

Alabama Rules of Criminal Procedure

Rule 5. Preliminary hearing.

Rule 5.1. Right to preliminary hearing; waiver; postponement.

(a) **RIGHT TO PRELIMINARY HEARING.** A defendant charged by complaint with the commission of a felony may, within thirty (30) days of arrest, demand a preliminary hearing. If demanded, the preliminary hearing shall commence in district court within twenty-one (21) days following the demand for preliminary hearing unless:

- (1) The complaint has been dismissed;
- (2) The hearing is subsequently waived;
- (3) The hearing is postponed as provided in section (d); or

(4) An indictment charging the same offense has been returned by the grand jury before the commencement of the hearing.

(b) **WAIVER.** A preliminary hearing, once demanded, may be subsequently waived in open court or by written waiver, signed by the defendant and defendant's counsel, if any.

(c) **DELAY.** If a preliminary hearing has not been commenced within twenty-one (21) days as required in section (a), unless postponed as provided in section (d), the defendant shall be released from custody automatically, unless the defendant is charged with a non-bailable offense, in which case the judge presiding shall immediately notify the presiding judge of that circuit of the delay and the reasons therefor. The circuit court may thereupon order that the hearing be set for a time specified by the court.

(d) **POSTPONEMENT.** Upon motion of any party, or upon the district judge's own initiative, the preliminary hearing may be postponed beyond the time limits specified in section (a), upon a finding that circumstances exist that justify delay, and in that event the court shall enter a written order detailing the reasons for the finding and shall give the parties prompt notice thereof.

Committee Comments

Rule 5(a) does not change the 30-day rule found in Ala.Code 1975, § 15-11-1.

The use of preliminary hearings developed historically from the time when grand juries met only infrequently and a defendant was liable to languish in jail for

several weeks or months upon an unjustifiable complaint (i.e., one for which there was no probable cause) before the grand jury could meet to consider the charge and return a No-Bill.

A preliminary hearing thus served the needs of a defendant being held prior to indictment. If the district attorney chooses to put on more than a bare minimum hearsay presentation of proof, it also may serve the resulting function of providing discovery for the defendant.

Once the grand jury has returned an indictment, the court does not have power to dismiss the indictment on a finding of no probable cause; thus a preliminary hearing held after return of an indictment would be a useless gesture, other than as a discovery deposition presided over by a judge. The dismissal of an indictment, once returned, can only come about by a circuit court's granting defendant's motion to dismiss, or by the court's granting the district attorney's motion for nolle prosequi. Ala.Code 1975, § 15-8-130.

Rule 5.1(a) and Ala.Code 1975, § 15-11-1, grant an accused charged with a felony the right to a preliminary hearing, where it is demanded within 30 days following the arrest; however, Rule 5.1(a)(4) provides that, where an indictment is returned prior to the hearing, the accused is no longer entitled to the preliminary hearing. *Herriman v. State*, 504 So.2d 353 (Ala.Crim.App.1987). The resulting denial to defendants of an absolute right to the discovery mechanism of a preliminary hearing is adequately offset both by other rules which provide defendants with formal methods of discovery designed to eliminate trial "by ambush" and by expanded pre-trial motion practice.

Under Ala.Code 1975, § 15-11-3, there is an implied presumption that a hearing not held at the proper time was postponed. See *State v. Richburg*, 42 Ala.App. 495, 168 So.2d 628 (1964); *Anderson v. State*, 240 Ala. 169, 198 So. 169 (1940).