

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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September 8, 2003

Opinion No. 03-108

Preliminary Examinations

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**QUESTIONS**

1. If a defendant does not request a preliminary examination within thirty days, has he or she waived the right to a preliminary examination?
2. Does the Attorney General's Office have the power to deny a preliminary examination?
3. Can the local Attorney General's Office have an unwritten policy stating that a defendant cannot have a preliminary hearing if it has been thirty days since his/her arraignment date?
4. Can a general sessions judge override the denial of the preliminary hearing if the local Attorney General prefers to give a preliminary hearing?
5. Do Rule 5.0 and Rule 5.1 of the Tennessee Rules of Criminal Procedure apply to the general sessions judges when it refers to magistrate? If so, doesn't the judge grant the preliminary hearing and not the Attorney General's Office?
6. Is it unethical for a local Attorney General to refuse to prepare for a preliminary hearing if the judge grants one over objection?

**OPINIONS**

1. A defendant waives the right to a preliminary examination in three circumstances: (1) if he expressly does so; (2) if he is indicted before the preliminary examination and does not request one or move to dismiss the indictment within thirty days; or (3) if the State indicts him thirty days after his arrest and does not act in bad faith.
2. The Office of the District Attorney General can seek an indictment or a presentment from the grand jury if the defendant effectively waives a preliminary hearing by not making a timely request for one. However, if the defendant requests a preliminary hearing within the specified periods, the District Attorney has no authority to deny the hearing. The State has the "power" to deny a preliminary examination only when the State does not arrest the defendant but, rather, gets an indictment from the grand jury.

3. Such a policy would run afoul of the rule that entitles a defendant to a preliminary examination regardless of the passage of time from arrest if the State does not indict.

4. The fourth question is unclear and, therefore, cannot be answered.

5. Yes, the reference to “magistrate” in Rules 5.0 and 5.1, Tenn. R. Crim. P., applies to general sessions judges. Tenn. Code Ann. §40-1-106. Indeed, Rule 54, Tenn. R. Crim. P., specifies that the term primarily refers to general sessions judges.

6. The policy of this Office is not to give opinions about ethical issues. *See* Tn. Op. Atty. Gen. Nos. 98-326, 01-083, 02-029.

### ANALYSIS

Rule 5, Tenn. R. Crim., gives a defendant who is arrested with or without a warrant a right to a preliminary hearing or examination. The magistrate must set a preliminary examination at the defendant’s initial appearance unless (1) the offense is a small one, (2) the defendant pleads guilty, or (3) the defendant expressly waives a preliminary examination. Rule 5(b), (c), (d). However, if the State does not arrest the defendant but gets an indictment from the grand jury and the defendant is then arrested on the grand jury’s *capias*, he or she is not entitled to a preliminary hearing at all. *Waugh v. State*, 564 S.W. 2d 654, 660 (Tenn. 1978).

A defendant who is indicted during the time that a preliminary examination is pending and who is arrested with or without a warrant (but not on a *capias*) may move for and obtain a dismissal of the indictment within thirty days of arrest. Rule 5 (e). Likewise, a defendant who has been arrested with a warrant and who is indicted before being afforded a preliminary examination may move for and obtain a dismissal of the indictment within thirty days of arrest. Rule 5(e). A defendant waives his right to a preliminary examination if the State, in good faith, gets an indictment after the thirty-day period has passed. *Moore v. State*, 578 S.W. 2d 78 (Tenn. 1979).

Thus, a defendant waives a preliminary examination in only three circumstances: (1) if he expressly does so; (2) if he is indicted before the preliminary examination and does not request one or move to have the indictment dismissed within thirty days; or (3) if the State indicts him thirty days after his arrest and does not act in bad faith.

The State may deny a preliminary examination in one instance only: when the State does not arrest a defendant but, rather, goes straight to the grand jury and obtains an indictment. If a defendant is arrested first, however, the State can “deny” a preliminary examination only with the defendant’s cooperation, *i.e.*, by failing to move to dismiss and obtain a dismissal of any indictment within thirty days of his arrest or by allowing thirty days to pass without a preliminary examination if the State indicts in good faith.

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