CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535
http://appellate-litigation.org/

ISSUES TO DEVELOP AT TRIAL

July 2020

We hope you, yours, and your clients have stayed safe and healthy during these unprecedented times. We've taken a hiatus for the last several months because of the obvious - no trials. No doubt, a multitude of issues will arise when trials resume (whenever that is, and in whatever fashion), and we look forward to continuing to support your work through these newsletters. In particular, we'll soon be examining the opportunities that CRL 50-a's repeal will open up for cross-examination.

In this edition, we draw your attention to an issue relevant to your advocacy now: your right to cross-examine and impeach police officers with prior misconduct during preliminary hearings – the statutory mechanism being used to hold our clients for grand jury action. This, we submit, is a natural extension of favorable law guaranteeing the right to confront police witnesses with civil suit allegations at trials and suppression hearings.

Whether you want to use this tool at the preliminary hearing is a separate question. With respect to that, we also present some strategic considerations.

Background Law

Preliminary hearings are a creature of statute and include the right of cross-examination. See CPL § 180.10, et seq. A few key provisions:

- The defendant has a right to a "prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury . . . . CPL § 180.10(2).

- The defendant has the right to be present. CPL § 180.60(4), and the right to counsel. See People v. Hodge, 52 NY.2d 313 (1981)(identifying a preliminary hearing as a "critical stage" in the state criminal process).

- The principal function of a preliminary hearing is to make sure that reasonable cause exists to believe that the defendant committed a felony before continuing confinement. "If there is not reasonable cause to believe the defense committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody . . . or . . . exonerate the bail." CPL § 180.70(4). The court can also, under certain circumstances, reduce the charge to a non-felony charge. CPL § 180.70(3), (4).

- **"Each witness including any defendant testifying in his own behalf, may be cross-examined." CPL § 180.60(4).**

Although the scope of cross-examination at a preliminary hearing has historically been restricted and narrow, you can argue for a broader right, particularly in light of recent developments in the law.

- The caselaw from the 1970s — when preliminary hearings were in wide use — is generally bad, setting forth a restricted right of cross-examination. These cases emphasized that the primary purpose of the preliminary hearing was to prevent improper confinement and that the constitutional right of confrontation is a trial right, which can be vindicated at the future trial.

- Nonetheless, the Court of Appeals in People v. Hodge identified the preliminary hearing as a "critical stage," and acknowledged defense's counsel's significant opportunity at the preliminary hearing to use the "time-tested tool for testing truth, cross examination." Id. at 318-19. Notably, the Court rejected the argument that the grand jury's subsequent indictment cured all infirmities from the hearing, noting that "once [the state] pursues the path of the preliminary hearing, the defendant becomes entitled to have it conducted with full respect for his right to counsel."

- In 1994, the First Department, addressing the right of confrontation at a Hinton hearing, used broad language to discuss the right, stating that "[t]he constitutional right of an accused to confront and cross-examine witnesses against him is fundamental to a fair trial, and extends to preliminary hearings as well as to the trial itself. People v. Torres, 201 A.D.2d 413, 414 (1st Dep't 1994).

- More recently, the Court of Appeals has affirmed, reaffirmed, and expanded the defense's broad right to cross-examine police officers on prior wrongdoing and issues of credibility. See People v. Smith, 27 N.Y.3d 652, 661-62 (2016) (civil lawsuits); People v. Rouse, 34 N.Y.3d 269 (2019) (judicial findings of untruthfulness).

- What is more, this right **has been directly applied to suppression hearings, where the probable cause determination is analogous to the "reasonable cause" determination to be made at the preliminary hearing**. See People v. Burgess, 178 A.D.3d 609, 609-10 (1st Dep't 2019) (reversing and remanding for new suppression hearing and trial where court circumscribed defense counsel's cross of the arresting officer at the suppression hearing); compare CPL § 180.60(8) (defining "reasonable cause" as the standard of proof at a preliminary hearing) and CPL § 140.10(1) (defining "reasonable cause as the standard of proof at a suppression hearing); see CPL § 70.10(2) reasonable cause defined); People v. Johnson, 66 N.Y.2d 398, n.2 (1985) (noting that "reasonable cause" is "usually equated with probable cause").

    - As you're aware, the showing required for such cross-examination at trial or a suppression hearing is a good-faith basis for inquiring (namely the lawsuit relied upon), and specific allegations that are relevant to the credibility of the law enforcement witnesses.

- Discovery reform also supports a broadened right of cross at preliminary hearings. Under CPL § 240.44, a prosecution witness's prior statements must be made available for defense counsel at a pre-trial hearing before the direct examination begins, although the defense must request the material, and the prosecution does not have to provide it without a request. Id.

- Although this is not a legal argument, the context today is different than the 1970's. There is (or

should be) a broader recognition in the courts of police misconduct and the reality of false arrest. The repeal of CRL § 50-a (see the box at the end of this newsletter for more on that) is further evidence of the changed landscape.

What to Argue

Step one is to investigate your witness for instances of misconduct. Legal Aid's "CAPSTAT" database is user friendly, publicly available and a great place to start. For more investigative tools, see our September 2018 *Issues to Develop,* available here. If you need further support, contact us, and we will try to connect you with resources for conducting the necessary investigation with a quick turnaround.

Once you identify instances of misconduct, develop arguments to establish their relevance to the "reasonable cause" determination. Instances of false arrest will be the most relevant, since they directly bear on the question of whether the witness is lying about what they claim your client did. Also useful may be Rouse material - instances where a court found the officer untruthful.

Argue that your right of cross-examination includes the right to inquire into these instances of misconduct:

- you have the right to cross-examine witnesses at this "critical stage" (CPL §180.60(4); Hodge).
- the right of cross-examination includes the right to cross-examine law enforcement specifically with relevant instances of prior wrongdoing. (Smith, Rouse).
- this right is not limited to trial, but extends to the probable cause question at issue in suppression hearings — a question closely analogous to the reasonable cause question at issue in the preliminary hearing. (Burgess).
- the prior misconduct you want to inquire about is relevant to the reasonable cause determination because [*marshal your "relevance" arguments*].

Strategic Considerations

But *should* you cross cops with prior instances of misconduct at this non-jury proceeding, where the prosecution's burden is relatively light?

- Maybe yes - if you have really good material and the cop is key, perhaps it will favorably influence the outcome or prompt a better plea offer.
- Maybe no - if the prosecution sees what you have, they could find less vulnerable witnesses to testify at subsequent proceedings.
- What happens if the court denies you the chance to cross? There is no right of appeal, BUT, if the case proceeds to trial and the witness becomes unavailable, you could argue that the prosecution should not be permitted to introduce a transcript of their preliminary hearing testimony at trial because you were not afforded an adequate opportunity to cross-examine the witness. See, e.g., People v. Simmons, 36 N.Y.2d 126 (1975) (because the court restricted defense counsel from testing the reliability of the witness's identification of the defendant, the

testimony of the deceased witness could not be admitted at trial).

- less clear is whether you can successfully make this claim if you did not attempt to cross with instances of misconduct at all. You would then need to take the position that the scope of the preliminary hearing is so narrow that it did not include the right to such cross and you were therefore were not required to try, or, alternatively, that it was Brady material that you were not obligated to find but that the prosecution was required to disclose. See, e.g., People v. Reed, 98 Misc.2d 488 (Sup. Ct. Kings Co. 1979) (declining to allow prosecution to use preliminary hearing transcript of deceased witness's testimony where defense counsel was not afforded opportunity to cross on witness's chronic alcoholism, of which defense counsel was unaware. Court rests its decision on the limited scope of the preliminary hearing which is "not intended to be a form of pretrial discovery nor is it a substitute for a trial itself").

- if you are certain that you do want to cross at the preliminary hearing with what you uncovered, the uncertain time frame for the resumption of trials may be a factor you can invoke to convince the court to allow you to — if the witness becomes unavailable for trial, the testimony will not be admissible unless you had a full and fair opportunity to cross.

Looking ahead: The repeal of CRL 50-a is a huge development and will present additional and important opportunities for cross examination. Stay tuned for a future issue, when trials resume, examining the different CCRB dispositions, and how they support your good-faith basis to cross.