

MANY SURPRISES ALREADY

# Shaw Preliminary Hearing Unique

By JACK DEMPSEY

What is a preliminary hearing?

What are the rules of procedure governing such a hearing? Who can testify? Can the guilt or innocence of a defendant be decided at the conclusion?

These and similar questions are being tossed around in every bar, sewing circle, and practically every public place.

The questions involve what may be the most sensational preliminary hearing in the annals of the Criminal District Court in New Orleans.

The hearing on Tuesday became unique from the moment it was set.

It is a device employed and initiated by defense attorneys in 99 per cent of the cases in which it is used.

The preliminary hearing in which businessman Clay Shaw stands accused of conspiracy

to murder President John F. Kennedy was initiated by the state.

FIRST ASSISTANT Dist. Atty. Charles R. Ward in his application for the hearing held that it was submitted under Article 292 of the Code of Criminal Procedure which in part provides:

"Before the finding of an indictment or the filing of an information, the court—on request of the state or the defendant—shall immediately order a preliminary examination in felony cases."

The move came as a big

surprise to everyone around the Court building who expected that defense lawyers would request the move as a matter of routine procedure.

Judge Bernard J. Bagert, senior judge of the eight-man Criminal District Courts, who granted the motion and set the date made the second surprise move in the case.

Judge Bagert availed himself of a rarely used provision of the rules of court in that he called upon two of his colleagues, Judges Malcolm V. O'Hara and Matthew S. Braniff, to sit with him in conducting the hearing.

ALTHOUGH JUDGES have sat en banc on previous occasions, this marks the first time in the memory of veteran

court attaches that three judges have sat on a preliminary hearing.

The next surprise in the case was an announcement on Friday by Asst. D. A. Ward that Dist. Atty. Jim Garrison would lead the state's presentation at the hearing, assisted by Assistant DA's Alvin Oser and James Alcock.

This marks only the third time that the district attorney has appeared in court since he was elected to the position in 1962.

Another surprise — although not wholly unexpected — was the opinion offered by Judge Bagert on Thursday that the state's confidential informant

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would be called upon to testify.

William Gurvich, Garrison's chief private investigator, had said earlier that the confidential informer would be available. But many close to the scene felt this statement was being made for effect and that the state would resist to the limit efforts to have the informant's identity disclosed.

**MANY CLOSE OBSERVERS** have raised the question as to who would rule when an objection is raised at the hearing. Suppose for example, Judge Braniff agreed to sustain, but Judge O'Hara wished to overrule the objection.

Judge Braniff cleared this point up when he said that all rulings would be made by Judge Bagert. If at any time there was a question of doubt, he would huddle with his two colleagues and together they would make the necessary ruling.

What is a preliminary hearing?

It's a hearing to show "probable cause" that a crime has been committed and that the evidence held by the state is either sufficient to bind him over for trial, or insufficient, in which case the defendant may be discharged.

When the state files for a preliminary hearing in a case, it gives a prosecutor the chance to perpetuate testimony in the form of official notes taken by the court reporter.

**THIS IS IMPORTANT** in the event that one of the witnesses should die or disappear when the actual trial is held.

When the defense counsel bid for the preliminary hearing, it is the contention that the presumption of innocence is great in behalf of the defendant and that he should be released.

In either case it is up to the state to prove what is known as a "prima facie" case, or furnish substantial proof that the defendant should be bound over for an actual trial.

It was pointed out that even if the three-man court should order the defendant discharged, the state could still fill a bill of information later charging him with the offense.

At a preliminary hearing,

or examination as it is often called, both the state and defense may produce witnesses who will be examined in front of the defendant, and will be subject to cross examination.

**THE LAW FURTHER** provides that the transcript of the testimony of a defendant at the preliminary examination is admissible against him upon the trial of the case, or, if relevant, in any subsequent judicial proceeding.

The transcript of the testimony of any other witness at the preliminary examination is admissible for any purpose in any subsequent proceeding in the case, on behalf of either party, if the court finds that the witness is dead, too ill to testify, absent from the state, or cannot be found, and that the absence of the witness was not procured by the party offering the testimony.

The transcript of testimony given by a person at a preliminary examination may be used by any party in a subsequent judicial proceeding for the purpose of impeaching or contradicting testimony.

The scope of a preliminary examination before an indictment has been filed against a defendant, as is the case in the present hearing is spelled out in Article 296 of the Code:

"If the defendant has not been indicted by a grand jury for the offense charged the court shall, at the preliminary examination, order his release from custody or bail if, from the evidence adduced, it appears that there is not probable cause to charge him with the offense or with a lesser included offense."

Thus the words "probable cause" are most important in this or any such preliminary hearing.

Veteran court attaches had predicted that the state would come in before the hearing and file a formal bill of information against the defendant.

But Judge Bagert shot down this conjecture when he announced on Thursday during arguments on a motion to dismiss the hearing that nothing would prevent it from being held.

They'll be talking and writing about Tuesday's hearing for many years to come.