

1/29/19 – San Diego Mock Trial Q & A:

Question: During the pretrial portion of the trial, will an attorney's responses to a judge's questions be timed by the clerk and included in the four-minute time limit?

Answer: No. Time spent answering a judge's questions during the pretrial motion is not included in the four-minute time limit.

Question: Regarding the Penal Code Section 995 pretrial motion, we have multiple questions:

- 1) May we assume that a Preliminary Examination occurred?
- 2) May we presume that the judge presiding over the Preliminary Examination held the defendant to answer on both the criminal threats and false report of an emergency charges?
- 3) May we presume that all witnesses to be called at trial testified at the preliminary examination consistent with their written statements, and that all exhibits in the materials were moved into evidence and admitted at the preliminary examination and, that the preliminary examination judge considered all of this information to bind the defendant over for trial?
- 4) Will the Committee provide a short definition of "probable or reasonable cause" from a case or other resource for guidance for the attorneys?
- 5) Can you confirm that pretrial motion is a challenge to the Criminal Threats charge and that the defendant's motion does not include a challenge to the False Report of an Emergency charge?

Answers:

Following review of the case materials, consultation with Mock Trial Committee members, as well as consultation with the Constitutional Rights Foundation, we offer the following guidance:

First, and most importantly, CRF has advised us that the gist of the pretrial motion is to address whether the facts as presented could comprise a crime, as a matter of law. I.e., if the bind over order relied upon a statement which, as a matter of law, is not encompassed by Section 422, then the defendant could not be held to answer based on evidence which does not constitute a crime. With that in mind, we focused on the language in the case materials, specifically the following:

The "Legal Authorities and Pretrial Materials" section on page 15 expressly describes the nature of the pretrial motion: "The pretrial motion in this case is a motion under California Penal Code section 995 to set aside Count 2 – Criminal Threat as a matter of law (emphasis added). A Section 995 motion is brought by the defendant asking the trial court to set aside the count if the defendant has previously been held to answer to the charges at a preliminary hearing without reasonable or probable cause. Here the defense will argue that Reagan Klein's NowPic comment is constitutionally protected free speech....If the presider rules in favor of the defense, finding the comment not to be a 'clear, immediate, unconditional, and specific' communication to Sawyer Smith of a serious intention and the immediate prospect of being carried out as required by law, the criminal threat charge will be dismissed."

In a summary of the pretrial arguments (page 15), the materials advise that the question to be addressed is whether it is free speech under the First Amendment for a person to comment on social media, "you deserve to die..." and then, whether those words meet the legal definition of a true threat and whether it is protected speech.

The "Sources for pretrial hearing" (pages 16-17) states: "The sources for the pretrial motion arguments are a 'closed library,' which means the Mock Trial participants may only use the materials provided in this case packet. These materials include: any relevant testimony to be found in the fact situation and witness statements of Reagan Klein, Sawyer Smith and Officer Lopez, excerpts from the U.S. Constitution, the California Penal Code, and edited court opinions."

Based on the case material and our consultation, our answers to your questions are as follows:

- 1) Participants can assume that a preliminary hearing was held;
- 2) The defendant was "held to answer" or bound over for trial;
- 3) There is nothing in the materials that indicates the source of the witness statements (prelim testimony vs. statement to police vs. statement to another person vs. affidavit) or whether some, all, or none of the witnesses testified at the preliminary hearing. Information could have been presented through hearsay consistent with Prop 115 and Penal Code Section 872(b). There is no mention in the "Closed library" that the exhibits were used or entered at the preliminary hearing, compared with the mention of physical evidence which is listed in the "Closed Library for the "Sources for Trial." With respect to what the judge relied on at the preliminary hearing to hold the defendant to answer to the charges, you should consider the closed library.
- 4) There are many California cases which define and use the term probable cause, including some seminal California Supreme Court cases. We decline to direct you to any resource that is not listed in the "closed library." Most importantly, the focus of this motion is the legal analysis whether the facts comprise a crime as a matter of law, such that the defendant should face a trial for actions which do not legally constitute a crime.
- 5) The guidance provided on page 15 under Legal Authorities and Pretrial Materials cited above clearly states that the motion is exclusively a motion to set aside Count 2.