191.

Continuing in *Moore*, the court rejected the defendant's claim that the indictment of a criminal defendant on a felony warrant can be accomplished *only* by way of preliminary hearing. The court said that had the legislature intended to forever bar the bringing of an indictment after a finding of no probable cause by a district court the statute would have so stated.²² Finally, the court in *Moore* rejected the proposition that these facts entailed an "upping of the ante," as proscribed by the United States Supreme Court in *Blackledge v. Perry*,²³ by elevating a misdemeanor into a felony on trial *de novo*. The Virginia Supreme Court observed that there was no conviction in the district court, no appeal to the circuit court, and therefore no upping of the ante.²⁴

WHAT IT IS

Thus, in summary, the preliminary hearing is not a constitutional right, a discovery vehicle, or a trial in itself. Having disposed of these common misconceptions, it is appropriate to consider now what the preliminary hearing is.

As previously noted, the preliminary hearing is a statutory right applicable in the limited circumstances of arrest on a felony charge prior to indictment on that charge.²⁵ The metes and bounds of preliminary hearings have been laid out by the Supreme Court of Virginia in two leading cases that outline the total extent of the jurisdiction of the district court. These cases are *Williams v. Commonwealth*²⁶ and *Foster v. Commonwealth*,²⁷ both decided in 1968. A discussion of both of these cases is warranted despite their essentially identical facts. These cases have interpreted the principal preliminary hearing statute²⁸ to limit the preliminary hearing in the bounds of evidence for and against the accused.

In *Williams*, the defendant was convicted of first degree murder and on appeal contended, *inter alia*, that he was denied a preliminary hearing as required by law. At the close of the Commonwealth's evidence, the attorney for the Commonwealth moved that

22. *Id.*

23. 417 U.S. 21 (1974).

24. 218 Va. at 396, 237 S.E.2d at 193.

25. See notes 5-11 *supra* & accompanying text.

26. 208 Va. 724, 160 S.E.2d 781 (1968).

27. 209 Va. 297, 163 S.E.2d 565 (1968).

28. VA. CODE ANN. § 19.2-183 (Repl. Vol. 1975).

the case be certified to the grand jury. Over the objection of defense counsel, the court certified the case to the circuit court and refused to permit the defendant to call witnesses concerning an alleged confession. In affirming the conviction, the Virginia Supreme Court stated:

The county judge had only one issue to decide when he presided at Williams's preliminary hearing, whether there was sufficient cause for charging Williams with murder or, in other words, whether there was reasonable ground to believe a murder had been committed and Williams was the person who had committed the murder. At William's preliminary hearing the Commonwealth produced three witnesses whose testimony showed Williams had killed Sarver. The attorney for the Commonwealth then moved the county judge to certify the case, so there was no reason to hear further evidence *against* the accused. . . . Defense counsel therefore had the right to present evidence *for* Williams, that is, to show there was no reasonable ground for belief that Williams had committed murder. But counsel did not represent to the county judge that they wished to offer testimony for that purpose. Instead they represented that they wished to call witnesses respecting an incriminating statement and a confession made by Williams.²⁹

In *Foster*, the defendants had subpoenaed eleven police officers at the preliminary hearing. After the Commonwealth had presented its evidence, the defendants attempted to produce lengthy testimony on their behalf. The Commonwealth's attorney objected to such examination on the ground that it was a mere fishing expedition. The court refused to permit counsel to examine the police officers and, after stating that there was probable cause, certified the case to the grand jury. In affirming on appeal, the supreme court, following *Williams*, sanctioned the action of the county judge in the absence of a representation that the proffered testimony would show no crime was committed or that the defendants were not connected with it.³⁰

An initial reading of these cases could lead one to interpret them as representing a fine distinction by the supreme court concerning what constitutes evidence *for* the accused. Careful consideration of

29. 208 Va. at 728-29, 160 S.E.2d at 784 (footnote and citations omitted).

30. 209 Va. at 300-01, 163 S.E.2d at 567-68.

the import of these cases indicates, however, that if the issue is a decision for the trier of fact, then it is not within the jurisdiction of the district court. Thus, the defense is limited to presenting evidence of the type that would support summary judgment or a directed verdict. Defense counsel must distinguish between improbability and impossibility in this respect. The alibi defense offers an excellent illustration. It is for the trier of fact to weigh the credibility of defense testimony that it is probable the accused was not present, but if defense evidence shows impossibility to commit the offense, such as being incarcerated at the time, the decision would lie within the purview of the court.

The distinction mentioned above does not preclude the district court from sitting as a trier of fact on at least two issues—unreasonable search and seizure and the validity of confessions—but only if a decision in favor of the defendant would negate either the existence of a crime or any link between the crime and the defendant. If the lower court should find that a confession was involuntary or that a proper *Miranda* warning was not given, and if the confession were the only link connecting the defendant to the offense, the district court should suppress the confession and dismiss the case. Similarly, the issue of an unreasonable search and seizure might require suppression of evidence of the crime. Surely if a warrantless search were made when a warrant was required, or if that warrant were defective, the court would have the jurisdiction to suppress. The suppression of the corpus delicti of a crime would be the equivalent of no felony having been committed.

Reversible Error and Waiver

The preliminary hearing is one instance in which the district court can commit reversible error. To take advantage of this, the accused must move to quash the indictment for failure to receive a proper preliminary hearing. Failure to raise the objection in this manner constitutes a waiver of the objection, as illustrated in *Snyder v. Commonwealth*.³¹ In *Snyder*, the defendant was charged with grand larceny. Following the Commonwealth's evidence at the preliminary hearing, the defendant moved to strike, which motion was taken under advisement. With no indication whether the motion was granted or denied, the defendant was indicted, tried,

31. 202 Va. 1009, 121 S.E.2d 452 (1961).

and convicted. Forty-seven days after the final order of conviction the objection was raised. The Virginia Supreme Court held that the preliminary hearing was procedural, not jurisdictional, and that the accused may waive a procedural step. Failure to raise the issue before trial was in effect a waiver, and being waived, the lack of a proper preliminary hearing was forever lost as a ground for objection.³²

A similar issue was raised in *Robertson v. Riddle*,³³ in which the defendant filed for habeas corpus on the ground that the presiding judge at the preliminary hearing was not a member of the Virginia bar. The defendant failed to raise this point prior to trial and did not raise it on appeal to the Supreme Court of Virginia. The court held that the judge's qualifications failed to raise a constitutional issue, and that lacking constitutional stature, the objection was lost by the failure to raise it in a timely fashion.³⁴

The preliminary hearing statute³⁵ specifically makes the waiver personal to the defendant. In *Triplett v. Commonwealth*,³⁶ for example, the defendant had been declared an habitual offender. He was arrested for driving a car in violation of the Virginia Habitual Offenders Act³⁷ and, upon conviction, was given a one-year sentence. On appeal, he alleged that he had not been given a preliminary hearing and had not waived it. The Virginia Supreme Court reversed, holding that the criminal statute involved did not preclude the need for a preliminary hearing. Where the defendant insists on his statutory rights, failure to honor those rights is reversible error.³⁸

Juvenile Court Proceedings

Proceedings in the Juvenile and Domestic Relations Court take on a different complexion when juvenile offenders are involved. In that court, the preliminary hearing is jurisdictional rather than procedural. This doctrine is set forth in *Peyton v. French*,³⁹ in which ten felony petitions were obtained after the defendant was commit-

32. *Id.* at 1014, 121 S.E.2d at 456.

33. 402 F. Supp. 144 (W.D. Va. 1975).

34. *Id.* at 146.

35. VA. CODE ANN. § 19.2-183 (Repl. Vol. 1975).

36. 212 Va. 649, 186 S.E.2d 16 (1972).

37. VA. CODE ANN. §§ 46.1-387.1 to -387.12 (Repl. Vol. 1974).

38. 212 Va. at 651, 186 S.E.2d at 17.

39. 207 Va. 73, 147 S.E.2d 739 (1966).

ted to Beaumont learning center for a status offense. The defendant was then summarily certified to the circuit court in a hearing at which his parents were not present, for no notice had been given them; nor had a guardian *ad litem* been appointed at the time of the hearing. The defendant was returned to the circuit court where counsel was appointed. Upon being arraigned, the defendant entered pleas of guilty to all charges. Subsequently a writ of habeas corpus was granted, the supreme court stating:

A hearing held under the Juvenile and Domestic Relations Court Law is not as limited in its scope as a preliminary hearing under the criminal procedures applicable to an adult. The juvenile court judge is expressly empowered with the discretion of either retaining jurisdiction of the child charged with the commission of a felony or certifying the child for criminal proceedings in a proper court of record.⁴⁰

In *Evans v. Cox*,⁴¹ however, the petitioner sought a writ of habeas corpus on the ground that the juvenile court had summarily certified his case to the circuit court without a preliminary hearing. He alleged that his parents were not present and that no guardian *ad litem* had been appointed. In the circuit court, a pre-trial report had been ordered and filed. The defendant's attorney moved in the circuit court that he be tried as a juvenile. After a hearing, the motion was denied; thereafter, the petitioner entered a plea of guilty and was sentenced. In response to his petition for habeas corpus, citing *Peyton*, the United States district court denied the writ, stating:

Evans was not certified for trial as an adult after a hearing by the juvenile court and the jurisdictional and procedural requirements for juvenile court hearings were not followed. Rather, the Circuit Court judge made his independent determination to try Evans as an adult after examining the pre-trial report prepared by the probation officer. Nothing more was required, and Evans' contention that the jurisdictional requirements for juvenile court hearings was not followed has no bearing on the validity of his conviction and sentence.⁴²

40. *Id.* at 78, 147 S.E.2d at 742.

41. 327 F. Supp. 1057 (E.D. Va. 1971).

42. *Id.* at 1060.

INCIDENTS OF A PRELIMINARY HEARING

Counsel

The right to assistance of counsel at a probable cause determination of the Virginia preliminary hearing type was established as a constitutional right by the United States Supreme Court in the case of *Coleman v. Alabama*.⁴³ The Court declared that the Alabama preliminary hearing was a "critical stage" of the state's criminal process.⁴⁴ At a critical stage, the defendant is entitled to the assistance of counsel, just as at the trial itself. It should be noted that this constitutional right to the assistance of counsel should not be construed in any manner as a constitutional right to a preliminary hearing. The rule is that while no preliminary hearing is constitutionally required in Virginia, when such a hearing is held anyway, the defendant is entitled to the assistance of counsel at that hearing.⁴⁵

The doctrine of *Coleman* quickly passed into Virginia law through the federal courts. *Coleman* was followed almost immediately by the Court of Appeals for the Fourth Circuit in *Phillips v. North Carolina*.⁴⁶ In *Phillips*, the defendant filed for a writ of habeas corpus on the ground that he had been denied counsel at his preliminary hearing. The court agreed that under North Carolina law the preliminary hearing was a critical stage, but held that the application of *Coleman* was not retroactive.⁴⁷

Thereafter, *Noe v. Cox*⁴⁸ arose in the United States District Court for the Western District of Virginia. The defendant had pled guilty to eight felony counts in 1961 and received eight consecutive ten year terms. He filed a petition for habeas corpus on the ground that he had been denied the assistance of counsel at his preliminary hearing. Holding that the rule enunciated in *Coleman* and followed in *Phillips* was applicable in Virginia, the Court again refused to apply *Coleman* retroactively.⁴⁹

43. 399 U.S. 1 (1970).

44. *Id.* at 9-10.

45. *Id.* See also C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 259-60 (1978).

46. 433 F.2d 659 (4th Cir. 1970).

47. *Id.* at 662-63.

48. 320 F. Supp. 849 (W.D. Va. 1970). See also *Evans v. Cox*, 327 F. Supp. 1057 (E.D. Va. 1971).

49. 320 F. Supp. at 851. The court justified this refusal to apply *Coleman* retroactively by noting that the burden of hearing hundreds of such cases was unacceptable, particularly in

Transcripts

The question of providing a transcript of the preliminary hearing is a matter dealt with by statute. One section of the Virginia Code⁵⁰ appears to vest this authority in the circuit court. Another section of the Code,⁵¹ however, does not restrict the authority to the court of record; rather it provides that a judge may require testimony to be reduced to writing. It would also appear that this determination is an inherent power of the court if, in its sound discretion, it would further the ends of justice.

In *Bird v. Peyton*,⁵² the defendant sought a writ of habeas corpus on the ground that he had been denied a petition for a court reporter at his preliminary hearing. In denying the writ, the United States district court held:

The appointment of a reporter for petitioner in the preliminary hearing may well have aided the petitioner in his defense but this court is not aware of any requirement for such reporting and its failure certainly does not violate any constitutional rights of petitioner.⁵³

Subsequently, in the case of *Young v. Commonwealth*,⁵⁴ the Virginia Supreme Court was confronted with the issue of the lack of a transcript of the preliminary hearing. The defendant had been advised that one would be made available to him, but it was later discovered that no transcript could be made because the electronic recording equipment had malfunctioned. The court stated that *Roberts v. LaVallee*,⁵⁵ which held that a person could not be denied a transcript because of his indigency, had no application. Recognizing that the malfunction was unfortunate, the court concluded it neither violated the defendant's constitutional right to equal protection nor interfered with the defendant's substantive rights to a fair hearing.

view of the possible prejudice to justice. The court, after noting that there is seldom a transcript of a preliminary hearing, stated that it was reluctant "to release an untold number of guilty defendants who had received a fair trial in a court of record" simply because witnesses had died, left for places unknown, or could not revive memories clouded with lapse of time. *Id.*

50. VA. CODE ANN. § 19.2-165 (Repl. Vol. 1975). See also VA. SUP. CT. R. 5(b)(1).

51. VA. CODE ANN. § 19.2-185 (Repl. Vol. 1975).

52. 287 F. Supp. 860 (W.D. Va. 1968).

53. *Id.* at 862.

54. 218 Va. 885, 241 S.E.2d 797 (1978).

55. 389 U.S. 40 (1967).

Trial Tactics

The Virginia Supreme Court has refused to rule on the trial tactics of defense counsel at a preliminary hearing. In *Davis v. Commonwealth*,⁵⁶ the court recognized that it was purely a matter of judgment whether an attorney had participated in the preliminary hearing in an aggressive manner.⁵⁷ Aggressive participation or the lack of it by the attorneys representing a defendant does not mean they are ineffective and incompetent, thereby entitling the defendant to a second preliminary hearing. This proposition has been affirmed by the United States district court in the case of *Saunders v. Slayton*.⁵⁸ The court determined that mistakes in tactics employed at a preliminary hearing do not deprive the accused of his constitutional rights.

Lesser Offenses

As noted in *Moore v. Commonwealth*,⁵⁹ the district court may find lack of probable cause for the felony charge and instead charge the accused with a misdemeanor, where justified by the evidence. It would also follow that the district court, after an evidentiary hearing, may certify on a lesser felony if some specific element is lacking.⁶⁰ On the other hand, defense counsel may move at the close of the Commonwealth's case involving the distribution of drugs other than marijuana that the case be certified as a Class 5 felony, rather than as a felony for which the penalty as a first offender is five to forty years, because it involved only an accommodation sale.⁶¹ Such motion should be denied. In *Stillwell v. Commonwealth*,⁶² the supreme court stated that evidence of accommodation went to the punishment and did not create two separate offenses.⁶³

56. 215 Va. 816, 213 S.E.2d 785 (1975).

57. In determining how active a role to play in preliminary hearings, see *Shifflett v. Commonwealth*, 218 Va. 25, 235 S.E.2d 316 (1977).

58. 348 F. Supp. 547 (W.D. Va. 1972).

59. 218 Va. 388, 237 S.E.2d 187 (1977).

60. For example, lack of proof of malice reduces the offense of hurling a missile at an occupied vehicle from a Class 4 to a Class 6 felony. VA. CODE ANN. § 18.2-248 (Cum. Supp. 1979).

61. *Id.*

62. 219 Va. 214, 247 S.E.2d 360 (1978).

63. The court stated:

. . . § 18.2-248(a) in our view, creates only a single offense, that being the unlawful manufacture, sale, transfer or distribution, or possession with the in-

Jurisdiction to Set or Modify Bond

Another problem that presents itself frequently, and which probably can never reach the supreme court, has been the question of when the district court loses jurisdiction of the case. This problem occurs after the judge has found probable cause and announced his decision to certify the case to the grand jury. Immediately thereafter, counsel moves to reduce bond in the district court, his client being incarcerated. Is this a proper motion, or has jurisdiction been immediately transferred to the circuit court? A truly definitive answer must await legislative action. As a practical matter, if the district court has jurisdiction of the case on the day of the preliminary hearing, it should at least be considered as having it all day. No mischief would result in further consideration of the bond the same day. This would be more expeditious than requiring the defendant to await the opportunity to be heard on this matter on motion in the circuit court.

Evidence

The rules of evidence applicable to preliminary hearings have not been clearly delineated by the Supreme Court of Virginia.⁶⁴ The biggest controversy has been over whether hearsay should be admitted. On a broad, nationwide basis, the proponents for the admission of hearsay argue that it is often reliable enough for a probable cause hearing, that it eliminates the need for one appearance by witnesses who are reluctant to get involved, and that the grand jury can indict on hearsay. It is also argued that the rules of evidence should be about the same as are required for a magistrate to issue a warrant.

The opponents urge that hearsay should be excluded for the same reason that it is excluded at trial: unreliability. They further urge that hearsay denies the defendant the right to confrontation and the right of cross-examination, and that the defendant should be bound

tent to manufacture, sell, give, distribute or possess certain controlled drugs. The provisions of § 18.2-248(a), which deal with the reduced penalty contingent upon proof of an accommodation gift, distribution or possession of marijuana operate only to mitigate the degree of criminality or punishment, rather than to create two substantive offenses as the defendants contend.

Id. at 222, 247 S.E.2d at 365.

64. For general discussion of the applicability of the rules of evidence to preliminary hearings in Virginia, see a companion article in this issue of the *William and Mary Law Review* by Charles E. Friend.

over and put to trial only on reliable evidence.

While all states do not have preliminary hearings, it would appear that those that do are split fairly evenly on the question of the admission of hearsay. The general district courts in Virginia are not in agreement as to the admission of hearsay,⁶⁵ and the supreme court has not been called upon to rule on this point. In *Clodfelter v. Commonwealth*,⁶⁶ the supreme court held that once the hearsay admitted at the preliminary hearing was excluded from the record, the evidence failed to prove beyond a reasonable doubt that the defendant was guilty and reversed the conviction. The court, however, neither approved nor disapproved the admission of hearsay during the preliminary hearing.

The proponents for admitting hearsay at the preliminary hearing rely upon the Federal Rules of Criminal Procedure. This argument is not directly applicable to the controversy in Virginia, however, because a specific provision for receiving hearsay was added in 1972.⁶⁷

The hearsay question may ultimately be brought before the Supreme Court of Virginia. If this does occur, the author feels that the court should exclude hearsay. Support for this proposition is founded on a critical analysis of section 19.2-183 of the Code of Virginia. This statute provides that at a preliminary hearing the judge shall hear evidence for and against the accused. Had the legislature intended that hearsay be admitted it would have so stated or provided that the district court receive evidence *against* the accused only. In providing that the judge shall hear evidence *for* the accused, the legislature must have intended that hearsay should be excluded. The statute further bolsters this position by providing that the accused may testify and introduce witnesses in his own behalf. The most important provision in the statute is the right of the accused to cross-examine witnesses. It is here we find in the statute the common law test of the reliability of testimony. Given this, there is no reliable standard by which the district court judge

65. In a recent survey of Virginia district court judges, 55 of 61 judges responding applied all rules of evidence at preliminary hearings; 5 did not apply the hearsay rule but did apply all others; and 1 applied the hearsay rule only in serious cases, such as rape or murder. Friend, *The Rules of Evidence in Preliminary Hearings in Virginia*, 20 WM. & MARY L. REV. 643, 646 (1979).

66. 218 Va. 619, 238 S.E.2d 820 (1977).

67. FED. R. CRIM. P. 5.1(a). The Federal Rules of Evidence exclude preliminary hearings from their scope altogether. FED. R. EVID. 1101.

can reach a reasoned decision except by the exclusion of hearsay. This proposition is supported by *Williams v. Commonwealth*⁶⁸ and *Foster v. Commonwealth*.⁶⁹ This position is also legally consistent with the lack of restrictions upon a grand jury in the use of hearsay, for the grand jury is not bound by statute to hear evidence for the accused.

The author also considers this proposition to be supported by *Coleman v. Alabama*.⁷⁰ There the Supreme Court of the United States said, "[S]killed examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over."⁷¹ The Court also stated that "skilled interrogation of witnesses . . . can fashion a vital impeachment tool . . . at trial."⁷²

At this time, the reception of hearsay at the preliminary hearing can be decided definitively only with legislative amendment or a rule of the Supreme Court of Virginia. The author recommends that such action be taken to exclude hearsay conclusively.

Burden of Proof

Another evidentiary problem that lawyers frequently seem to confuse is the burden of proof. Many feel that the Commonwealth is put to the burden of proving the case beyond a reasonable doubt. The Supreme Court of the United States dealt with this quantum of proof in 1949 in the case of *Brinegar v. United States*.⁷³ After holding that guilt in a criminal case had to be proved beyond a reasonable doubt, they held that less proof was required in a probable cause hearing, stating, "The substance of all the definitions of probable is a reasonable ground for belief of guilt.' And this means less than evidence which would justify condemnation or conviction."⁷⁴

Although the amount of proof has not been defined, it must be more than mere suspicion. If it is enough to lead a reasonable man to believe that the accused may have committed the offense, then

68. 208 Va. 724, 160 S.E.2d 781 (1968).

69. 209 Va. 297, 163 S.E.2d 565 (1968).

70. 399 U.S. 1 (1970).

71. *Id.* at 9.

72. *Id.*

73. 338 U.S. 160 (1949).

74. *Id.* at 175 (citations omitted)(quoting *McCarthy v. DeArmit*, 99 Pa. 63, 69 (1881)).

it is sufficient. In weighing the evidence, the standard probably is defined as a preponderance of the evidence, in the same manner as proof of issues other than guilt.

CONCLUSION

A preliminary hearing in Virginia is an adversary proceeding before a judicial officer to determine whether a felony has been committed and whether there is probable cause to believe the defendant committed it. It is not a constitutional right guaranteed either under the United States Constitution or under the constitution of Virginia. The United States Supreme Court, however, has determined in *Coleman v. Alabama* that it is a "critical stage" of the criminal process, thereby guaranteeing to the accused the constitutional right to the assistance of counsel, but with the caveat that *Coleman* will not be applied retroactively.

The preliminary hearing is procedural and not jurisdictional, except in juvenile cases, and may be waived. Objection to the failure to grant a preliminary hearing may be forever lost by failing to assert it in a timely manner. Failure to observe the defendant's right to a preliminary hearing when it is not waived constitutes reversible error.

The preliminary hearing is not a trial on the merits and therefore the guilt or innocence of the accused is not an issue. Accordingly, it is not double jeopardy if the defendant is released, no probable cause having been found, and then subsequently indicted and put to trial. A preliminary hearing is not the only route to indictment, but it may be required if the accused is arrested on a warrant. Arrest on a warrant, however, does not foreclose the right of the Commonwealth to dismiss the warrant prior to the preliminary hearing and to present the charge directly to the grand jury for indictment.

The preliminary hearing is not a discovery vehicle. Further, counsel's participation in the preliminary hearing, whether aggressive or not, is not a matter for appellate review. Similarly, mistakes by counsel in trial tactics at the preliminary hearing do not deprive the defendant of his constitutional rights.

It is not settled in Virginia whether hearsay is or is not admissible at preliminary hearings. The statute does provide that the judge at such hearings shall hear evidence for and against the accused. The defendant may testify and introduce evidence in his own behalf. Finally, and of equal importance, he may cross-examine witnesses,

the purpose of which is to test the truth of such testimony.

Overall, although this concept is difficult for many defense lawyers to accept, the preliminary hearing is basically nothing more than "show-and-tell" for the Commonwealth. To further complicate comprehension, the basic nature of the law of preliminary hearings is procedural, rather than substantive. Because it is not a trial, mere knowledge of the incidents of trial is insufficient to properly prepare an attorney for a preliminary hearing. The author urges all attorneys who participate in the criminal process to review their understanding of the preliminary hearing, not only to improve their own performance, but also to facilitate the administration of justice.