

Michael D. Cicchini

*Defense Lawyer Decision-Making and the Preliminary Hearing*, 119 NORTHWESTERN U. L. REV. ONLINE \_\_\_\_ (forthcoming, August 2024)

Abstract:

*The defense has to make numerous decisions throughout the course of a criminal case. Some decisions—such as whether to move to dismiss the complaint, to challenge an arrest, to challenge a search warrant, or to invoke the right to a preliminary hearing—hinge on the concept of probable cause. Such decisions require a lawyer’s training and experience, and are therefore typically allocated to defense counsel, not the defendant. However, there is one exception: the decision to have or waive the preliminary hearing, or “prelim,” is typically allocated to the defendant.*

*Allocating the decision to have or waive the prelim to the defendant creates numerous problems. This Article therefore argues that such a decision should, along with other probable cause-related decisions, normally be allocated to the defense lawyer. To support this claim, the Article mines the case law for the criteria used to allocate decisions in other contexts, and creates a conceptual framework for the allocation of decision-making authority. It then applies the framework to the decision to have or waive the prelim and demonstrates that, with one exception, this decision should rest with defense counsel, not the defendant.*