PROBABLE CAUSE HEARING FOR PERSONS CHARGED WITH CRIMES PUNISHABLE BY DEATH OR LIFE IMPRISONMENT

By Hope C. Seeley,
(with thanks also to Ronald Gold)

Introduction—The State Constitutional Mandate

Our state constitution guarantees that no one will be forced to stand trial for a crime that is punishable by death or life imprisonment[1] unless a court has first made a finding of probable cause at an open hearing in which the accused is provided with a full panophy of adversarial rights, such as the right to counsel and the right to cross-examine witnesses. Article I, Section 8 of the Connecticut Constitution provides in pertinent part:

> No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law....

Prior to November 1982, the Connecticut Constitution required a grand jury indictment as a prerequisite to the prosecution of anyone charged with a crime punishable by death or life imprisonment. Under the former grand jury system, a prosecutor was required to present evidence to eighteen grand jurors who were all citizens of Connecticut. The prosecutor was only required to present sufficient evidence to convince the grand jury that there was probable cause to believe that the accused committed the crime. The evidence was presented to the grand jury in a private room—but neither the prosecutor nor the defense attorney was permitted in the room.

Instead, the elected foreperson of the grand jury would direct the questioning of the witnesses. The accused was permitted to be present in the grand jury room and he or she was permitted to question the witnesses. After the evidence was presented to the grand jury, the accused would leave and the grand jury would deliberate as to whether there was probable cause to believe that the accused committed the crime. If the grand jury determined there was probable cause, then it would return a "true bill" of indictment against the accused; if the grand jury determined there was insufficient evidence, it would mark the bill "not a true bill."

Although originally conceived as a shielding device to protect individuals

from unfounded prosecutions, the grand jury system came to be widely criticized for its secret operation and its ex *parte* nature.[2] For example, while an accused was generally permitted to attend the grand jury session and to question witnesses, he or she was not permitted to have his or her attorney present or to present evidence in his or her behalf. In an attempt to correct the perceived inequities of the grand jury system and to provide expanded protections to an accused charged with a serious crime, the legislature in 1981 proposed a constitutional amendment to abolish the grand jury indictment system in Connecticut and to replace it with an open and adversarial probable cause hearing.[3] This proposed amendment was approved by the electorate on November 2, 1982, and certified by the Secretary of the State on November 24, 1982, as Amendment Seventeen to the Connecticut Constitution, which is now embodied in Article I, Section 8 as quoted above.[4]

THE STATUTORY PROVISION, CONNECTICUT GENERAL STATUTES § 54-46A

At the time that the constitutional amendment was adopted, it did not embody the procedures necessary to facilitate its implementation, but rather left the enactment of such procedures to the legislature. The legislature responded by enacting Conn. Gen. Stat. § 54-46a in the 1983 legislative session. Subsection (a) of the statute provides as follows:

> (a)No person charged by the state, who has not been indicted by a grand jury prior to May 26, 1983, shall be put to plea or held to trial for any crime punishable by death or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it. The accused person may knowingly and voluntarily waive such preliminary hearing to determine probable cause.

The standard of proof at the hearing is whether the state's evidence would warrant a person of reasonable caution to believe that the accused had committed the crime. The quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than proof beyond a reasonable doubt, the quantum of proof necessary for conviction at trial. It is even less than the civil standard of preponderance of the evidence.[5]

This statute also establishes the ground rules for conducting a probable

cause hearing. These ground rules are as follows:

1. *The preliminary hearing must be conducted within sixty days of the filing of the complaint or information in superior court unless the hearing is waived by the accused person or it is extended by the court for good cause shown.*

In order for a defendant to waive his or her right to have the probable cause hearing held within sixty days after the information is filed, the waiver must be knowing and voluntary.[6]

2. *The court is required to follow the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules.*

This requirement means that any written reports of an expert witness such as the report of the medical examiner who conducted the autopsy or the report of a forensic expert who performed testing on a piece of evidence are admitted into evidence without having to call the expert witness to testify. Likewise, whereas at trial the prosecutor must establish the "chain of custody" relative to a piece of evidence prior to its admissibility (*i.e.*, if the prosecutor wants to introduce the murder weapon, he or she would have to call the person who discovered the weapon, the officer who seized the weapon, *etc.*) he or she does not have to establish the chain of custody at the preliminary hearing.

However, the Connecticut Supreme Court has made it clear that the other rules of evidence must be followed. For example, in one case, it set aside a defendant's conviction for felony murder and ordered a new trial because the trial court had improperly admitted a hearsay statement of a co-defendant at the probable cause hearing when this statement was the only evidence implicating the defendant.[7]

3. *No motion to suppress or for discovery shall be allowed in connection with such hearing.*

The Connecticut Supreme Court has upheld the constitutionally of this provision's prohibition against the filing of a motion to suppress evidence at a probable cause hearing. The Court noted that a hearing in probable cause is necessarily more limited in scope than a full trial on the merits and as long as the defendant is afforded an opportunity to challenge at trial the admissibility of statements or other evidence that he or she claims was illegally seized by the police, his or her due process rights are not violated.[8]

On the other hand, the Connecticut Supreme Court has ruled that this provision's ban on discovery motions does not relieve the prosecution of its duty to disclose exculpatory material to a criminal defendant.[9] The Court reasoned that since the adversarial probable cause hearing is an essential part of a defendant's criminal prosecution, the constitutional obligation to disclose exculpatory material attaches at that time.[10] Therefore, a prosecutor must disclose to the defendant any exculpatory information in his or her possession prior to the probable cause hearing, but the defendant is not entitled to any other discovery.[11]

> 4. *The accused person shall have the right to counsel and may attend and, either individually or by counsel, participate in such hearing, present argument to the court, cross-examine witnesses against him or herself and obtain a transcript of the proceedings at his or her own expense.*

Pursuant to this provision, the accused has the right to counsel; therefore, if he or she has not retained counsel and cannot afford counsel, a public defender will be appointed prior to the preliminary hearing. It permits the defendant's counsel to cross-examine the state's witnesses,[12] to present argument relating to the admissibility of evidence and to present a summation against a finding of probable cause, and it expressly permits the defendant to obtain a copy of the transcript. This provision addresses most of the major criticisms of the former grand jury procedure.

> 5. *At the close of the prosecution's case, if the court finds that, based on the evidence presented by the prosecution, probable cause exists, the accused person may make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The court shall not allow the accused person to present such evidence unless the court determines that such evidence would be sufficient to rebut the finding of probable cause.*

Thus, if the trial court finds probable cause based upon the state's evidence, then the accused may make a specific offer of proof to rebut the finding of probable cause. However, an accused gains the right to present this evidence only if the court determines that the proposed evidence would rebut the finding of probable cause. The purpose of this procedure is to exclude evidence that, even if believed, would not undermine the court's prior determination of probable cause while, at the same time, safeguarding the accused's interest in attempting to persuade the court that probable

cause is lacking despite the state's evidence.

Finally, Conn. Gen. Stat. § 54-46a(c) provides that if the court determines that there is probable cause to believe that the accused person has committed the offense charged, the court must make a finding that it is approving the continuance of the accused person's prosecution for that offense. On the other hand, if the court determines that probable cause has not been established, then the charges are dismissed. However, even if a court determines there is no probable cause to believe that the accused committed the crime charged, the state is not prevented from bringing a subsequent prosecution of the same person for the same offense. For example, in one case, the trial court found no probable cause after each of two probable cause hearings and dismissed the information after each hearing. The state succeeded in convincing a court that there was probable cause to continue the murder prosecution after a third hearing.[13]

Generally, probable cause hearings last no more than a day or two, although there have been several which have lasted weeks. For example, in *State v. Sherman*, 38 Conn. App. 371, 375 (1995), the hearing lasted for fourteen days. Following a finding of probable cause, the case would be assigned to the pretrial docket and the discovery process would begin.

A finding of probable cause following a hearing conducted pursuant to Conn. Gen. Stat. § 54-46a is reviewable on appeal after a conviction. Thus, an invalid finding of probable cause undermines the court's power to hear the case at trial and the remedy for a defective probable cause hearing is a new probable cause hearing and a new trial.[14] The state may appeal a finding of *no* probable cause.[15]

ENDNOTES

1. By law, a person can be punished by death only if he or she is charged with a capital felony pursuant to Conn. Gen. Stat. § 53a-54b. A capital felony is the commission of murder with certain additional circumstances, such as murder of two or more persons at the same time or in the course of a single transaction, or murder of a police officer or murder committed during the commission of sexual assault in the first degree. See Conn. Gen. Stat. § 53a-54b for a complete listing of the nine categories of capital felony. A person is eligible to receive a sentence of life imprisonment when he or she is charged with murder pursuant to Conn. Gen. Stat. § 53a-54a, with felony murder pursuant to Conn. Gen. Stat. § 53a-54c, or with arson murder pursuant to Conn. Gen. Stat. § 53a-54d. Additionally, Conn. Gen. Stat. § 21a-278(a) contains a penalty of life imprisonment for the manufacture and distribution of certain illicit drugs. Life imprisonment is defined as a sentence of sixty years. *See* Conn. Gen. Stat.§ 53a-35b.

2. *See* Berdon, *Connecticut Grand Juries: The Case for Reform*, 54 Conn. B.J. 8, 9-16 (1980);

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1165, 1171 (1960).

3. *See* 24 H.R. Proc., Pt. 10, 1981 Sess., pp. 3148-50, remarks of Rep. Alfred J. Onorato; Con. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1981 Sess. pp. 369-70, remarks of Rep. Richard D. Tulisano; *see also* Substitute House Joint Resolution No. 36 (1981).
4. *See generally State v. Mitchell*, 200 Conn. 323, 326-30, 512 A.2d 140, 143-45 (1989).
5. *See State v. Munoz*, 233 Conn. 106, 135-36 (1995), *State v. Patterson*, 213 Conn. 708, 720-1, 570 A.2d 174, 180 (1990).
6. *See State v. Ramos*, 201 Conn. 598, 603-04, 519 A.2d (1986).
7. *See State v. Boyd*, 214 Conn. 132, 141, 570 A.2d 1125, 1129 (1990), *on remand*, 221 Conn. 685, 607 A.2d 376, *cert. denied*, 113 S. Ct. 344 (1992).
8. *See State v. Kane*, 218 Conn. 151, 158-59, 588 A.2d 179, 183-84 (1991).
9. In accordance with the United States Supreme Court's mandate in the landmark case of *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), a prosecutor has a constitutional duty to disclose all material evidence in his or her possession which is favorable to an accused. Exculpatory evidence includes impeachment evidence such as evidence which might alter the credibility of a witness. The obligation to disclose exculpatory evidence stems from the recognition that the primary duty of the prosecutor is not to convict but to see that justice is done.
10. *See State v. Mitchell*, 200 Conn. 323, 337-39, 512 A.2d 140, 148-49 (1989); *State v. Grant*, 231 Conn. 43, 52, 646 A.2d 835 (1994).
11. If there has been a failure to disclose exculpatory evidence at a criminal defendant's probable cause hearing and he or she is later convicted, the defendant is entitled to a reversal of his or her conviction if the non-disclosure tainted the defendant's subsequent prosecution so as to deprive him or her of a right to fair trial. *See State v. White*, 229 Conn. 125, 134-140, 640 A.2d 572 (1994).
12. The Connecticut Supreme Court has held that it was not error to admit transcripts of a witness' testimony at the probable cause hearing when the witness could not be located to testify at trial. *See State v. Munoz*, 233 Conn. 106, 136-39 (1995). Thus, even though the defendant's counsel had been appointed to represent him or her just before the hearing began, the Court found that the defendant had an ample opportunity to cross-examine the witness, and therefore, the probable cause testimony was admissible at trial.
13. *See State v. Moody*, 214 Conn. 616, 631, 573 A.2d 716, 723-24 (1990).
14. *See State v. Mitchell*, 200 Conn. 323, 337-39, 512 A.2d 140, 148-49 (1989); *State v. White*, 229 Conn. 125, 139-40, 640 A.2d 572 (1994).
15. *See State v. Harrell*, 238 Conn. 828, 681 A.2d 944 (1996); *State v. Solek*, 242 Conn. 409, 699

    A.2d 931 (1997).