

Alabama Rules of Criminal Procedure

Rule 5. Preliminary hearing.

Rule 5.3. Proceedings at preliminary hearing.

(a) PROCEDURE. The preliminary hearing shall be held in the district court. Only evidence that is relevant to the question of whether probable cause exists shall be admitted. All parties shall have the right to cross-examine personally the witnesses testifying. The defendant may introduce evidence in his own behalf relevant to the issue of probable cause.

(b) INAPPLICABILITY OF SUPPRESSION MOTIONS. Motions or objections made to exclude evidence on the ground that it was obtained unlawfully shall be inapplicable in preliminary hearings.

(c) FINDINGS MAY BE BASED UPON HEARSAY EVIDENCE. The findings by the court shall be based on substantial evidence, which may be hearsay, in whole or in part, in the following forms:

(1) Written reports of expert witnesses;

(2) Documentary evidence without a proper predicate, provided there is a substantial basis for believing such predicate will be available at trial and that the document is otherwise competent; or

(3) Testimony of a witness concerning the declarations of another where such evidence is cumulative, or there is a substantial basis for believing that the source of the hearsay is credible and that a factual basis for the information furnished exists and there is no reason for believing the declarant will not be personally available for trial.

(d) AMENDMENT OF COMPLAINT. The complaint may be amended at any time to conform to the evidence, unless substantial rights of the defendant would be prejudiced.

Committee Comments

Ala.Code 1975 § 12-12-32(b)(2), vests exclusive jurisdiction to hold preliminary hearings in the district court.

A defendant is permitted to call witnesses to present testimony and evidence as a matter of right, on a proper showing of relevance. Art. I, § 6, Alabama Constitution of 1901, requires “[t]hat in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either”; arguably the

court could not constitutionally preclude the defendant from testifying at a preliminary hearing.

Rule 5.3(b) limits issues on suppression motions or objections only to the “competency” of the evidence, and not its admissibility at trial. The admissibility of trial evidence is left to the trial court. Rule 3.13(b) provides that a motion to suppress may be made at any time after indictment.

There is no constitutional requirement that hearsay evidence be excluded from a probable cause hearing. See Rule 5.1(a), Fed.R.Crim.P.; *Coleman v. Burnett*, 477 F.2d 1187, n. 89 (D.C.Cir.1973); *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (upholding a grand jury indictment based solely on hearsay testimony). See also *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Allowing hearsay at preliminary hearings is in keeping with the diminished role assigned such hearings.

The Advisory Committee notes that the *Aguilar* standard has been abandoned by the United States Supreme Court in favor of the “totality of the circumstances” approach. See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (reversing the Massachusetts Supreme Court for employing the *Aguilar-Spinelli* two-prong approach).